



Crowdsourcing Mediator Ethics

United States District Court
Eastern District of New York
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Welcome and Introductions

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Columbia Law School
Mediation Program



Agenda

- Goals for this Workshop
- Intersection of Ethical Responsibilities Between Attorneys and Mediators
 - General Overview of Mediation Ethics
 - Mediator's Obligations as an Attorney
 - Attorneys' Obligations in Mediation
- Break
- Current Topics in Mediation Ethics: Immigration
 - Hypothetical Issues in EDNY Mediations
 - Overview of Professional Responsibility Rules
- The Role of Judges and Mediation Confidentiality
 - Review of Pertinent EDNY Rules
 - Discussion Questions





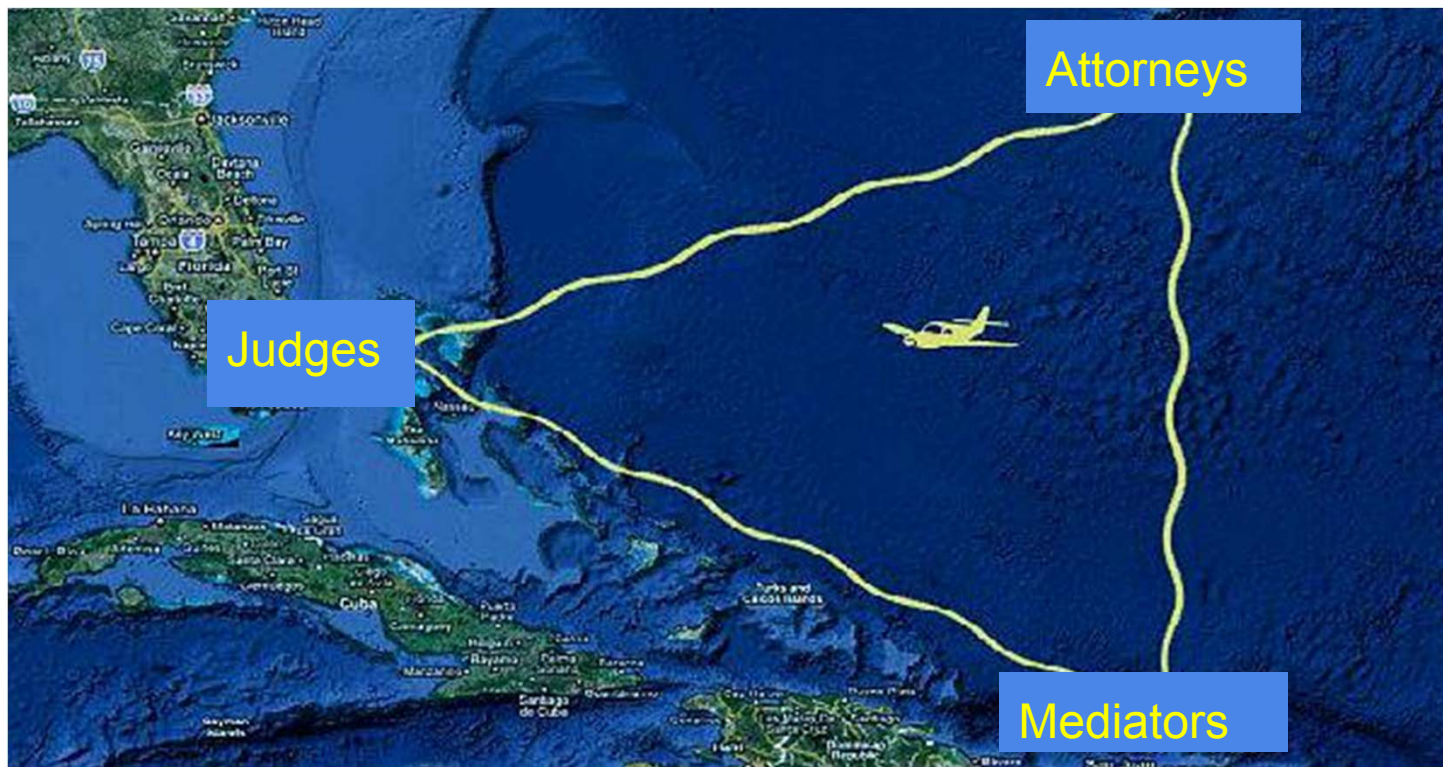
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The Ethical “Bermuda Triangle”

Dealing with Attorneys, Parties, and Judges in Mediation





Goals for this Workshop

1. Discuss the ethical frameworks present in mediation
2. Explore the intersections of these ethical frameworks
3. Apply takeaways to contemporary issues for EDNY mediators





Mediation Ethics

- Crowdsource: where do you go when you have an ethical question?





Mediation Ethics

- Crowdsource: where do you go when you have an ethical question?

Model Standards of Conduct	Rules of Professional Conduct
ABA Ethics Opinions	Federal Rules
Publications or other secondary sources	Local/Court Rules
EDNY Mediation Office	Other mediators





Mediation Ethics

- Overall goals:
 - Differentiating style vs. ethics
 - Getting guidance for difficult situations
 - Establishing best practices
 - Learning from mutual experience
- Creating a space for ethics discussion



Model Standards of Conduct for Mediators

- Adopted in 1994 then updated in 2005, the Model Standards seek to clarify best practices for mediators regardless of context. They are not legally binding within New York State.
- **Standard I: Self-Determination**
 - I.A: “Self-determination is the act of coming to a **voluntary, uncoerced** decision in which each party makes **free and informed choices** as to process and outcome.”



Model Standards of Conduct for Mediators

- **Standard II: Impartiality**

- II.A: “Impartiality means freedom from **favoritism, bias or prejudice.**”
- II.B: “A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the **appearance of partiality.**”
- II.C: “If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator **shall withdraw.**”



Model Standards of Conduct for Mediators

- **Standard V: Confidentiality**

- V.A: “A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or **required by applicable law.**”
- V.A.2: “A mediator **should not** communicate to any non-participant information about **how the parties acted** in the mediation. A mediator **may report, if required**, whether parties **appeared** at a scheduled mediation and whether or not the parties **reached a resolution.**”



Model Standards of Conduct for Mediators

- **Standard VI: Quality of the Process**
 - VI.A: “A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.”
 - VI.A.5: “The role of a mediator differs substantially from other professional roles. **Mixing the role of a mediator and the role of another profession is problematic** and thus, a mediator should distinguish between the roles”





Mediation Ethics

- Mediator ethical best practices
 - Avoiding partiality (or the appearance thereof)
 - Safeguarding party self-determination
 - Preventing role confusion
 - Safeguarding confidentiality
 - Ensuring a quality process



Frequently Asked Questions: Party Imbalances

- How do I deal with imbalances between parties?
 - Strategic Imbalances
 - Power Imbalances
 - Informational Imbalances



Informational Imbalances

- What to do when one party lacks pertinent information?
- Hypothetical:
 - Mediating FLSA Dispute
 - Previously, NY law permitted a type of double recovery of state damages in addition to FLSA liquidated damages
 - A recent Second Circuit Case* just ended the practice, holding NY law does not permit awarding liquidated damages over/above a like award of FLSA liquidated damages
 - [continued on next slide]...

*Chowdhury v. Hamza Express Food Corp., 2016 WL 7131854 (E.D.N.Y. Dec. 7, 2016)



Informational Imbalances

- Hypo Cont.
 - Plaintiff is pushing for the old, typical double recovery.
 - In caucus, P confides that she knows the new law drastically reduces her claim's value. But, she tells you not to tell D because D's attorney doesn't seem to be aware.
- What *can* you do?
- What *should* you do?
 - What about if both parties are unaware of the new law?

*Chowdhury v. Hamza Express Food Corp., 2016 WL 7131854 (E.D.N.Y. Dec. 7, 2016)





Wrap-up

Discussion Questions:

- How to “close the deal,” when both parties want to do so, without applying too much pressure?
- What to do when attorneys ask for feedback that borders on legal advice?
 - Or parties?
- Questions from the group





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The Attorney's Ethical Obligations in Mediation

- NY Rule 1.0(w): “‘Tribunal’ denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other **body acting in an adjudicative capacity.**”
- NY Rule 2.4(a): “A lawyer serves as a ‘third-party neutral’ when the lawyer assists two or more persons who are **not clients of the lawyer** to reach a resolution of a dispute or other matter Service as a third-party neutral may **include service as . . . a mediator**”
- NY Rule 4.1: “In the course of representing a client, a lawyer shall **not knowingly make a false statement** of fact or law to a third person.”



The Attorney's Ethical Obligations in Mediation

- No duty of candor before mediator
 - Comment [5] to NY Rule 2.4: When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(w)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the **lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.**
 - Comment [1] to NY Rule 4.1: A lawyer is **required to be truthful** when dealing with others on a client's behalf, but . . . has **no affirmative duty to inform an opposing party of relevant facts.** A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.



The Attorney's Ethical Obligations in Mediation

- Challenging situations posed by attorneys representing parties in mediation
 - Lawyers mediating in a manner that detracts from a fair process for both parties
 - Subverting their client's self-determination
 - Discouraging a quick resolution so as to increase their fees
 - Encouraging party's unrealistic valuation of suit
 - Misrepresenting client's position to the other party
 - Using mediation as a delay tactic to run-up other party's costs
 - Others that you have noticed?



The Attorney's Ethical Obligations in Mediation

- No bright-line for when to report, definition of good faith, or party self-determination
 - Goal of this open space is to ensure a common ground and understanding for when those situations might occur



EDNY Attorney-Mediators' Ethical Obligations

- Mediator's obligations and intersections with the Rules of Professional Conduct

Duty to Report

NY Professional Rule 8.3(a): A lawyer **shall report** a violation of the Rules by another lawyer that raises a question as to that lawyer's **honesty, trustworthiness, or fitness.**

Avoiding Conflicts of Interests

EDNY Local Rule 83.1 (e)(2): "No mediator may serve in any matter in violation of the standards set forth in 28 U.S.C. § 455 [conflict-of-interest standards for judges]."

Confidentiality

EDNY Local Rule 83.1 (d)(1): "(A) Unless the parties otherwise agree, all written and oral communications made by the parties and the mediator in connection with or during any mediation session **are confidential and may not be disclosed or used for any purpose unrelated to the mediation.**



NY Professional Conduct Rules and Model Mediator Standards

- NY Rule 2.4 Comment [2]: “Lawyer-neutrals **may also be subject to various codes of ethics**, such as the . . . Model Standards of Conduct for Mediators”
- Preamble to Mediator Model Standards: “Various aspects of a mediation . . . may also be affected by applicable professional rules. These sources **may create conflicts with, and may take precedence over, these Standards.**”
- How do you resolve a conflict?



Best Practices: Conflicting Attorney-Mediator Obligations

- Duty to Disclose vs. Preserving Confidentiality
Hypothetical:
 - Mediating an EDNY dispute
 - Party's attorney commits professional misconduct
- What *can* you do?
- What *should* you do?



Best Practices: Confidentiality vs. Duty to Disclose

- No clear statutory guidelines
 - Neither NY's Professional Rules of Conduct, EDNY's Local Rules, or the EDNY's confidentiality agreement contain relevant exceptions
 - Uniform Mediation Act is not in effect in NY
- Case Law:
 - Attorney-mediator or party's attorney may be able to report unethical conduct during a mediation session despite a general confidentiality order.*
- Academic Recommendations:
 - In mediations, "to the extent the issue is misconduct by counsel or the presiding official, reporting should be required."**

* See *In re Waller*, 573 A.2d 780, 785 n. 5 (D.C. 1990) (finding the confidentiality requirement of mediation was not intended to preclude the mediator from disclosing when a party's attorney had committed misconduct); see also *Lawson v. Brown's Day Care Ctr., Inc.*, 172 Vt. 574 (2001) (refusing to sanction an attorney who filed confidential mediation communications in a good-faith attempt to report misconduct of another party's attorney).

** Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 Geo. J. Legal Ethics 259, 318 (2003)





Wrap-up

- Discussion on attorney-mediator obligations:
 - Thoughts?
 - Questions?
 - Other problems you may have encountered?





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Contemporary Issues and Mediation

- Mediation is an effective tool that has been used to address the most contemporary socio-political issues including:
 - The financial crisis and consumer debt
 - Foreclosure
 - Environmental disasters
- One of the more pressing modern social problems that is now coming up in mediation is immigration.





Immigration Threats

- Immigration Threat Example:
Counsel for one party threatens to report the other party, or that party's witness, to immigration authorities in order to induce that party to capitulate to a settlement.
- What *should* the mediator do?
- What *can* the mediator do?



Immigration Threats: NY Extortion Law

- S 155.05 (e) Larceny by extortion: A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will . . .
 - (iv) Accuse some person of a **crime** or cause criminal charges to be instituted against him; or
 - (v) Expose a **secret** or publicize an **asserted fact**, whether true or false, tending to subject some person to **hatred, contempt or ridicule**



NY Rules of Professional Conduct

- Rule 3.1: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is **not frivolous.**”
- Rule 4.1: “[A] lawyer shall not knowingly make a **false statement of fact or law** to a third person.”
- Rule 4.4: “In representing a client, a lawyer shall not use means that have **no substantial purpose other than to embarrass or harm** a third person”
- Rule 8.4: “A lawyer or law firm shall not: . . . (d) engage in conduct that is **prejudicial to the administration of justice**”
- ALSO NOTE Rule 3.4: “A lawyer shall not . . . present, participate in presenting, or **threaten to present criminal charges** solely to obtain an advantage in a civil matter.”



ABA Ethics Opinion

- ABA Ethics Committee issued Formal Opinion 92-363, Use of Threatened Disciplinary Complaint Against Opposing Counsel (1992):

“Threats of criminal prosecution are permitted **only when there is a nexus** between the facts and circumstances giving rise to the civil claim, and those supporting criminal charges.”

The lawyer must also have “a **well founded belief** that both the civil claim and the possible criminal charges are **warranted by the law and the facts**,” and the lawyer must not “attempt to exert or suggest **improper influence** over the criminal process.”



Background on Deportation Consequences

- Traditionally, deportation consequences have been viewed as civil, not criminal, in nature:
 - “A deportation proceeding is a **purely civil action to determine eligibility** to remain... **not to punish** an unlawful entry, though entering or remaining unlawfully in this country is itself a crime.” I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1032 (1984)
- However, the Supreme Court has since recognized the “unique” nature of deportation; “[d]eportation as a consequence of a criminal conviction [has a] **close connection** to the criminal process” Padilla v. Kentucky, 559 U.S. 356, 357 (2010).



Best Practices: Immigration Threats

- Returning to the Immigration Threat Example:
Counsel for one party threatens to report the other party, or that party's witness, to immigration authorities in order to induce that party to capitulate to a settlement.
- What *should* the mediator do?
- What *can* the mediator do?



Summary: Immigration Threats

- If a lawyer does bring up immigration consequences, they must have a basis in law and fact for their claims (Rule 3.1).
- A lawyer cannot lie about possible immigration consequences, and can be disciplined for doing so (Rule 4.1).
- A lawyer may not use immigration consequences as a threat where the only substantial purpose is to embarrass or harm a party (Rule 4.4), or doing so would be prejudicial to the administration of justice (Rule 8.4), and can be disciplined for doing so.
- Rule 3.4 may also be applicable considering the Supreme Court's recent views on deportation consequences as closely connected to the criminal process. This Rule prohibits, and the ABA counsels against, using immigration consequences as threats solely to gain an advantage in a civil matter.





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The Role of Judges and Mediation Confidentiality

- The EDNY Rules intend for judges to be separated from the mediation process.
 - “In all cases, mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which **could not be addressed by judicial action.**”
 - “No papers generated by the mediation process will be included in Court files, nor shall the Judge or Magistrate Judge assigned to the case have access to them. Information about what transpires during mediation sessions **will not at any time be made known to the Court, except to the extent required to resolve issues of noncompliance with the mediation procedures.**”



The Role of Judges and Mediation Confidentiality

- Discussion Questions
 - What constitutes “issues of noncompliance with the mediation procedures”?
 - Does this impose any level of a “good faith” requirement for attorneys and/or parties?
- Example
 - A judge in the case you are mediating asks you your thoughts on which party had a better case. What should you do?



The Role of Judges and Mediation Confidentiality

- How have you handled tricky interactions with judges before?
 - What have you found most helpful?
 - What have you found least helpful?





Thank You & Feedback



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