Selected Ethics Issues in Mediation & Settlement Negotiations

April 5, 2011
9:00 a.m. - 11:45 a.m.

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Selected Ethics Issues in Mediation & Settlement Negotiations

April 5, 2011
9:00 a.m. - 11:45 a.m.

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Coordinator, Office of ADR and Court Improvement Programs
New York State Unified Court System
Selected Ethics Issues in Mediation & Settlement Negotiations

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Agenda

9:00 - 9:10 Sources of guidance for ethics issues involving mediation and settlement.
   Dan M. Weitz & Prof. Alexandra Carter

9:10 - 9:55 The intersection of conflicts and confidentiality.
   Panel

9:55 - 10:25 The boundaries of proper advocacy and truth in negotiation.
   Jeremy R. Feinberg & Prof. Alexandra Carter

10:25 - 10:40 Break

10:40 - 11:10 Role play of a sample inquiry to the Mediator Ethics Committee.
   Panel

11:10 - 11:40 Considerations in mediating and settling cases from the in-house point of view. Tensions between the inside and outside lawyer.
   Bruce J. Hector

11:40 - 11:45 Q&A

New York & California Credit: 3.0 ethics.
This live program provides transitional/non-transitional credit to all attorneys.
Illinois Credit: 2.5 professional responsibility (pending).
Selected Ethics Issues in Mediation & Settlement Negotiations

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Do’s and Don’ts of Ethics Research
Jeremy R. Feinberg

- **Don’t** just jump on Westlaw/LEXIS and type in a search. You’ll need days to sift through everything a typical query generates.

- **Do** figure out what the governing rule(s) are and start there. Are you in a:
  - Model Rules jurisdiction? (All states except California).
  - a jurisdiction that “does its own thing?” (California uses similar principles but different format than everyone else).

- **Don’t** assume that just because you’re in a Model Rules jurisdiction that the Rules were adopted word for word.
  - Model Rules are just that (models) and there may be some deliberate and significant differences in the text and meaning.

- **Don’t** look to case law as the only interpretative choice for the rules. Courts typically only weigh in on limited ethical issues (e.g., disqualification motions, privilege issues). Bar Association ethics opinions are key interpretative authorities.

- **Do** consult secondary sources. Be sure to consider the resources available in your law library, including, for example:
  - Simon’s *New York Rules of Professional Conduct Annotated* is widely acknowledged as the first place to look for a New York question.
    - It is organized around the Rules with pages of annotations to case law, ethics opinions, secondary sources, and even the Professor’s own commentary. If you don’t know what Rule applies to a given issue, you can look at a detailed topic/word index.
  - The ABA/BNA Lawyer’s Manual on Professional Conduct is widely acknowledged as the first place to go for issues in other jurisdictions, and a good alternative for New York questions.
    - It is well-indexed by subject matter, including privilege and malpractice issues. This can save you time, particularly if you have a 50-state survey.
  - Restatement (Third) of the Law Governing Lawyers is an underappreciated text.

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1 The contents of this outline are the opinions of the author only. They do not represent the views of New York’s Office of Court Administration or the Unified Court System. (Ver. V, 2/11).
• This is also a solid source of annotations, from all states. Good hypothetical examples and illustrations can be found in the Comments.

• **Don’t** forget about statutory authority, beyond the governing rules, that may govern your question (see, e.g., NY Judiciary Law § 475 [attorney liens]).

• **Do** look to Bar Association opinions as good interpretative authority and a source for the research materials to review. Some examples include:
  
  • New York City Bar (www.nycbar.org) (click Reports/Publications/Press Releases; Ethical Responsibilities and Opinions).
  
  • New York State Bar (www.nysba.org) (click Publications; Ethics Opinions).
  
  • American Bar Association (www.abanet.org) (click Lawyer Resources; ETHICSearch; Lawyer Ethics and Professionalism; ABA ethics opinions).

• **Don’t** look for any hierarchy between and among ethics opinions of different Bar Associations. There isn’t any, and sometimes reasonable minds can differ. Generally, opinions from associations within the state whose rules you are interpreting should carry more weight than those outside the state, however.


• **Do** consider other non-traditional periodicals and resources to round out your research.

  • In New York, the *New York Professional Responsibility Report* has columns on hot topics in the field, and can provide a half-hour credit in Ethics CLE if you complete a quiz at the end, provided that you are not newly admitted. See www.nyprr.com

  • The ABA’s website has a comprehensive list of ethics resources throughout the country: www.abanet.org/cpr/links.html.

  • Cornell's legal information institute American Legal Ethics Library, http://www.law.cornell.edu/ethics/ provides one-stop shopping for rules and commentary (and links to opinions), by jurisdiction.

• **Don’t** be afraid to ask for help. Call a free ethics hotline to consult an attorney about your own conduct before you do (or don’t do) something.

• The New York City Bar’s ethics hotline is reachable at 212-382-6624. Operators are standing by!
STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS

revised October 16, 2009
STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS

INTRODUCTION

The New York State Office of Alternative Dispute Resolution and Court Improvement Programs has developed these Standards of Conduct (“Standards”) for New York State mediators in community dispute resolution centers located throughout New York State. These Standards have been adapted from The Revised Model Standards of Conduct created by the American Arbitration Association, the American Bar Association (Section of Dispute Resolution) and the Association of Conflict Resolution.

The Standards are intended to serve as a general framework for the practice of mediation and aim to:

1. educate mediators regarding current standards of practice;
2. guide mediators in their practice;
3. promote public confidence in mediation as a dispute resolution process; and
4. inform the mediating parties about the process.

The Standards include different levels of guidance:

- Use of the term “may” is the lowest strength of guidance and indicates a practice that the mediator should consider adopting but which can be deviated from in the exercise of good professional judgment.
- Use of the term “should” indicates that the practice described in the Standard is strongly suggested and should be departed from only with very strong reason.
- Use of the term “shall” is the highest level of guidance to the mediator, indicating that the mediator must follow the practice described.

These Standards of Conduct are applicable to those practicing mediators who mediate under the auspices of a New York State Community Resolution Center Program.

The Standards are listed and followed by Comments, where appropriate. The order of the Comments is not intended to reflect any priority in their importance. The Standards are meant to be read and interpreted in their entirety.

The Standards are to be used as a guide for ethical mediation practice. The Standards are not intended to be used as a substitute for other professional rules, applicable law, court rules, or regulations.

To the extent that a mediator cannot resolve an ethical dilemma after reading these Standards as a whole, or that the mediator finds that a certain Standard may conflict with another Standard contained therein, the mediator is encouraged to address this concern in writing to the Mediator Ethics Advisory Committee of the New York State Office of ADR and Court Improvement Programs. The Mediator Ethics Advisory Committee ("Committee") serves as an ethics advisory board, to interpret and clarify the Standards as they are raised by practicing CDRCP mediators in conjunction with an ethical dilemma. The committee is appointed and serves under the rules created by the New York State Office of ADR and Court Improvement Programs. The Committee will consider

1A Community Dispute Resolution Center is a community-based, private, not-for-profit program that contracts with the Chief Administrative Judge of the Unified Court System of the State of New York to provide conciliation, mediation, arbitration, or other types of dispute resolution services.
2Joint Committee Draft, January 1, 2004 (approved by the American Bar Association 2005).
3This language is adopted in large part from the Model Standards of Practice for Family and Divorce Mediation, developed by the Symposium on Standards of Practice (August 2000).
4The Mediator Ethics Advisory Committee (“Committee”) serves as an ethics advisory board, to interpret and clarify the Standards as they are raised by practicing CDRCP mediators in conjunction with an ethical dilemma. The committee is appointed and serves under the rules created by the New York State Office of ADR and Court Improvement Programs. The Committee will consider
resolve a conflict in a shorter time period than the Committee may have to respond. In such a case, the mediator should exercise good professional judgment for guidance in reaching a resolution of the conflict. Nonetheless, the mediator should consult the Mediator Ethics Advisory Committee.

The Standards are followed by “Committee Notes” that clarify, define, and expand on the statements made in the Standards and Comments, as well as a “Definitions” section and an “Appendix.”

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any ethical dilemma that a mediator raises in accordance with its rules, requiring that the mediator state the dilemma in writing and send the request to: The Mediator Ethics Advisory Committee, New York State Office of ADR and Court Improvement Programs, 25 Beaver Street, Room 859-A, New York, NY, 10004, or by e-mail to: cdrp@courts.state.ny.us. 

5This may include looking to other applicable professional standards within the mediation field. See Committee Notes.
STANDARD I. SELF-DETERMINATION
A mediator shall conduct a mediation in a manner that supports the principle of party self-
determination as to both process and outcome. Party self-determination means that parties are
free to make voluntary and uncoerced procedural and substantive decisions, including whether to
make an informed choice to agree or not agree.

COMMENTS:
1. Parties can exercise self-determination at any stage of a mediation, including
mediator selection, process design, participation in the process, and outcomes.
The mediator is responsible for supporting party self-determination in each area,
tempered by a mediator’s duty to conduct a quality mediation process.

2. Although party self-determination is a fundamental principle of mediation
practice, a mediator may need to balance party self-determination with a duty to
conduct a quality mediation process. When resolving these potentially conflicting
duties, a mediator should be cautious of conflict of interest issues and avoid
influencing party decisions for reasons such as higher settlement rates, egos,
increased fees and outside pressures from individuals or organizations.

3. A mediator cannot personally ensure that each party has made a fully informed
choice to reach a particular agreement, but the mediator can make the parties
aware that they may consult other professionals to help them make informed
choices at any point during the mediation process.6

4. Where a power imbalance exists between the parties such that one or both parties
cannot exercise self-determination, the mediator should postpone the session,
withdraw from the mediation, terminate the mediation, or consult with center
staff.7 (see Committee Notes)

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6A party is unable to make a fully informed choice where, for example, the party is unable to
articulate his or her concerns or lacks substantial information regarding the dispute such that the party is
unable to make procedural and substantive decisions or an informed decision to agree or not to agree.

7Indicators of a “power imbalance” that may impede a party’s ability to make a decision freely
and willingly include where one party threatens, intimidates, or otherwise coerces the other party into
participating in or reaching a desired result in the mediation.
STANDARD II: IMPARTIALITY

A. A mediator shall conduct a mediation in an impartial manner and shall avoid conduct that gives the appearance of partiality toward or prejudice against a party. Impartiality means freedom from favoritism or prejudice in word, action or appearance.

B. A mediator shall accept for mediation only those matters in which the mediator can remain impartial.

C. If at any time a mediator is unable to conduct the process in an impartial manner, the mediator shall withdraw.

D. In any mediation, a mediator shall neither give nor accept a gift, favor, loan or other item of value that would raise a question as to the mediator’s actual or perceived impartiality.

COMMENTS:

1. A mediator should not act with partiality based on any participant’s race, ethnicity, sex, religion, national origin, or sexual orientation or to any other factors that may create bias on the mediator’s part. (see Committee Notes)

2. During the mediation, a mediator shall maintain impartiality even while raising questions regarding the reality, fairness, equity, durability and feasibility of proposed options for resolution. In the event circumstances arise during a mediation that would reasonably be construed to impair or compromise a mediator’s impartiality, the mediator is obligated to withdraw.8

3. The mediator’s commitment is to remain impartial towards the parties and their choices in the process, in both joint and private sessions with the parties.9

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8FLA Rule 10.330, Committee Notes, Florida Rules for Certified and Court Appointed Mediators (2000 Revision).

9A party may request, or a mediator may offer to the parties as an option, the opportunity to meet individually with the mediator. This private session is often referred to as a “separate session” or “caucus”. During such separate sessions between a party and the mediator, the mediator continues to be bound by the Standard of Impartiality and the Standard of Confidentiality (Standard V.).
STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid the appearance of a conflict of interest before, during and after a mediation either by disclosing the conflict or withdrawing from the process.

B. Before accepting a mediation, a mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. Thereafter, and as soon as practical, a mediator shall disclose all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator’s ability to fairly discharge his or her responsibilities. If a mediator learns any fact described above after accepting a mediation, she or he shall disclose it to the parties as soon as is practical. If all parties agree to retain the mediator after disclosure, the mediator may proceed or continue with the mediation. However, if a conflict of interest casts serious doubt on the integrity of the process, the mediator shall withdraw or decline to proceed regardless of the express agreement of the parties.

C. During a mediation, a mediator shall not solicit or otherwise attempt to procure any future professional services, including future mediations, beyond the sessions necessary, to obtain an outcome.

D. Subsequent to mediation, a mediator shall not establish another relationship with one of the parties in any matter that would raise questions about the integrity of the mediation process.

COMMENTS:

1. The mediator’s duty to make a reasonable inquiry may be shaped by the sponsoring organization for which she or he mediates. A mediator should make an inquiry of the parties and participants prior to the time of the mediation regarding potential conflicts of interest. Given the central role that a mediator’s impartiality assumes to promote the integrity and effectiveness of the mediation process, a mediator should avoid conduct that undermines the public’s or party’s perception of her or his impartiality. This duty to avoid conflicts of interest exists at the pre-mediation stage, during the mediation conference, and following the mediation session.

2. Disclosure of relationships or circumstances that would create the potential for a conflict of interest rests on the mediator and should be made at the earliest possible opportunity and under circumstances that will allow the parties to freely exercise their right of self-determination as to both the selection of the mediator and participation in the mediation process.

3. Development of relationships by the mediator following the mediation with persons, organizations or agencies that might create a perceived or actual conflict of interest depend upon considerations such as time elapsed following the mediation and the nature of the relationship established and services offered.
STANDARD IV: COMPETENCE
A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties and the sponsoring organization for which she or he mediates.

B. If a mediator cannot satisfy this Standard, the mediator shall immediately notify the parties and take steps reasonably appropriate under the circumstances, including declining or withdrawing from the mediation or, where appropriate, obtaining assistance from others.

C. A mediator shall not conduct any aspect of a mediation while impaired by drugs, alcohol, medication or otherwise.

COMMENTS:
1. A mediator should obtain the training, skills, experience in mediation, cultural understanding, and other qualities that are necessary for effective mediation, consistent with the sponsoring organization for which he or she mediates.

2. A mediator should inform the parties, where necessary or when asked, of information relevant to the mediator’s training, education and experience.  

3. A mediator should attend educational programs and related activities to enhance and strengthen his or her personal knowledge of and skills in the mediation process, consistent with the sponsoring organization for which she or he mediates.

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10 Under the CDRC Program Manual and as required by Article 21-A of the New York State Judiciary Law governing all New York State community dispute resolution center programs, community mediators are required to complete a minimum of 30 hours of initial training, followed by a supervised apprenticeship at the center where they volunteer prior to becoming a community mediator for that center (CDRCP Program Manual, Ch. 7, Section I. A.(1) (June 11, 2003)). Additional training is required for community mediators who mediate disputes in family cases, youth cases, and civil, city, and district court cases (CDRCP Program Manual, Ch. 7, Section I. A.(5)).
STANDARD V: CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, including information obtained from the parties, non-party participants or documents shown to the mediator, with the exception of any allegation of child abuse.11

COMMENTS:

1. All mediations that are conducted by mediators on behalf of a New York State community resolution center are protected by a confidentiality statute, Article 21-A of the New York State Judiciary Law.12

2. If an allegation of child abuse is made during the mediation, the mediator is required to stop the mediation process, consult with each party individually for the purpose of obtaining as much information about the circumstances as possible, and consult with center program staff to determine whether to resume the mediation process.13

3. A mediator who meets with a party in private session during a mediation should not convey directly or indirectly to any other party, group or institution any information that was obtained during that private session without the consent of the disclosing party.

4. A mediator may report, pursuant to the policies of the local center, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.14

5. Nothing in this Standard should be construed to prohibit monitoring, research, and evaluation of mediation activities or the continuing education of mediators.

6. Nothing in this Standard should be construed to prohibit a mediator from disclosing necessary information to staff of the sponsoring organization for which she or he mediates.

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11 All centers deem allegations or evidence of child abuse inappropriate for mediation; accordingly, this information is not deemed confidential pursuant to Formal Opinion No. 83-F17 of the New York State Attorney General (1983).
12 This statute protects all memoranda, work product and case files from disclosure in judicial or administrative proceedings and deems confidential all communications that relate to the subject matter of the dispute resolution proceeding. Mediators at community dispute resolution center programs may request participants to sign a written consent form agreeing to mediate in order to ensure full protection under Article 21-A (1981).
13 CDRCP Program Manual, Ch. 5, Section II. A., Guideline IV. New York State CDRCP mediators are required to be aware of these Guidelines.
14 See generally CDRC Program Manual.
STANDARD VI: QUALITY OF THE PROCESS
A. A mediator shall conduct a quality mediation process that is consistent with these Standards of Conduct.

B. A mediator shall terminate the mediation, withdraw from service, or take other appropriate steps if she or he believes that participant conduct, including that of the mediator, jeopardizes sustaining a quality mediation process.

C. A mediator shall not exclude a party’s attorney from a mediation session, including an attorney for the child.

COMMENTS:
1. A mediator should agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when she or he can satisfy the reasonable expectation of the parties concerning the timing of the process.

3. A mediator should only accept cases when he or she can satisfy the reasonable expectation of the parties concerning his or her experience and training based on the guidelines of the sponsoring organization for which the mediator mediates.

4. The mediator should respect the decision of a party who chooses not to participate in the presence of another party’s attorney or another third party (see Committee Notes)

5. The primary purpose of a mediator is to help the parties communicate, negotiate, and/or make decisions. This role differs substantially from other professional client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators should strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice or services, or consider resolving their dispute through arbitration, neutral evaluation, or another dispute resolution process.

6. A mediator should not conduct a dispute resolution procedure other than mediation but attempt to characterize it as mediation in an effort to gain the protection of rules, statutes or other governing authorities pertaining to mediation.

7. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

8. If a party appears to have difficulty comprehending the process, issues or settlement options, or difficulty participating in the mediation process, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate and exercise self-determination. If no such option can be reasonably provided, the mediator should take other appropriate steps, including postponing the session, withdrawing from the mediation or terminating the mediation.

9. A mediator should postpone the session or take other appropriate steps if he or she becomes aware that a party is unable to participate due to drug or alcohol use.

10. If a mediation is being used to further illegal conduct, a mediator should take appropriate steps to insure a quality process including, if necessary, postponing the session, withdrawing from the mediation or terminating the mediation.
11. A mediator has an ongoing obligation to be sensitive to power imbalances between the parties and to ensure that the mediation process is conducted in a manner consistent with these Standards. If the mediator cannot ensure a quality process, the mediator should take appropriate steps to postpone the session, withdraw from the mediation or terminate the mediation.\textsuperscript{15} (see Committee Notes)

12. A mediator is responsible for confirming with the parties that mediation is an appropriate dispute resolution process under the circumstances of each case.\textsuperscript{16}

13. A mediator should consult with center staff if a party reveals or the mediator is otherwise made aware of a credible threat of serious and imminent physical harm to the speaker or to center staff.

\textsuperscript{15}Such power imbalances include where a party threatens, intimidates, or otherwise coerces the other party into participating in or reaching a desired result in the mediation.

\textsuperscript{16}FLA Rule 10.400. Mediator’s Responsibility to the Mediation Process.
STANDARD VII: ADVERTISING AND SOLICITATION
A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating his or her qualifications, experience, and range of available professional services.

COMMENTS:
1. Communications, including business cards, letter heads, or computer based communications, should not include any statistical settlement data or any promises as to outcome.

2. Communications may include references to a mediator’s fulfilling state, national or private organization qualifications only if the entity referred to has a procedure for qualifying mediators, and the mediator has been duly granted the requisite status.17

3. A mediator should not solicit in a manner that could give an appearance of partiality for or against a party.

4. A mediator should not list names of clients or persons served in promotional materials and communications without their permission.

17The New York State Office of ADR and Court Improvement Programs does not certify mediators. Under the CDRC Program Manual, however, mediators may obtain certification by a local center by completing an initial community training that is at least 30 hours in duration and conducted by a trainer who has been certified by the New York State Office of ADR and Court Improvement Programs, followed by an apprenticeship at the center, a performance evaluation under the supervision of the center’s Program Director, and an assessment by the Director that the mediator is prepared to mediate pursuant to the center’s performance standards (Ch. 7, Section 1.A.(1)).
STANDARD VIII: RESPONSIBILITIES TO THE MEDIATION PROFESSION
A mediator shall act in a manner that enhances the growth and quality of the mediation profession.

COMMENTS: Any person offering mediation services under the auspices of a New York State Community Dispute Resolution Program is considered to be a member of the mediation profession. Among other activities, a mediation professional should:

1. Foster diversity in the mediation field, reaching out to individuals with differing backgrounds and perspectives.

2. Strive to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participate in research in the field when given the opportunity, including obtaining participant feedback when appropriate.

4. Participate in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assist newer mediators through training, mentoring and networking.

6. Exhibit tolerance of differing points of view within the field, seeking to learn from one another and work together to improve the profession and better serve people in conflict.
COMMITTEE NOTES

These Committee Notes contain annotations to the Introduction and “Comments” listed under each Standard. The Committee Notes include both “General Notes” and “Comment Notes.” The General Notes contain introductory comments by the Committee and the Comment Notes clarify, define, and expand upon the specific Comment to which they refer. This section may be updated as necessary by the Mediator Ethics Advisory Committee (“Committee”).

Introduction to Committee Notes

Where a mediator is unable to resolve an ethical dilemma after reading these Standards as a whole, or finds that a certain Standard conflicts with another Standard contained therein, the mediator is encouraged to address this concern in writing to the Committee. In the interim, a mediator may look to other applicable professional rules or standards within the mediation field. Specific reference should be made to the Community Dispute Resolution Program Manual as a general rule, but particularly in circumstances that require immediate and decisive action by a mediator. Such instances may include where a party is in danger by the other party due to domestic violence, or the particular protocol a mediator should employ if a party reveals or the mediator is otherwise made aware of an allegation of child abuse. A mediator might also look to the Model Standards of Practice for Family and Divorce Mediation, that specifically addresses ethical practice for mediators of family cases (Symposium on Standards of Practice August 2001).

STANDARD I. SELF-DETERMINATION

General Notes
Practitioners and scholars cite self-determination as the fundamental principle of mediation. Comments for Standard I, however, identify how this principle might conflict with other Standards and suggest that a mediator’s duty, in limited circumstances, may override this principle.

Comment Notes

Comment

4. The Committee recognizes that power imbalances are an inherent part of mediation between any two parties, based on many factors including informational, emotional, or verbal differences, or even due to the disparity between the numbers of parties at the table. However, since the issue of power at the mediation table concerns the fundamental principle of self-determination, the mediator should be sensitive to any significant challenge to a party’s ability to freely and willingly make decisions regarding his or her own future. Such circumstances include where one party is threatening, intimidating, or otherwise manipulating the other party through either words or actions. In those cases the mediator should take immediate action to either postpone the session, withdraw from the mediation or terminate the mediation.

Comment Notes

Comment
STANDARD II: IMPARTIALITY

Comment Notes

Comment 1. The Committee’s intention in this Comment is to reflect all possible bases of bias that may cause a mediator to act with partiality. The classes of persons listed under this Comment are provided as examples, and are not intended to serve as an exhaustive or exclusive list.

The Committee’s emphasis is on the mediator’s action with regard to any bias he or she may hold. A mediator who may have a particular bias towards a party for any reason must not act with partiality due to her or his views. A mediator who is unable to act in an impartial, neutral way towards all parties in the dispute must decline to mediate or withdraw from the mediation.

STANDARD VI: QUALITY OF THE PROCESS

Comment Notes

Comment 4. A center must permit all parties to appear with representatives, including counsel, and to present all relevant evidence relating to the dispute, including calling and examining witnesses (22 New York Code of Rules and Regulations Part 116.3(I); see also and CDRC Program Manual, Ch. 5, Section IV. B.(3)). Parties who speak another language are afforded the assistance of a court interpreter, who must be present in the mediation (although no direct authority addresses this, this practice is recognized by centers as an “equal access to justice” issue; indirectly, this practice is covered under CDRC Program Manual Ch. 5, Section IV. B.(4)), centers shall not discriminate on the basis of age, sex, religion, creed, ethnic origin, sexual orientation or disability) (emphasis added). Parties may also request the presence of other third parties, such as friends and/or family for support. Prior to the mediation, both parties should determine together if these third parties will participate in the session.

Comment 11. A mediator has a duty to conduct a quality mediation process. The quality of the process, consistent with the Standards, requires the mediator to conduct a process that supports party self-determination, with impartiality, no conflicts of interest, competence, and by upholding the confidentiality of the parties (with the exception of child abuse). Specifically, this Comment refers to the Standard of Self-Determination (Standard I.). As the Committee states in Committee Notes to Standard I. Self-Determination, Comment 4., any significant challenge to a party’s ability to self-determine or freely and willingly make decisions regarding his or her own future should be a concern to the mediator, such as when one party is threatening, intimidating, or otherwise manipulating the other party through either words or actions. In such circumstances, the mediator should take immediate action to either postpone the session, withdraw from the mediation or terminate the mediation.
Standards Committee Meeting August 2009

Standard I. Self-Determination, Comment 3. and Standard VI. Quality of the Process, Comment 5.

General Notes
Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree. In order to make an informed choice, one of the mediator’s roles is to make the parties aware that they may consult other professionals at any point in the mediation process. In addition, to ensure a quality mediation process, the mediator should not mix the role of mediator with that of any other professional role. While a mediator may hold specialized knowledge, due to the mediator’s profession or area of expertise, a mediator should only be acting as a mediator when mediating and not in any other professional role.

Comment Notes
The Committee recognizes that the mediator may have specialized knowledge, due to the mediator’s professional role or area of expertise, as stated in Standard VI. Quality of the Process, Comment 5. Sometimes this knowledge can impact what the mediator believes to be the potential outcome of the parties’ decisions (for example, the mediator is an attorney and is aware of a particular law that impacts the parties’ agreement). However, even if the mediator were correct and this knowledge would impact the parties’ agreement, the mediator must be careful to assist the parties in making informed choices without providing direct (professional) advice, legal, therapeutic or otherwise. Since, as Standard I. Self-Determination, Comment 3. states, the mediator’s role is solely to help the parties make informed choices at any point during the mediation process, the mediator must find a balance between making the parties aware that they may consult other professionals to help them make informed choices with providing specific advice based on the mediator’s specialized knowledge.

When faced with this dilemma, the mediator can assist the parties by questioning their understanding of the implications of their decisions and making them aware that they may consult with other professionals regarding any decisions they make or would like to make. The mediator should take care to question the parties in a balanced way, so that both parties are receiving the same consideration.


Standard V. Confidentiality, Comment 6. and Standard VI. Quality of the Process, Comment 10.

General Notes
While a mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, except any allegation of child abuse, that does not prohibit a mediator from disclosing necessary information to staff. If a mediator becomes aware of or suspects that a crime may be or may have been committed, then the mediator should consult with staff regarding next steps without delay.

Comment Notes  The Committee does not want to put the mediator in the position of making determinations as to what is legal, since it is beyond the scope of the mediator’s role. When the mediator is faced with a situation where there is a concern about the legality of a certain action or a fear of something illegal taking place, the mediator should disclose this information to center staff, as indicated in Standard V. Confidentiality, Comment 6. The mediator must also consider Standard VI. Quality of the Process, Comment 10. at this time, and, if a mediation is being used to further illegal conduct, the mediator should take appropriate steps to ensure a quality process, including, if necessary, postponing the session, or withdrawing from or terminating the mediation.

Revision to Standard VI. Quality of the Process, C.
This new language has been added in order to ensure that a necessary party to a mediation is not excluded from the session.

While the Committee requires the mediator to not exclude the attorney for the child, the Committee also recognizes that the CDRCs play an active role in ensuring that the stakeholders in the mediation process in cases where an attorney for the child would be appointed -- generally Family Court personnel and other professionals who are integrally involved in a system based case such as a caseworker/supervisor, in addition to the parties -- are routinely notified of scheduled mediation sessions and have an equal chance of participation.

The CDRC Program Manual recognizes the importance of including all necessary parties in the mediation process (Chapter 5, Operational Policies, IV.B.1.3.) and this is reinforced through mediator’s initial training as well (Chapter 7, Standards and Guidelines for Mediators and Mediation Trainers, III., 8.).
DEFINITIONS

Conflict of Interest: A person has a conflict of interest when a person is in a position that requires him or her to exercise judgment on behalf of others and also has interests or obligations that might interfere with the exercise of his or her judgment.\(^{18}\)

Impartiality: Impartiality means freedom from favoritism or prejudice in word, action or appearance.

Mediation: For the purpose of these Standards, mediation is defined as a confidential, informal procedure in which a neutral third party helps disputants communicate, negotiate, and/or make decisions. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome.

\(^{18}\)www.unmc.edu/ethics/words.html.
APPENDIX

ARTICLE 21-A
COMMUNITY DISPUTE RESOLUTION
CENTERS PROGRAM

Section 849-a. Definitions.
849-b. Establishment and administration of centers.
849-c. Application procedures.
849-d. Payment procedures.
849-e. Funding.
849-g. Reports.

S 849-a. Definitions. For the purposes of this article:
1. "Center" means a community dispute center which provides conciliation, mediation, arbitration or other forms and techniques of dispute resolution.
2. "Mediator" means an impartial person who assists in the resolution of a dispute.
3. "Grant recipient" means any nonprofit organization that administers a community dispute resolution center pursuant to this article, and is organized for the resolution of disputes or for religious, charitable or educational purposes.

S 849-b. Establishment and administration of centers.
1. There is hereby established the community dispute resolution center program, to be administered and supervised under the direction of the chief administrator of the courts, to provide funds pursuant to this article for the establishment and continuance of dispute resolution centers on the basis of need in neighborhoods.
2. Every center shall be operated by a grant recipient.
3. All centers shall be operated pursuant to contract with the chief administrator and shall comply with all provisions of this article. The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article, including provisions for periodic monitoring and evaluation of the program.
4. A center shall not be eligible for funds under this article unless:
   (a) it complies with the provisions of this article and the applicable rules and regulations of the chief administrator;
   (b) it provides neutral mediators who have received at least twenty-five hours of training in conflict resolution techniques;
   (c) it provides dispute resolution without cost to indigents and at nominal or no cost to other participants;
   (d) it provides that during or at the conclusion of the dispute resolution process there shall be a written agreement or decision setting forth the settlement of the issues and future responsibilities of each party and that such agreement or decision shall be available to a court which has adjourned a pending action pursuant to section 170.55 of the criminal procedure law;
   (e) it does not make monetary awards except upon consent of the parties and such awards do not exceed the monetary jurisdiction of the small claims part of the justice court, except that where an action has been adjourned in contemplation of dismissal pursuant to section 215.10 of the criminal procedure law, a monetary award not in excess of five thousand
dollars may be made; and (f) it does not accept for dispute resolution any defendant who is named in a filed felony complaint, superior court information, or indictment, charging: (i) a class A felony, or (ii) a violent felony offense as defined in section 70.02 of the penal law, or (iii) any drug offense as defined in article two hundred twenty of the penal law, or (iv) a felony upon the conviction of which defendant must be sentenced as a second felony offender, a second violent felony offender, or a persistent violent felony offender pursuant to sections 70.06, 70.04 and 70.08 of the penal law, or a felony upon the conviction of which defendant may be sentenced as a persistent felony offender pursuant to section 70.10 of such law.

5. Parties must be provided in advance of the dispute resolution process with a written statement relating:
   (a) their rights and obligations;
   (b) the nature of the dispute;
   (c) their right to call and examine witnesses;
   (d) that a written decision with the reasons therefor will be rendered; and
   (e) that the dispute resolution process will be final and binding upon the parties.

6. Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication.

S 849-c. Application procedures.
1. Funds appropriated or available for the purposes of this article may be allocated for programs proposed by eligible centers. Nothing in this article shall preclude existing resolution centers from applying for funds made available under this article provided that they are otherwise in compliance with this article.

2. Centers shall be selected by the chief administrator from applications submitted.

3. The chief administrator shall require that applications submitted for funding include, but need not be limited to the following:
   (a) The cost of each of the proposed centers components including the proposed compensation of employees.
   (b) A description of the proposed area of service and number of participants who may be served.
   (c) A description of available dispute resolution services and facilities within the proposed geographical area.
   (d) A description of the applicant’s proposed program, including support of civic groups, social services agencies and criminal justice agencies to accept and make referrals; the present availability of resources; and the applicant’s administrative capacity.
   (e) Such additional information as is determined to be needed pursuant to rules of the chief administrator.

S 849-d. Payment procedures.
1. Upon the approval of the chief
administrator, funds appropriated or available for the purposes of this article shall be used for the costs of operation of approved programs. The methods of payment or reimbursement for dispute resolution costs shall be specified by the chief administrator and may vary among centers. All such arrangements shall conform to the eligibility criteria of this article and the rules and regulations of the chief administrator.

2. The state share of the cost of any center approved under this section shall include a basic grant of up to twenty thousand dollars for each county served by the center and may include an additional amount not exceeding fifty per centum of the difference between the approved estimated cost of the program and the basic grant.

S 849-e. Funding.
1. The chief administrator may accept and disburse from any public or private agency or person, any money for the purposes of this article.
2. The chief administrator may also receive and disburse federal funds for purposes of this article, and perform services and acts as may be necessary for the receipt and disbursement of such federal funds.
   (a) A grant recipient may accept funds from any public or private agency or person for the purposes of this article.
   (b) The state comptroller, the chief administrator and their authorized representatives, shall have the power to inspect, examine and audit the fiscal affairs of the program.
   (c) Centers shall, whenever reasonably possible, make use of public facilities at free or nominal cost.

S 849-f. Rules and regulations. The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article.

S 849-g. Reports. Each resolution center funded pursuant to this article shall annually provide the chief administrator with statistical data regarding the operating budget, the number of referrals, categories or types of cases referred, number of parties serviced, number of disputes resolved, nature of resolution, amount and type of awards, rate of compliance, returnees to the resolution process, duration and estimated costs of hearings and such other information the chief administrator may require and the cost of hearings as the chief administrator requires. The chief administrator shall thereafter report annually to the governor and the and the temporary president of the senate, speaker of the assembly, and chairpersons of the judiciary and children and families committees regarding the operation and success of the centers funded pursuant to this article. The chief administrator shall include in such report all the information for each center that is required to be in the report from each center to the chief administrator.
The following Standards of Conduct shall govern all who serve as mediators in cases that undergo mediation pursuant to the Rules ("the ADR Rules") of the Alternative Dispute Resolution Program of the Commercial Division, Supreme Court, New York County ("the ADR Program"). Separate Standards of Conduct for Arbitrators and Neutral Evaluators have been issued.

The ADR Program aims to provide an alternative to the formal litigation process that is sound, fair, efficient, expeditious, and inexpensive. To achieve this objective, the Program must have the confidence of the Bar and the public. All activities undertaken pursuant to the ADR Rules will reflect upon the Commercial Division and the court system as a whole. Therefore, the Program must be marked at all times by the highest possible standards of integrity, honesty, fairness, openness, intelligence, and diligence.

STANDARD I
SELF-DETERMINATION

A mediator should recognize that mediation is based on the principle of self-determination.

Self-determination is the fundamental principle of mediation. Mediation is built upon the ability and right of the parties to communicate, assess facts, events, and issues, and make choices for themselves, and, if they wish, to reach an agreement, voluntarily and free of coercion.

1 In these Standards, the Commercial Division has sought to tailor to the particular characteristics of the Program and to implement standards that have gained national recognition and wide acceptance among ADR neutrals, Judges, court administrators, the Bar, and members of the public utilizing these processes. These Standards have been derived from the Model Standards of Conduct for Mediators, a product of the joint labors of the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.
Ethical Considerations

1. As set forth in Standard VI, a mediator should provide information about the process to the parties. The primary role of the mediator is to foster dialogue and, when desired by the parties, facilitate a voluntary resolution of a dispute. A mediator may identify issues and help parties to communicate and explore options. A mediator should never do anything to undermine an atmosphere of free exchange of views and ideas, or to coerce an agreement.

2. The mediator may facilitate the parties’ own engagement in assessment of risks or analysis of legal positions, in private discussions (“the caucus”) or in joint sessions, if that will assist the parties to understand options fully. A mediator may also, where appropriate, provide an assessment of the risks associated with litigation or other binding processes.

3. A mediator should encourage balanced discussion and discourage intimidation by either party. A mediator should work to promote each party’s understanding of and respect for the perspective, interests, feelings, concerns, and position of each of the other parties, even if they cannot agree.

4. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement. However, a party in the ADR Program will normally be represented by counsel and the mediator should provide full opportunity to parties and their attorneys to consult with each other and, if necessary, for both to consult with outside professionals.

5. If the mediator discovers an intentional abuse of the process, the mediator may discontinue the process.

STANDARD II
IMPARTIALITY

A mediator should conduct the mediation in an impartial manner.

A mediator should act at all times with the utmost of impartiality and evenhandedness. A mediator should mediate only those matters in which he/she can remain impartial and evenhanded. The mediator should withdraw if unable to do so at any time.

Ethical Considerations

1. A mediator should avoid all conduct that gives the appearance of partiality toward one of the parties. A mediator should avoid favoritism or prejudice based on the parties’ background, prominence, personal characteristics, economic importance, performance at the mediation, or any other factors. The quality of the mediation process is enhanced and the reputation of the Program protected when the parties have confidence in the impartiality of the mediator.
2. The principle of impartiality does not prohibit the mediator from engaging in caucuses in accordance with these Standards as part of the mediation process.

STANDARD III
CONFLICTS OF INTEREST

A mediator should decline any appointment if acceptance would create a conflict of interest. Before accepting an appointment, a mediator should disclose all potential conflicts of interest. After such disclosure, the mediator may accept the appointment if all parties so request. The mediator should avoid conflicts of interest during and even after the mediation.

A mediator offered an appointment in a case should comply with the ADR Rules regarding conflicts of interest. A mediator should review his/her past or present professional and other relationships, including with attorneys for parties and parents, subsidiaries, and affiliates of corporate parties, and should decline the appointment if the review reveals the existence of a conflict of interest. Consistent with the principle of self-determination by mediating parties, a mediator who contemplates accepting an appointment should disclose to all parties all potential conflicts of interest that could reasonably be seen as raising a question about impartiality. If in doubt, the mediator should err on the side of disclosure. If all parties agree to mediate after such disclosure, the mediator may proceed. If, however, the conflict of interest or potential conflict would cast serious doubt on the integrity of the process or the Program, the mediator should decline the appointment.

A mediator should avoid conflicts of interest during and even after the mediation. Before or during the mediation the mediator should not discuss with any party future retention in any capacity.

Ethical Considerations

1. If, during a mediation, the mediator discovers a conflict, the mediator should notify the Program Administration and counsel. Unless the mediator, the parties, and the Program Administration all give their informed consent to the mediator’s continuation and continuation would not cast serious doubt on the integrity of the process or the Program, the mediator should withdraw.

2. A mediator should not recommend the services of particular professionals to assist the parties and counsel in the mediation unless a request for a recommendation is made jointly by all parties and provided that in so recommending the mediator does not engage in a conflict of interest. A mediator may make reference to professional referral services or associations that maintain rosters of qualified professionals.
STANDARD IV
COMPETENCE

A mediator should mediate only when he/she has the qualifications necessary to satisfy the reasonable expectations of the parties.

In principle, any person may be selected as a mediator, provided that the parties are satisfied with the mediator’s qualifications. However, training and experience are necessary for effective mediation. All members of the Panel of Mediators should comply with the Division’s training standards. Parties in the Program are free to utilize mediators not listed in the Panel. Any person who offers to serve as mediator in a case represents that he/she has the training and competency to mediate effectively. If the mediator in fact lacks that ability, due to the complexity or difficulty of the matter or other factors, the mediator should decline the appointment.

STANDARD V
CONFIDENTIALITY

A mediator should comply with the ADR Rules regarding confidentiality and should respect the reasonable expectations of the parties on that subject.

The ADR Rules provide for confidentiality in mediation, recognizing that confidentiality is essential to the process. Mediators should at all times comply with these Rules. The parties’ expectations of confidentiality generally depend on the Rules and any other rules or law providing for confidentiality, the circumstances of the mediation, and agreements they may make. The parties may provide for additional levels of confidentiality beyond that guaranteed in the Rules and such agreement should be respected. The mediator should not disclose any information that a party, in accordance with the foregoing, reasonably expects to be confidential unless given permission by the confiding party or required by law or authorized by the Rules.

Ethical Considerations

1. At the outset, the mediator should explain to all parties the principle of confidentiality, with regard to both joint sessions and caucuses.

2. If a party conveys to the mediator in a caucus information that the mediator knows or believes the other party to the case does not possess, the mediator should exercise the utmost diligence to prevent revelation of that information to the other party unless the communicating party has specifically agreed to disclosure.

3. A mediator should not disclose confidential information to the Program Administration or the assigned Justice, including with regard to the merits of the case, settlement offers, and how the parties acted in the process, except that, as provided in the ADR Rules, the mediator may report violations of the Rules to the Administration.
4. Confidentiality should not be construed to prohibit effective monitoring or evaluation of the Program by the Program Administration. Thus, a mediator may report to the Administration, in general terms, whether the process is continuing and the future schedule for the proceeding. Under appropriate circumstances, the Program Administration may allow researchers access to general statistical data and, with the specific permission of all parties, individual case files, observations of live mediations, and interviews with participants. Similarly, mentors and trainees may observe live mediations, but only with permission of all parties and subject to the ADR Rules on confidentiality.

5. A mediator should not, at any time, use confidential information acquired during the ADR process to gain personal advantage or advantage for others, or to affect adversely the interests of another.

STANDARD VI
QUALITY OF THE PROCESS

A mediator should conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination.

A mediator should work to ensure a process of high quality. This requires a commitment by the mediator to fairness, diligence, sensitivity toward the parties, and maintenance of an atmosphere of respect among the parties. The mediator should guarantee that there is adequate and fair opportunity for counsel and each party to participate in discussions. The mediator should observe deadlines and handle his/her responsibilities with diligence and expedition. The parties decide when and under what conditions they will reach an agreement.

Ethical Considerations

1. A mediator should agree to accept an appointment only when able to commit the time and attention essential to a fair and effective process. If the mediator may be too busy with other matters to do so, then the proposed appointment should be declined. If after acceptance of the appointment, circumstances develop that prevent the mediator from serving, the mediator should withdraw. Withdrawal may cause significant inconvenience for the parties; therefore, the mediator should exercise diligence to determine availability in advance of commencement of the proceeding.

2. A mediator should ensure that deadlines set forth in the ADR Rules are adhered to and shall keep the Program Administration informed about the schedule for the process. A mediator should not allow a mediation to be delayed and should consult with the Administration if the process is being delayed.

3. A mediator should treat parties and counsel with sensitivity, civility and respect and should encourage parties and counsel to treat each other in the same way. A mediator should
foster cooperation and work to build reasonable trust among the parties in the process. A mediator should provide all counsel and parties with an adequate and fair opportunity to state positions, opinions and interests.

4. The primary purpose of the mediator is to facilitate communication by or among the parties, their development and assessment of options, and a voluntary agreement. A mediator should refrain from providing professional advice and should at all times distinguish between the roles of mediator and adviser. A mediator may, when appropriate, recommend that counsel and parties seek outside professional advice or consider resolving the dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who at the request of the parties agrees to undertake an additional dispute resolution role in the same matter is governed by other Standards of Conduct.

5. A mediator should explain to all participants at the outset of the process the procedures that will be followed in the process and what the mediator’s role will be, including, insofar as practical, the extent to which the mediator will undertake an evaluative function. (Within the ADR field, there are differences of view as to whether, when, and to what degree a mediator may assume an evaluative approach.) The mediator should make reasonable efforts during the process to explain to the parties the mediator’s role and these procedures.

6. A mediator should withdraw from a mediation or postpone a session if the mediation is being used to further illegal activity, or if a party or counsel is unable to participate due to physical or mental incapacity. Where authorized by the Rules or required by law a mediator may or shall disclose to appropriate authorities illegal or unprofessional activity being engaged in or threatened by a party to the mediation or counsel.

7. A mediator’s behavior should not be distorted by a desire for a high settlement rate.

8. A mediator should be mindful of the needs of persons with disabilities, including but not limited to, obligations under the Americans with Disabilities Act.

STANDARD VII
COMPENSATION

At the outset of the mediation, the mediator shall explain the rules governing compensation, which are set forth in the ADR Rules. A mediator should not seek compensation in other circumstances.

At present, the Program provides for an initial mandatory mediation session or sessions totaling four hours (excluding time spent in arranging and preparing for the mediation).
the conclusion of the four hours, any party may bring the mediation process to an end. If the parties agree to continue, the Panel mediator shall be compensated as provided in the rules. The Rules also govern compensation paid to a Panel mediator who is selected by the parties as substitute for a mediator designated by the ADR Coordinator. All Panel mediators shall comply with these Rules. The mediator shall explain these rules to the parties and counsel before the mediation begins.

Ethical Considerations

1. A Panel mediator who accepts an appointment should not, directly or indirectly, request from the parties any compensation other than as provided in the ADR Rules.

2. A mediator should not accept a fee or other benefit for referral of a matter to anyone.

3. A mediator who joins the Panel should provide ADR services in accordance with the ADR Rules. Such a mediator should not unreasonably decline to accept appointments upon request of the Program Administration. If the standards of compensation set forth in the Rules are not considered satisfactory by the mediator, he or she shall withdraw from the Panel.

STANDARD VIII
OBLIGATIONS TO THE MEDIATION PROCESS

Mediators are regarded as knowledgeable about the process of mediation. They should use their expertise to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities. Mediators should cooperate with efforts of court administrators to promote adequate professional skills among those who function as mediators. When serving in the Program, mediators should conduct themselves so as to protect and promote the integrity and standing of the Program.

Dated: June 15, 2008

HON. JACQUELINE W. SILBERMANN
ADMINISTRATIVE JUDGE
Opinion 2010-01

A volunteer mediator from our center was mediating a case at Civil Court. During an individual session with one of the parties, the mediator noticed that the party had a tape recorder on her lap. When the mediator asked the party if she had been taping the mediation session all along, the party said yes “because she wasn't a good note taker” and she didn't "want to miss anything important."

The mediator asked the party whether she was planning to share with the other party that the session had been recorded and to ask if the other party would agree to have the rest of the mediation taped. The party said she did not plan to do either, since she was recording the session for her own purposes and did not plan to use the taped session against the other party if they went before a judge.

The mediator attempted to explore with the party her underlying interests for wanting a recording of the session. However, the party did not want to discuss it beyond sharing that she just felt more comfortable having a record of the session. The mediator was unsure how to proceed.

Questions:

1. Should the mediator continue with the mediation?

2. If the mediator does not continue the mediation, can the mediator disclose the reason why he is withdrawing:
   A. To the other party?
   B. To center staff?

- Submitted by the director of a CDRC

Summary of the Opinion

The mediator shall not continue with the mediation. The mediator shall disclose to the parties in joint session that he is terminating the mediation.

The mediator may disclose the fact of the taping and/ or that the taping is the reason for withdrawal. After the mediation session has been ended, the mediator should disclose the taping to center staff.

Authority Referenced

Opinion

Question 1.) Should the mediator continue with the mediation?

The mediator shall not continue with the mediation.\(^1\)

According to the facts, the mediator has attempted to explore the underlying interests of the party taping the session (“taping party”). In addition, the mediator has asked the taping party if she would share that she is taping the mediation with the other party. The taping party has not only declined to share the fact of the taping with the other side but has also declined to discuss her reasons for the taping any further. Because this discussion took place during a private session and since the taping party refuses to disclose it to the other party, the private taping directly conflicts with the taped party’s ability to exercise self-determination by making voluntary procedural and substantive decisions from the outset. To allow the mediation to continue without revealing the private taping to the other party would also conflict directly with the quality of the process and the mediator’s impartiality.

The Committee finds that the Standards impacted by this decision to terminate the mediation include Standard I. Self Determination, Standard VI. Quality of the Process, and Standard II. Impartiality.

Standard I. Self-Determination, Comment 1., states:

> Parties can exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in the process, and outcomes. The mediator is responsible for supporting party self-determination in each area, tempered by a mediator's duty to conduct a quality mediation process.

While quite unusual, tape recording of mediation can be an appropriate issue of process design for the parties to discuss at the outset of mediation. If given the opportunity to discuss the issue up front, the parties can make informed decisions related to the impact of taping. Parties can determine the acceptable uses of any tape recording given the confidential nature of mediation. They can also assess for themselves the degree to which they participate in the process including their willingness to candidly discuss sensitive concerns when the discussion is being recorded. If

\(^1\) The Introduction to the Standards of Conduct for New York State Community Dispute Resolution Center Mediators (“CDRC Standards”) states the different levels of guidance. Use of the term “may” is the lowest strength of guidance and indicates a practice that the mediator should consider adopting but which can be deviated from in the exercise of good professional judgment. Use of the term “should” indicates that the practice described in the Standard is strongly suggested and should be departed from only with very strong reason. Use of the term “shall” is the highest level of guidance to the mediator, indicating that the mediator must follow the practice described. The levels of guidance are extremely significant to understanding the Committee’s analysis, because the Committee’s reasoning can vary greatly whether or not a mediator “may”, “should”, or “shall” pursue a certain course of action. Referring to the levels of guidance when reading the Committee’s Opinion is crucial to understanding the nuances revealed by the ethical dilemma and how the Committee reaches its conclusion. (Standards of Conduct for New York State Community Dispute Resolution Mediators, p. 1).
the taping party is not willing to share that taping has already occurred, then the mediator is unable to ensure that the taped party can exercise self-determination as to his participation in the process. The impact on the taped party’s self-determination alone might be sufficient reason for the mediator to stop the mediation. However, the Committee’s analysis includes the impact on quality of the process and impartiality.

Standard VI. Quality of the Process, A., states that “(a) mediator shall conduct a quality mediation process that is consistent with these Standards of Conduct.” VI. B. further notes that a mediator “shall terminate the mediation, withdraw from service, or take other appropriate steps if she or he believes that participant conduct…jeopardizes sustaining a quality mediation process.”

Here, the taping party’s refusal to disclose the taping to the other party conflicts with the mediator’s obligation to conduct a quality mediation process. If the taped party is unaware of the taping, he would clearly have difficulty participating in the process in a manner consistent with these Standards. Again, therefore, the mediator shall terminate the mediation, withdraw from service, or take other appropriate steps, since participant conduct, including that of the mediator, would jeopardize sustaining a quality mediation process.

In addition, the Committee finds further support to terminate the session or withdraw from the mediation in Comment 8. to Standard VI., where -- as in this scenario -- the party appeared to have difficulty participating in the mediation process. The Comment directs the mediator to “explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate and exercise self-determination. If no such option can be reasonably provided, the mediator should take other appropriate steps, including postponing the session, withdrawing from the mediation or terminating the mediation.” Here, the mediator did attempt to explore with the taping party her underlying interests for wanting a recording of the session and the party did not want to discuss it. That provides additional justification for not continuing with the session.

The other Standard directly impacted by this scenario is Standard II. Impartiality. In addition to the above Standards that would lead the mediator to not continue with the mediation session, Standard II. would also create a reason for the session to be discontinued. The mediator could not continue with the session without informing the other party of the taping that has occurred, because to do so would be to create the appearance (and in fact the possible existence) of mediator partiality. Standard II. A. states:

A mediator shall conduct a mediation in an impartial manner and shall avoid conduct that gives the appearance of partiality toward or prejudice against a party. Impartiality means freedom from favoritism or prejudice in word, action or appearance.

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2 Standard VI. B., Quality of the Process.
3 The Committee does not address which of these actions to take, because the inquirer only asks whether the mediator should continue with the mediation, and because the Committee’s role is not to suggest “best practices.”
The taped party could very well find out about the taping at a later time and it would impact the taped party’s experience of the mediation, as well as the possible outcome.

In weighing all of the above factors, the Committee concludes that the mediator shall not continue with the mediation. Taping a mediation without the other party’s knowledge interferes with the other party’s exercise of self-determination, the mediator’s obligation to remain impartial and jeopardizes sustaining a quality mediation process. As always, if the mediator is unsure how to proceed in this instance, the mediator should stop the mediation and consult with Center staff.

**Question 2.A.) If the mediator does not continue the mediation, can the mediator disclose the reason why he is withdrawing to the other party?**

The Committee, after careful consideration, finds that the mediator may disclose the taping to the taped party. The Committee notes that the mediator’s discretion to disclose the taping to the taped party indicates a practice that the mediator should consider adopting although it can be deviated from in the exercise of good professional judgment. In reaching its conclusion, The Committee looks to Standard V. Confidentiality, Standard I. Self Determination, Standard II. Impartiality, and Standard VI. Quality of the Process.

Standard V. Confidentiality, states:

> A mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, including information obtained from the parties, non-party participants or documents shown to the mediator, with the exception of any allegation of child abuse.

The taped party would reasonably expect that communications made during the course of mediation would remain confidential. The secret tape recording of the mediation by the taping party could reasonably be seen as frustrating the taped party’s expectation of mediation confidentiality.

However, the facts indicate that the mediator became aware of the tape recorder during private session and the taping party informed the mediator that she did not intend to tell the other party. Standard V. Confidentiality, Comment 3., states:

> A mediator who meets with a party in private session during a mediation should not convey directly or indirectly to any other party, group or institution any information that was obtained during that private session without the consent of the disclosing party.

The Committee therefore must attempt to balance the taping party’s confidentiality with the taped party’s confidentiality while at the same time examining the impact of the taping and its

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4 See explanation of levels of guidance for use of the term “may” in the Introduction to the CDRC Standards.
The Committee admits that on the analysis of the Standard of Confidentiality alone, the mediator might be told that he may disclose the taping to the other party. However, with the additional examination of the impact of the taping and its non-disclosure on self-determination, quality of the process, and the mediator’s impartiality, the Committee solidifies the finding that the mediator may disclose the taping to the other party.

Looking to the analysis of Standard I., Comment 1., above, if the taping party is not willing to share that taping has already occurred, then the mediator is unable to ensure that both parties can exercise self-determination as to their participation in the process. The taped party cannot assess how taping could impact his participation in the process.

As stated previously in Question 1. above, the mediator shall avoid conduct that gives the appearance of partiality toward or prejudice against a party.5 By not disclosing to the other party that the mediation had been taped, the mediator could be perceived as acting with prejudice against the taped party. Furthermore, by not disclosing the taping to the other party, the mediator would at a minimum be giving the appearance of acting with partiality towards the taping party.

Finally, Standard VI. Quality of the Process requires that the mediator “shall conduct a quality mediation process that is consistent with these Standards of Conduct.”6 By not disclosing the reason for terminating the session, withdrawing from service, or taking other appropriate steps to temper the taping party’s conduct, the mediator would not be fulfilling his required duty to sustain a quality mediation process.7 For all of the above reasons, the Committee holds that the mediator may disclose the reason for ending the session.

2.B.) If the mediator does not continue the mediation, can the mediator disclose the reason why he is withdrawing to center staff?

Standard V. Confidentiality, Comment 6., states that "(n)othing in this Standard should be construed to prohibit a mediator from disclosing necessary information to staff of the sponsoring organization for which she or he mediates."

The mediator should disclose the taping to center staff so that staff will be aware of the circumstances of why the mediator withdrew from the mediation, especially if the same parties requested or are referred to mediation by the court again.

5 Standard II. Impartiality, A.
6 Standard VI. A.
7 Id. at B.
The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics

Formal Opinion 2003-02: Undisclosed Taping of Conversations by Lawyers

TOPIC: Undisclosed taping of conversations by lawyers.

DIGEST: A lawyer may not, as a matter of routine practice, tape record conversations without disclosing that the conversation is being taped. A lawyer may, however, engage in the undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that disclosure of the taping would impair pursuit of a generally accepted societal good. NY City 1980-95 and 1995-10 are modified by this opinion.

CODE: DRs 1-102(a)(4), 7-102(a)(5), 7-102(a)(7), 7-102(a)(8)

QUESTION: May a lawyer tape record a conversation without informing all parties to the conversation that it is being recorded?

OPINION:

In June 2001, the American Bar Association (“ABA”) reversed course with respect to whether it is permissible for lawyers to tape a conversation without disclosing that the conversation was being taped. For more than twenty-five years, it was the position of the ABA that undisclosed taping by any lawyers other than law enforcement officials was unethical. See ABA Formal Op. 337 (1974). In Formal Opinion 01-422, however, the ABA reversed its position, opining that undisclosed taping was not in and of itself unethical unless prohibited by the law of the relevant jurisdictions.

The Professional Responsibility Committee of this Association has recommended to this Committee that we follow the lead of the ABA – at least to the extent of modifying our prior opinions declaring all undisclosed taping by lawyers in civil and commercial contexts to be unethical. We have revisited the issue of undisclosed taping by lawyers and conclude that our prior opinions, like the ABA’s 1974 opinion, swept too broadly. However, we regard the ABA’s new position as an overcorrection.

This Committee remains of the view, first expressed in NY City 1980-95, that undisclosed taping smacks of trickery and is improper as a routine practice. At the same time, however, we recognize that there are circumstances in which undisclosed taping should be permissible on the ground that it advances a generally accepted societal good. We further recognize that it would be
difficult, if not impossible, to anticipate and catalog all such circumstances, and that a lawyer should not be subject to professional discipline if he or she has a reasonable basis for believing such circumstances exist. NY City 1980-95 and 1995-10 are modified accordingly. 1

**DISCUSSION:**

ABA Formal Opinion 01-422 offers a variety of reasons for abandoning a general prohibition against undisclosed taping. Some of the reasons offered are more persuasive than others. None, in the view of this Committee, provides persuasive support for the conclusion that undisclosed taping, as a routine practice, should be permissible for attorneys.

The ABA's Opinion leads with the suggestion that reversal of the prohibition against undisclosed taping is warranted by an intervening change in societal attitudes and practices with respect to undisclosed taping. Thus, according to the ABA:

the belief that nonconsensual taping of conversations is inherently deceitful, embraced by this Committee in 1974, is not universally accepted today. The overwhelming majority of states permit recording by consent of only one party to the conversation. Surreptitious recording of conversations is a widespread practice by law enforcement, private investigators and journalists, and the courts universally accept evidence required by such techniques. Devices for the recording of telephone conversations on one's own phone readily are available and widely are used. Thus, even though recording of a conversation without disclosure may to many people "offend a sense of honor and fair play," it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded.

ABA Formal Opinion 01-422 (footnotes omitted).

We are unpersuaded that there has been any material change in societal attitudes or practices with respect to undisclosed taping since the 1970s. While it is certainly true that many states currently permit the recording of conversations without the consent of all parties and that courts routinely accept evidence acquired by such techniques, the same could have been said at the time the ABA issued its 1974 Opinion. Similarly, we are unaware of any reason to believe that undisclosed taping is significantly more prevalent today as an investigative technique than it was in the 1970s. To the contrary, as at least one court has noted, the ABA's 1974 opinion expressly cited the prevalence of surreptitious recording as the reason why a formal opinion on the subject was advisable. See Anderson v. Hale, 202 F.R.D. 548, 557 n.5 (N.D. Ill. 2001). 2

This Committee likewise does not share the ABA's skepticism with respect to whether individuals today can justifiably assume that a conversation is not being recorded – particularly when the
conversation is with an attorney. Anyone who has ever had occasion to call customer service for a telephone, bank or charge account – i.e., the overwhelmingly majority of U.S. residents – has repeatedly been greeted with a taped message advising callers that their conversations may be recorded for quality control or training purposes. Accordingly, we believe it is neither unlikely nor unjustifiable that many individuals assume that a commercial conversation will not be recorded unless they have been given notice of the possibility that it will be. Nor do we think it unjustifiable for individuals to assume – or advisable for the legal profession to discourage individuals from assuming – that the business practices of lawyers are any less courteous and honorable than those of the local bank or telephone company.

In any event, we regard the state of mind of the recording’s target to be considerably less relevant than the state of mind of the individual making the decision to engage in undisclosed taping. And however much the expectations of the target may be subject to debate, it cannot seriously be doubted that an individual who engages in undisclosed taping does so in the hope that the target is not expecting to be taped. Indeed, it is difficult to conceive of any other reason for failing to disclose that the conversation is being taped. It was in recognition of that fact that our first opinion on undisclosed taping characterized the practice as “smacking of trickery,” NY City 1980-95, and joined ABA Formal Opinion 337 in concluding that undisclosed taping was, as a general matter, violative of DR 1-102(a)(4)’s proscription against engaging in conduct that “involv[ed] dishonesty, deceit, fraud or misrepresentation.”

Undisclosed taping smacks of trickery no less today than it did twenty years ago. In that respect, the passage of time has not altered the analysis. What has, however, emerged over the years is an increasing recognition of the variety of circumstances in which the practice of undisclosed taping can be said to further a generally accepted societal good and thus be regarded as consistent with “the standards of fair play and candor applicable to lawyers.” NY City 1980-95.

We invoked that principle in our 1980 opinion to support an exception to the general rule against undisclosed taping for criminal defense lawyers who may need to secretly record conversations with certain witnesses. Since that time, other bar committees, boards and courts have adopted that exception, recognized a variety of others (such as the investigation of housing discrimination and other actionable business practices and the documentation of threats or other criminal utterances), and/or opined that the permissibility of undisclosed taping should be determined on a case-by-case basis. In addition, some committees have gone so far as to opine that undisclosed taping is not, in and of itself, unethical.

ABA Formal Opinion 01-422 cites the variety of approaches that have been taken as support for its conclusion that it is time simply to declare the general rule to be that undisclosed taping is, in and of itself, not ethically proscribed:

A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline is highly troubling. We think the proper approach to the question of
legal but nonconsensual recordings by lawyers is not a general prohibition with
certain exceptions, but a prohibition of the conduct only where it is accompanied
by other circumstances that make it unethical.

In fact, however, most of the opinions cited by the ABA are less at odds with one another than
reflective of a cautious case-by-case evolution toward the general principle that if undisclosed
taping is done under circumstances that can be said to further a generally accepted societal
good, it will not be regarded as unethical.

While that principle carries with it, as many ethical rules do, some risk of uncertainty in its
application, attorneys can easily minimize that risk by confining the practice of undisclosed taping
to circumstances in which the societal justification is compelling. In addition, even if a disciplinary
body does not necessarily share an attorney’s assessment of the need for undisclosed taping in a
particular set of circumstances, there is little likelihood of, and no need for, the imposition of
sanctions as long as the attorney had a reasonable basis for believing that the surrounding
circumstances warranted undisclosed taping. We accordingly regard there to be less conflict in
the field, and less risk to attorneys in the field, than is suggested by the ABA’s Opinion.

We also have yet to see any persuasive argument – either in the ABA’s recent opinion or
elsewhere – in support of permitting undisclosed taping as a matter of routine practice.
The committees that have opined that undisclosed taping is not in and of itself unethical have
tended to stress either that the practice is legal in that jurisdiction,7 that there are unquestionably
times when there is a good reason to engage in undisclosed taping, 8 and/or that tape recording
“is merely a technological convenience, providing a more accurate means of documenting rather
than relying on one’s memory, notes, shorthand, transcription, etc. for recall.” Ok. Bar. Assoc. Op.
307 (1994).

If, however, the only reasons for taping are convenience and increased accuracy, there is no
reason to refrain from disclosing that the conversation is being taped. 9 Nor is it correct that
undisclosed taping has no effect other than providing an accurate record of what was said. As
attorneys are well aware, individuals tend to choose their words with greater care and precision
when a verbatim record is being made and some individuals may not wish to speak at all under
such circumstances. Undisclosed taping deprives an individual of the ability to make those
choices. Undisclosed taping also confers upon the party making the tape the unfair advantage of
being able to use the verbatim record if it helps his cause and to keep it concealed if it does not.
In addition, because undisclosed taping has those effects, it therefore also has the potential effect
of undermining public confidence in the integrity of the legal profession, which in turn undermines
the ability of the legal system to function effectively.

See, e.g., Anderson v. Hale, 202 F.R.D. at 556 (noting that open discussion is vital to the
advancement of justice and that the public’s willingness to speak openly with attorneys is directly
affected by public perception of the integrity of attorneys); NY City 80-95 (undisclosed taping has
the potential to “undermine those conditions which are essential to a free and open society”).
The fact that a practice is legal does not necessarily render it ethical. Moreover, the fact that the practice at issue remains illegal in a significant number of jurisdictions10 is a powerful indication that the practice is not one in which an attorney should readily engage. Similarly, the fact that there are times when a valid reason exists to engage in undisclosed taping does not mean that if should be permitted when there is no valid reason for it. No societal good is furthered by allowing attorneys to engage in a routine practice of secretly recording their conversations with others, and there is considerable potential for societal harm.

Accordingly, while this Committee concludes that there are circumstances other than those addressed in our prior opinions in which an attorney may tape a conversation without disclosure to all participants, we adhere to the view that undisclosed taping as a routine practice is ethically impermissible. We further believe that attorneys should be extremely reluctant to engage in undisclosed taping and that, in assessing the need for it, attorneys should carefully consider whether their conduct, if it became known, would be considered by the general public to be fair and honorable.

In situations involving the investigation of ongoing criminal conduct or other significant misconduct that question will often be easy to answer in the affirmative. The same is true with respect to individuals who have made threats against the attorney or a client or with respect to witnesses whom the attorney has reason to believe may be willing to commit perjury (in either a civil or a criminal matter).

The answer is likely to be far less clear with respect to witnesses whom the attorney has no reason to believe will engage in wrongdoing, and the prudent attorney will, absent extraordinary circumstances, refrain from engaging in the undisclosed taping of such witnesses. Similarly, while we are not prepared to state that it would never be ethically permissible to engage in the undisclosed taping of a client or a judicial officer, the circumstances in which doing so would be ethically permissible are likely to be few and far between.

Finally, as we have made clear, merely wishing to obtain an accurate record of what was said does not justify undisclosed taping. Nor, at least with respect to individuals who are not potential witnesses, is undisclosed taping justified by a desire to guard against the possibility of a subsequent denial of what was said. Such practices constitute engaging in undisclosed taping as a routine matter and, for the reasons discussed above, are ethically impermissible.

**Conclusion**

NY City 80-95 and 95-10 are modified. A lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good. However, undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice.

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1. This opinion assumes that the taping occurs in a jurisdiction where taping without disclosure to all parties is legal and that the attorney has not represented that the conversation is not being recorded. Attorneys may not engage in illegal conduct, see DR 7-102(a)(7), (8), or knowingly make a false statement of fact. See DR 7-102(a)(5).

2. Formal Opinion 337 begins with the following statement:

   Recent technical progress in the design and manufacture of sophisticated electronic recording equipment and revelations of the extent to which such equipment has been used in government offices and elsewhere make it desirable to issue a Formal Opinion as to the ethical questions involved.

3. We reaffirmed our general disapproval of undisclosed taping in NY City 1995-10, which opined that a lawyer may not tape record a telephone or in-person conversation with an adversary attorney without informing the adversary that the conversation is being taped.

4. As we noted in our 1980 opinion:

   Unlike more explicit ethical prohibitions, concepts like candor and fairness take their content from a host of sources – articulated and unarticulated – which presumably reflects a consensus of the bar’s or society’s judgments. Without being unduly relativistic, it is nevertheless possible that conduct which is considered unfair or even deceitful in one context may not be so considered in another. (See, e.g., the ABA’s Proposed Model Rules of Professional Conduct, Rule 4.1, Comment concerning assertions made in settlement negotiations.)

authorized by statute, court rule or court order").


9. In this regard, the Ohio Board of Commissioners on Grievances and Discipline has aptly observed:

Although the accurate recall of information is important to attorneys in providing legal representation, this on its own does not persuade the Board to condone the routine use of surreptitious recordings in the practice of law. For those who wish to use taping as a way of assisting the memory, consent may be obtained. The fact that an attorney wants to hide the recording from the other person suggests a purpose for the recording that is not straightforward. Recordings made with the consent of all parties to the communication are consistent with the ideals of honesty and fair play, whereas recordings made by clandestine or stealthy means suggest otherwise. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Op. 97-3 (June 13, 1997).


Issued: June, 2003
The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics

Formal Opinion 2003-03: Checking for Conflicts of Interest

Topic: Conflicts of Interest; Recordkeeping, Policies, and Systems for Conflicts-Checking Purposes

Digest: Under DR 5-105(e) of the New York Code of Professional Responsibility, all law firms must keep records and must have policies and systems in place to check for conflicts of interest to the extent necessary to render effective assistance to the lawyers in the firm in avoiding imputed conflicts under DR 5-105(d) based on current or prior engagements. What records the firm must keep, and what policies and systems the firm must implement, depends on a number of factors, including (a) the size of the firm, (b) where the firm practices, and (c) the nature of the firm's practice.

Code: DR 5-105(d); DR 5-105(e)

Question

What records must a law firm keep, and what policies and systems must a law firm implement for checking proposed engagements against current and previous engagements, to comply with New York's mandatory conflict-checking rule, DR 5-105(e)?

Opinion

On May 22, 1996, effective immediately, the Appellate Divisions adopted DR 5-105(e) of the New York Code of Professional Responsibility. In essence, the rule requires every New York law firm to keep records and implement policies and systems that effectively assist the firm in complying with New York's imputed conflicts rule, DR 5-105(d), with respect to conflicts caused by the firm's current and previous engagements.

DR 5-105(e) was drafted by the courts sua sponte. It was not based on any formal proposal by the Bar. It was adopted as part of the package of new and amended rules (also including DR 1-102 and DR 1-104) that made law firms as entities subject to discipline in New York. The requirements of the rule are not well defined or understood. The New York State Bar Association has not adopted any Ethical Considerations to explain DR 5-105(e); not a single court case has discussed the rule; and only one bar association ethics committee opinion has discussed DR 5-105(e) at any length—see N.Y. State Opinion No. 720 (1999), 1999 WL 692571. The rule is unique to New York—no other jurisdiction has adopted a rule anything like it—so other
jurisdictions provide minimal guidance. At least one article has been written about the rule—see Roy Simon, Checking for Conflicts Under DR 5-105(e), New York Professional Responsibility Report, November 2002—but little formal guidance is available about the rule and its requirements. Accordingly, this Committee has been asked to render guidance to the Bar regarding the requirements imposed on law firms by DR 5-105(e).

Discussion

The three sentences of DR 5-105(e) (which we quote verbatim below but break into separate paragraphs for greater clarity) provide as follows:

- “A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105(d).”
- “Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105(d) occurs, shall be a violation by the firm.”
- “In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105(d) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105(d).”

The text of DR 5-105(d), to which DR 5-105(e) refers four times, provides as follows:

“While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101(a), DR 5-105(a) or (b), DR 5-108(a) or (b), or DR 9-101(b) except as otherwise provided therein.”

This opinion will focus only on the first sentence of DR 5-105(e), with particular emphasis on the type and quality of records that a law firm must keep and the policies and systems the law firm must implement for checking proposed engagements against current and previous engagements.

What is a “law firm”?

Because DR 5-105(e) applies only to a “law firm,” we begin by briefly exploring the scope of the term “law firm.” The New York Code of Professional Responsibility (the “Code”) (at 22 N.Y.C.R.R. § 1200.01) defines the term “law firm” as follows:

“Law firm” includes, but is not limited to, a professional legal corporation, a limited liability company or partnership engaged in the practice of law, the legal department of a corporation or other organization and a qualified legal assistance organization.”

This definition of course encompasses large law firms, corporate legal departments, governmental legal departments, and non-profit law firms. We also believe that a solo law practice, whether or not it is organized as a professional corporation or a limited liability company, is a “law firm” within...
the meaning of DR 5-105(e).

In addition, since the definition of “law firm” in the Code “is not limited to” traditional law firms and legal departments, the term has been applied for conflicts purposes to other practice arrangements. For example, as this Committee and other ethics committees have opined, lawyers in some practice arrangements must check for conflicts of interest as if they were a single law firm. See, e.g., ABCNY Opinion No. 80-63 (1980) (two firms that shared offices could not represent opposing parties in litigation because of the “strong likelihood” that the separate law firms could not maintain the confidences and secrets of their respective clients); N.Y. County Opinion No. 680 (1990), 1990 WL 677022, *2 (“Even though lawyers who share office space are not partners, they may be treated as if they were partners for some purposes under the Code (particularly the provisions for vicarious disqualification in the event of a conflict of interest)” if they share confidential information.) ABCNY Opinion No. 1995-8 (1995) (when law firms are “of counsel” to each other one-unit conflicts checking is required); ABCNY Formal Op. 1996-08, 1996 WL 416301, *3 (“of counsel’ relationships are treated as if the ‘counsel’ and the firm are one unit”).

We think DR 5-105(e) applies to these “constructive” law firms as well as to more traditional firms. In short, we believe DR 5-105(e) applies to a wide range of practice arrangements. We concentrate the remainder of this opinion on private law firms, but the principles and concepts discussed here apply in some fashion to other types of law firms as well, including the legal departments of corporations and government agencies.

**Fundamentals of DR 5-105(e)**

The essence of the first sentence of DR 5-105(e) is to require every law firm to do two things: (1) create a record of each new engagement at or near the time the engagement commences; and (2) have a policy implementing a system for checking proposed engagements against current and previous engagements. The rule does not specify what records a firm must keep, or what type of policy and system a firm must implement to check proposed engagements against current and previous engagements. Rather, the rule indicates simply that whatever systems are adopted should “render effective assistance to lawyers within the firm” in complying with their obligation to avoid conflicts that would violate DR 5-105(d).

At a minimum, to assist in complying with DR 5-105(d), we think that all firms should have mechanisms for assisting lawyers in identifying and resolving two types of conflicts arising from current or previous engagements that are expressly covered by DR 5-105(d):

- Conflicts among current clients, whether the conflicts arise before or during the engagement – see DR 5-105(a) and (b); and

- Conflicts with former clients, including the former clients of laterals and their former firms – see DR 5-108(a) and (b).
DR 5-105(d) also embraces conflicts that arise under DR 9-101(b) when a private law firm hires lawyers who formerly served as public officers or employees. However, because conflicts with former government lawyers are complicated by laws and rules governing grand jury secrecy, the secrecy of investigative information acquired by the government, governmental privileges, and other factors that make public officers and employees substantially different from private lawyers, this opinion does not address systems for checking the conflicts of former public officers and employees.

What kind of system is required to check for conflicts with current and former clients will turn on the nature of each law firm. In particular, the specific measures that DR 5-105(e) requires will depend on factors such as: (a) the size and structure of the firm; (b) the nature of the firm’s practice; (c) the number and location of the firm’s offices; (d) the relationship among the firm’s separate offices; and (e) other characteristics of the law firm and its operations. The records, policies, and systems will vary from law firm to law firm. But all law firms, whatever their particular characteristics—large or small, urban or rural, litigation or transactional, governmental or private—must keep certain minimum records and implement certain minimum policies and systems suitable to provide effective assistance to the firm’s lawyers in avoiding conflicts arising from current or former engagements and that will be imputed to the firm under DR 5-105(d).

Recordkeeping Requirements

The first sentence of DR 5-105(e) begins with a mandate for recordkeeping. It provides, in part, that a law firm “shall keep records of prior engagements … made at or near the time of such engagements….” The expressly stated purpose of this recordkeeping requirement is to assist lawyers in the firm in avoiding conflicts of interest that will be imputed to the entire firm under DR 5-105(d) (discussed above). The rule raises a number of questions, which we address one at a time.

1. What are “records”?

To get one preliminary point out of the way quickly, we think the term “records” refers to written or electronic records. Information inside a lawyer’s head that has not been written down does not qualify as “records.” Thus, even solo practitioners must keep written or electronic records to comply with DR 5-105(e).

Moreover, those records must be maintained in a way that allows them to be quickly and accurately checked for possible conflicts. Thus, the mere fact that the law firm has information about clients and engagements written down in the individual files pertaining to each matter does not satisfy the “records” requirement. It is simply not realistic to think that a law firm can search through every paper file and folder to look for conflicts each time the firm considers a proposed new engagement. However, if the law firm opens electronic files on all of the law firm’s clients and prospective clients, and if those records are electronically searchable (as all word processing programs and law practice management programs appear to be), then those electronic files will...
qualify as “records” for purposes of DR 5-105(e). In other words, the key characteristic that qualifies information as “records” under DR 5-105(e) is that the information can be systematically and accurately checked when the law firm is considering a proposed new engagement.

2. When must the required records be made?

DR 5-105(e) provides that the required records of prior engagements “shall be made at or near the time of such engagements....” We think this language is largely self explanatory. If the records are made at the inception of a new engagement, that obviously satisfies the rule. If the records are not made at the inception of a new engagement, however, DR 5-105(e) allows them to be made “near” the time the engagement begins. To satisfy that alternative requirement, we think the records must ordinarily be made in time to assist in checking for conflicts by the next time a proposed new engagement comes along. In many law firms, proposed new engagements (including new matters for existing clients) come along every day or every few days. Thus, we think DR 5-105(e) requires that law firms make the necessary records within days, not weeks, after commencing a new engagement. The best practice is to make the records at the time engagements commence, but the rule allows some leeway by using the word “near.” In addition, even though it is not required by DR 5-105(e), the best practice would also be to update the records periodically with additional parties or other pertinent information, for example where a complaint is amended to add new parties or where there are other developments with respect to a matter that might create a conflict under another rule. However, the Committee expresses no view in this opinion on whether other rules require such updating.

3. How far back in time must records go?

DR 5-105(e) took effect on May 22, 1996. Since that date, law firms have been obligated to “keep records of prior engagements....” However, nothing in the rule suggests that law firms were required to develop a comprehensive list of prior engagements going backward in time from May 22, 1996. As a practical matter, the rule contemplated only that law firms would begin keeping records of all engagements (including engagements already underway on May 22, 1996) starting on the rule’s effective date. With these records in place the firm can determine whether it needs to fill in gaps in past records to provide effective assistance to the firm in avoiding conflicts.

4. How must the records be organized?

Merely recording information about current and previous engagements will not accomplish anything unless the information is readily accessible. The Committee therefore believes that the required records must be kept in a way that permits efficient access to the information they contain. Many methods are possible, but one straightforward method would be to list clients and former clients (perhaps alphabetically) and to list engagements undertaken for each client (perhaps in chronological order) under each client name. Regarding adverse parties, a firm should probably maintain a list, cross-referenced to the client and matter in which the adverse parties were involved. But a law firm may use any method that makes it possible for the firm to
check the records in a timely fashion, and the type and organization of the records may depend largely on, among other things, the software and search engine employed to create and check the records.

5. What records must a law firm keep?

Unfortunately, DR 5-105(e) is silent about the type of records that a firm must maintain. It says only that the records are to provide “effective assistance” to lawyers within the firm in avoiding new engagements that would create a conflict of interest based on other current engagements or previous engagements. We therefore now address what records we think DR 5-105(e) requires.

The nature of the records needed to render effective assistance to lawyers in the conflict clearing process will vary depending on the size, structure, history, and nature of the law practice at issue. An example of a law firm near one end of the spectrum is a solo practitioner, concentrating solely in plaintiffs’ personal injury matters, who has just begun to practice law. Such a law firm has relatively few clients and former clients and may need only the simplest written records to jog the lawyer’s memory sufficiently to recognize and avoid conflicts. Toward the other end of the spectrum, presenting different and more complex problems, is an established law firm with hundreds of lawyers practicing in multiple domestic and foreign offices. Such a firm typically has thousands or tens of thousands of clients and former clients, many of them large corporate clients with affiliates and subsidiaries and with names that may have changed over time. In such a firm, fairly complex records will be needed to check effectively for conflicts. Somewhere in the middle of the spectrum are law firms with five or ten or twenty lawyers that have been in business for a decade or more. The nature of the records needed to check for conflicts in these mid-sized firms will depend on many factors.

As an initial matter, we note that several options are theoretically open regarding recordkeeping requirements. One option is a standard recordkeeping requirement specifying in detail the precise data that all firms must keep. We reject that option because it would ignore the substantial differences among firms. An alternative option is to adopt a variable recordkeeping requirement so that the nature of the required records depends on the size and nature of the law firm, its practice, and its lawyers. We adopt that option because a variable requirement takes into account the differences among firms and recognizes that firms may have to change the nature of their records as they grow and change. However, this Committee is not capable of specifying in detail the nature of the records that each type and size of firm must keep. Rather, we specify in general terms only the rock-bottom minimum records that we think all law firms must keep, no matter how small or specialized. But we caution that as law firms grow larger and more complex, they will find it increasingly difficult to fulfill their conflict checking duties unless they keep more than the minimum records that we believe are mandated by DR 5-105(e). (We address additional desirable information that might be maintained toward the end of the opinion, when we discuss systems for checking particular types of conflicts.)

Against this background, and for the reasons given below, the Committee believes that the
following records are the minimum that any lawyer or private law firm must keep in order to comply with DR 5-105(e):

1. **Client names.** The full and precise name of each client the firm currently represents.

2. **Adverse party names.** The precise names of parties involved in a matter whose interests are materially adverse to each party the firm represents.

3. **Description of engagement.** A brief description of each engagement or prospective engagement.

With this basic information at hand, a law firm should be able to detect most potential conflicts involving clients or former clients before accepting any proposed new engagement. With less information in its records, many conflicts could not be detected. For example, without the client information, the remaining firm data would be useless in assisting lawyers in avoiding conflicts. Without adverse party information, a firm could not determine whether it was already acting adversely to the interests of a person or entity it later might seek to represent. Without a brief description of each engagement, a law firm could not judge whether a proposed new engagement would create conflicts with former clients. Of course, after identifying a potential conflict, a law firm may need to conduct factual and legal investigation to determine whether a prohibited conflict actually exists or is likely to develop. But the basic information outlined above should render effective assistance to most firms in putting them on notice that possible conflicts exist and that further study may be required.

We have not interpreted DR 5-105(e) to require records of the financial, business, property, or personal interests that may create conflicts under DR 5-101(a). Personal conflicts are not current or previous “engagements,” so they are not within the scope of DR 5-105(e). We do not address whether any other provision of the Code requires a law firm to check for conflicts arising under DR 5-101.

Regarding records of prior engagements, we note that since March 4, 2002, a new court rule entitled “Written Letter of Engagement” (22 N.Y.C.R.R. Part 1215) has required all New York lawyers to provide written letters of engagement to clients in every matter where fees are expected to be $3,000 or more unless the client has previously paid the attorney for services “of the same general kind” or the matter is a domestic relations matter (in which case a written retainer agreement is required – see 22 N.Y.C.R.R. § 1400.3). For firms that do not have many repeat clients, such as firms that handle personal injury work, the written engagement letters required by Part 1215 will, in the normal course, identify the client and describe the nature of the representation in enough detail to satisfy the basic recordkeeping requirements we have set out above. (The firm will either have to record adverse parties separately or add that information to the engagement letters, however.) More elaborate engagement letters may also define who is not the client (e.g., “The firm does not represent any of the client’s affiliates or subsidiaries” or “The firm represents you but not your spouse even though you and your spouse own your home as joint tenants”). Indexing or cataloging engagement letters may be one way to keep records of prior
engagements at or near the time of the engagements. But engagement letters will not provide information about each new engagement if firms do not issue new engagement letters to clients who have previously paid for legal services of the same general kind, or for clients whose matters were never expected to generate $3,000 or more in legal fees.

While much additional information could be maintained to assist in the conflicts research process, it is difficult to argue that DR 5-105(e) requires information beyond the basic information necessary to put lawyers on notice that a potential problem exists. What law firms do with that basic information—what "system" they use to check for conflicts—is a separate and more difficult question, to which we now turn.

Policies and Systems for Checking for Possible Conflicts

In addition to mandating that law firms keep records, DR 5-105(e) requires every law firm to have "a policy implementing a system by which proposed engagements are checked against current and previous engagements," again with the stated aim of rendering "effective assistance to lawyers within the firm in complying with" DR 5-105(e)’s purpose to avoid conflicts arising from current or previous engagements.

1. What is a “system”?

An initial question is: What is a "system" within the meaning of DR 5-105(e)? The wording of DR 5-105(e) is curious: While the rule requires law firms to maintain “records of prior engagements,” it does not expressly require the law firm to check those records when checking proposed engagements for conflicts. Rather, DR 5-105(e) simply requires a law firm to establish a policy and system “by which proposed engagements are checked against current and prior engagements...” (We do not believe that the word “policy” adds anything significant to the word “system,” so we focus only on the meaning of the word “system.”) Taken literally, a “system” for checking proposed engagements against current and previous engagements would not necessarily require checking the written records. No doubt some solo practitioners use a “system” of consulting their memories alone, and some small law firms (and perhaps even some mid-sized law firms) use a “system” of talking to a partner with a good memory or asking around the firm (orally or via email or memo) to find out whether anyone knows of a conflict with a proposed engagement.

This Committee does not believe that any of those relatively informal methods of checking for conflicts would qualify as a “system” within the meaning of DR 5-105(e). Rather, we think DR 5-105(e) requires that a “system” of checking for conflicts within the meaning of DR 5-105(e) must include systematically consulting the “records” that must be kept to satisfy the opening clause of the rule. Less formal methods of checking for conflicts may of course be used (and may have to be used) to supplement a systematic check against those records, but we think it would be pointless to require a law firm to maintain written “records” but not require the law firm to consult those records as part of its conflict checking “system.”
2. Essential elements of a “system.”

We have just said that a “system” must include systematically consulting the “records” required by DR 5-105(e). What else must a system include to meet the requirements of DR 5-105(e)?

Because law firms vary in size, structure, practice areas, and history, the systems that will provide “effective assistance” in checking for conflicts within the meaning of DR 5-105(e) will depend on many factors. Sole practitioners and very small firms (five lawyers or less, all practicing in a single location) may not need to do much more than check their records and consult with other lawyers in the firm about any questions triggered by the records. As firms grow larger and build up a larger base of prior engagements, and as their practices grow more diverse, law firms may need to install software systems to check the records for conflicts rather than checking the records in a rudimentary fashion. See Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264 (D. Del. 1980) (law firms should make maximum use of technology to aid in avoiding conflicts). Some firms will be able to use commercial software programs “off-the-rack,” but other firms, especially those with larger or more complex practices, may need to seek technical assistance to tailor the software program to the firm’s particular needs.

If consulting the records leads to missing too many potential conflicts, and thus is not providing “effective assistance” to the firm in ferreting out conflicts with current and previous engagements, the firm will need to supplement the records check. Small firms may be able to do this through personal communications among key partners (or all partners) at the firm, either in writing or orally. Larger firms, especially those with more than one office, may need to supplement their records with email, formal written memos circulated throughout the firm, or other communication methods—electronic and traditional—designed to reach lawyers who may have relevant information about possible conflicts.

Many law firms (perhaps most firms) will be able to satisfy DR 5-105(e) by implementing a system that checks only the basic information that the rule requires (client names, adverse party names, and brief description of each engagement), supplemented by other types of communications and records checks to resolve any questions and detect certain types of conflicts not readily discoverable through a records check alone. In larger or more complex practices, however, an effective system will depend not only on a check of the records database but also on the ability of lawyers in the firm to communicate with others in the firm who have relevant information, to gain access to the firm’s client files or other information regarding particular engagements, and to obtain more information readily upon request.

We believe that most firms afford access to information relevant to client engagements (except to the extent certain files have been screened off from particular lawyers). We also believe that virtually all large firms make it easy for a lawyer in the firm to communicate with other lawyers in the firm by email or other means. The more difficult question is the third element: What other information must be readily available upon request to supplement the basic records that all firms must keep? We turn to that complex question.
Systems for Checking Particular Types of Conflicts

In this section we discuss special considerations that may affect the system a law firm uses to check for conflicts arising under DR 5-105 and DR 5-108. We note, however, that we believe that the fact that a law firm is disqualified from a matter under these (or any other) rules does not necessarily mean that the law firm violated DR 5-105(e), and, furthermore, that keeping records required by DR 5-105(e) is not, in and of itself, a defense to a disqualification motion under DR 5-105, DR 5-108, or any other rules.

1. Conflicts with current clients.

The law is well established in New York that a law firm may not oppose a current client in any matter—even a totally unrelated matter—unless the law firm satisfies the “disinterested lawyer” test and obtains the informed consent of each client affected by the conflict. See, e.g., DR 5-105; Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976). Moreover, whenever two or more of a law firm’s current clients are involved in the same litigation or transaction, even on the same side, the potential for conflict—and for a violation of DR 5-105(d)—is present. The records that include the names of all current clients, plus information available to the person checking the proposed engagement for conflicts, should usually be sufficient. That information will ordinarily be enough to alert the firm to investigate potential conflicts that arise when a law firm is opposing a current client, or when more than one current client is involved in the same transaction or litigation. However, concurrent client conflicts come in so many varieties that no single system of checking for conflicts will detect them all. We therefore address here some special situations that illustrate the practice-specific nature of conflict-checking systems.

(a) Corporate family conflicts.

When a law firm desires to oppose an entity that belongs to a current client’s corporate family (e.g., an affiliate, subsidiary, parent, or sister corporation of a current corporate client), a concurrent client conflict may arise. Whether such a conflict is disqualifying will depend on many factors, including the relationship between the two corporations and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to undertake in opposition to the client’s corporate family member. See, e.g., Discotrade Ltd. v. Wyeth-Ayerst Int’l, Inc., 200 F. Supp. 2d 355 (S.D.N.Y. 2002) (granting motion to disqualify); JPMorgan Chase Bank v. Liberty Mutual Ins. Co., 189 F. Supp. 2d 20 (S.D.N.Y. 2002) (granting motion to disqualify); Brooklyn Navy Yard Cogeneration Partners L.P. v. PMNC, 254 A.D.2d 447, 679 N.Y.S.2d 312 (2d Dep’t 1998) (denying motion to disqualify); see generally ABA Formal Opinion No. 95-390 (1995) (no automatic disqualification when a law firm opposes a corporate client’s affiliate); N.Y. County Opinion 684 (1991), 1991 WL 755940 (attorney may, under certain circumstances, accept employment in a matter adverse to a subsidiary of a corporate client if the adverse action would not materially affect the corporate client’s interests).

We would not require a law firm to maintain records showing every corporate affiliate of every
current client. However, if a law firm frequently represents corporations that belong to large
corporate families, then the firm should have some system for alerting the firm to potential
conflicts with the members of the corporate client’s family. One possibility is to explore the
corporate family tree of proposed new adversaries to determine whether the adversary is related
to other current clients of the firm. This search may require the law firm to maintain its own
database of corporate family members; or the firm may decide to use a commercial service for that
purpose; or the firm may directly ask its current clients. If the firm discovers a potential conflict
with a corporate family member, the firm can conduct the appropriate research to determine
whether the current client’s consent is necessary. Not all law firms need such a system, but some
kind of system will be necessary to render effective conflict-checking assistance to firms whose
clients have many affiliates, subsidiaries, and other corporate relatives. (The same research will
often be required to determine whether a proposed engagement will create a conflict with a
former client – see the discussion of former client conflicts below.)

(b) Corporate constituents.

When a law firm represents an entity, DR 5-109(a) provides that the law firm “is the lawyer for the
organization and not for any of the constituents.” The first sentence of EC 5-18 of the Code is
even more explicit: “A lawyer employed or retained by a corporation or similar entity owes
allegiance to the entity and not to a shareholder, director, officer, employee, representative, or
other person connected with the entity.”
Nevertheless, especially when a law firm represents a small or closely held corporation with few
shareholders, or when the law firm appears on behalf of individual officers or employees but bills
the corporate client for the legal services, an attorney-client relationship does or may develop
—intentionally or unintentionally—between the law firm and one or more individual constituents of
the entity. See, e.g., Rosman v. Shapiro, 653 F. Supp. 1441 (S.D.N.Y. 1987) (50% shareholder of
a closely held corporation was a client of law firm that represented the corporation); Cooke v.
officer was considered client of law firm that represented corporation because law firm appeared
on behalf of officer in an SEC proceeding). Accordingly, a law firm that represents corporate
clients may need a system for determining whether the law firm has an attorney-client relationship
with individual constituents of a client organization and, if so, should add the names of those
clients to its records database.

(c) Trade association members.

A law firm that represents a trade association ordinarily represents only the trade association and
not the members of the trade association. However, an attorney-client relationship between the
law firm and a member may arise if a member provides the law firm with confidential information.
In that instance, the law firm will be restricted in its freedom to oppose the member. See, e.g.,
Glueck v. Jonathan Logan, Inc., 653 F.2d 746 (2d Cir. 1981) (trade association member may be a
“vicarious” client); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978)
(a client is no longer merely a person who walks through the door); ABA Formal Opinion 92-365
(1992) (whether a lawyer for a trade association also represents members of the association is a question of fact). If a law firm represents a trade association, its conflict-checking system should enable attorneys to determine whether members of the trade association are also clients. If so, the law firm should add the member’s name to the records identifying the firm’s clients.

2. Conflicts with former clients.

(a) The law firm’s own former clients.

Under DR 5-108(a) (entitled “Conflict of Interest—Former Client”), except with the consent of a former client after full disclosure, or in compliance with the special provisions of DR 9-101(b) for former public servants, a lawyer who has formerly represented a client in a matter shall not thereafter “represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client.” In short, absent the former client’s informed consent, or absent an information screen and other procedures mandated by DR 9-101(b) for conflicts involving former public servants, a lawyer may not oppose a former client in the same or a substantially related matter.

Because conflicts with former clients are common, we think every law firm must have a system for discovering such conflicts. If the law firm consistently maintains its database of clients and former clients, then checking each proposed engagement against that list should be adequate. If a probable adverse party turns out to be one of the firm’s former clients, the firm will know that it should look further into the situation to see whether the former client’s consent is required.

Unfortunately, it will not always be clear whether a particular person is a current client or a former client. See, e.g., Oxford Sys. Inc. v. CellPro, Inc. 45 F. Supp. 2d 1055 (W.D. Wash. 1999); SWS Financial Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392 (N.D. Ill. 1992); Lama Holding Co. v. Shearman & Sterling, 758 F. Supp. 159 (S.D.N.Y. 1991). This is not the place for a comprehensive discussion of the factors that will enable a law firm to distinguish between current clients and former clients, or to tell when a current client has become a former client. However, to provide effective assistance to the firm in avoiding conflicts with current clients, a law firm’s conflict-checking system should include some means of determining whether a client remains a current client or has become a former client.

(b) The former clients of laterals.

When a lawyer moves from one private law firm to another private law firm, the clients that the lawyer personally represented at his or her prior law firm are potential sources of conflict for the new law firm. See, e.g., Kassis v. Teachers Ins. and Annuity Ass’n, 93 N.Y.2d 611, 695 N.Y.S. 2d 515 (1999) (disqualifying a firm that hired a lawyer who had actively worked on litigation in which the old and new firms were opposing counsel, where the litigation was still pending when the lawyer changed firms); N.Y. State Opinion 723 (1999) (discussing the DR 5-108); (N.Y. State Opinion 720 (1999), 1999 WL 692571, at *2 (“[W]e believe that the intent of [DR 5-105(e)] can only
be effected if a firm adds to its system information about the representations of lawyers who join the firm."). Under DR 5-108(b), absent the former client’s informed consent, a law firm that hires a lateral may be disqualified from acting adversely to a client of the lateral’s former law firm in a matter substantially related to the former firm’s representation of that client if the lateral, while at the former firm, “acquired information protected by DR 4-101(b) that is material to the matter,” even if the lateral never personally represented the client in question at the former firm.

Accordingly, since DR 5-105(e) specifically applies only to prior engagements of the law firm itself, if a law firm hires lawyers laterally from other law firms, the hiring firm should include in its conflict-checking system a means for determining which clients the lateral lawyer personally represented while at his or her former firm. At the same time, while it is not required under DR 5-505(e), it would be prudent for the firm to consider what, if any, other steps it might take with regard to other matters about which the lateral lawyer acquired protected information while at the former firm. In either event, the information from the lateral’s former firm should be obtained only insofar as it is possible to do so in a manner that is consistent with the lateral’s obligations to his or her former firm and its clients. See, e.g., N.Y. State Opinion 720 (1999) 1999 WL 692571 (discussing lateral’s duties to protect former clients’ confidences and secrets, as well as contractual or fiduciary restrictions the lateral may be subject to regarding the disclosure of information proprietary to the lawyer’s former firm).

**Types of Conflicts Not Addressed in This Opinion**

The subject of conflicts of interest is vast, and we have discussed only a small portion of the field. There are many other areas that we have not discussed but that law firms may have to consider when checking for conflicts pursuant to DR 5-105(e). These include (a) conflicts arising in class actions; (b) conflicts that arise when lawyers in a firm invest in client ventures (either directly or in lieu of fees – see ABCNY Opinion 2000-3 (2000), 2000 WL 33769162; (c) conflicts that arise when lawyers in the firm serve on a client’s Board of Directors; (d) conflicts that arise in connection with an insurance triangle; (e) conflicts with nonlawyers (such as paralegals and secretaries), especially those who have previously worked at another law firm (including the legal department of a corporate adversary); (f) conflicts arising from the use of temporary lawyers who concurrently work or have in the past worked at other law firms; (g) conflicts that arise when lawyers represent or are represented by other lawyers; (h) conflicts that arise when a current client is an adverse witness; (i) conflicts involving former public servants; and (j) the special conflict issues that may arise in connection with beauty contests or other business development activities. Each firm should survey the extent to which these special varieties of conflicts are pertinent to the firm’s practice and should adopt measures to detect and deal with them.

**Conclusion**

Under DR 5-105(e) of the New York Code of Professional Responsibility, all law firms must keep records and must have policies and systems in place to check for conflicts of interest to the extent necessary to render effective assistance to the lawyers in the firm in complying with New York's
rule on imputed conflicts, DR 5-105(d). The records each firm must keep, and the policies and systems each firm must implement, will depend on each law firm's particular nature, structure, practice, history, personnel, and other factors. However, all law firms must keep certain minimum written or electronic records of each new or prospective engagement and must consult those records when checking proposed new engagements for conflicts of interest.

Issued: October, 2003
The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics

Formal Opinion 2009-3: Conflicts Arising When Hiring Law School Graduates Who Participate in Law School Legal Clinics

TOPIC: Addressing conflicts faced by law firms when hiring law school graduates who work in legal clinics operated by law schools.

DIGEST: Upon hiring a law school graduate, law firms generally may accept or continue representations adverse to clients of the clinic where the graduate worked. When the firm's representation involves a matter substantially related to the one previously handled by the graduate at the clinic, or the graduate acquired confidential information from her client that is material to the matter handled by the firm, the firm should implement adequate measures to screen the graduate upon commencement of employment to protect the confidences and secrets of her former client.

CODE: DR 4-101; DR 5-101a; DR 5-105; DR 5-108; DR 9-101

QUESTION: What are a law firm's ethical obligations when addressing conflicts that arise in connection with hiring a law school graduate who previously provided legal services to a client under the auspices of her school's legal clinic?

OPINION

I. Introduction

Most law schools run clinics offering free legal services to eligible clients. According to a recent survey, 85 percent of American law schools sponsor at least one clinic, and many operate multiple clinics covering a wide variety of legal fields ranging from family law to securities arbitration.1

The law students who staff the clinics gain invaluable real world experience helping clients resolve their legal problems. But this "on-the-job" training may create conflicts of interest once the students seek to parlay their academic achievements and practice skills into employment with law firms. For example, if the student's clinical experience included representation of a client with interests adverse to a client of the law firm she hopes to join, the provisions of DR 5-108 of the Code of Professional Responsibility (the "Code") would be implicated, requiring the firm to determine whether it can hire the student and continue to represent its client without violating the rule. This opinion provides guidance to firms for addressing that question.
II Application of DR 5-108 and DR 5-105

When hiring a law school graduate who worked at her school's legal clinic, a law firm must consider conflicts of interest that may arise once the graduate commences employment with the firm. See N.Y. State 774 (2004); N.Y. State 720 (1999); DR 5-105(E). This conflicts screening process necessarily would include consideration of the potential applicability of DR 5-108, which imposes certain restrictions on, among other things, representations affecting the interests of former clients of newly-hired lawyers joining the firm. DR 5-108(A) provides:

A. Except as provided in DR 9-101(B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:

1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.
2. Use any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret becomes generally known.

In addition, DR 5-108(B) further provides:

B. Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

1. Whose interests are materially adverse to that person; and
2. About whom the lawyer had acquired information protected by DR 4-101(B) that is material to the matter.

In situations where DR 5-108 prohibits a lawyer from continuing or commencing the representation of a client, DR 5-105(D) prohibits the other lawyers associated in the same law firm from undertaking the representation. DR 5-105(D) provides in pertinent part:

While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under . . . DR 5-108(A) or (B) . . . .

The provisions of the Code generally, and DR 5-108 and DR 5-105(D) in particular, are addressed to and regulate the conduct of "lawyers," i.e., individuals admitted to the Bar, and do not specifically purport to regulate the activities of law students. Nevertheless, the provisions of the Code have been found applicable "to law students functioning as lawyers in clinical education programs." ABCNY Formal Op. 1991-1, see also ABCNY Formal Op. 79-37 (same). Moreover, "unless the Code otherwise provides, the rules governing law firms are equally applicable to [a] law school's legal clinic." N.Y. State 794 (2006). Consequently, if a law student, L, worked at a clinic representing client C in a wage dispute with C's employer, Company A, and law firm F
represented Company A in that dispute, then absent the prior consent of C, DR 5-108(A) generally would impose the following restrictions following F's employment of L: (i) L could not represent Company A in the wage dispute with C, and no other lawyer employed by F could continue to represent Company A in that dispute; and (ii) neither L nor any other lawyer at the firm would be able to represent any firm client with interests materially adverse to any client of the clinic, unless L could show that she did not personally represent the adverse clinic client and did not acquire any material confidential information regarding the client while working at the clinic.

III Screening Law School Graduates

As noted, in general, the Disciplinary Rules of the Code do "not apply to non-lawyers." NY Code of Prof'l Responsibility (prelim. stmt.). Nevertheless, the Code (and the newly adopted Rules) "do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment." Id.

Law students, of course, are not members of the bar. Yet, when working in a legal clinic, a law student typically "will be functioning as a lawyer, [and] the clients involved justifiably will regard the student as a lawyer." ABCNY Formal Op. 79-37. Mindful of this dual status, we must also consider the salutary objective of encouraging practical legal training without unduly limiting a student's prospects for employment. Balancing the two, we believe that the conflicts rules can and should be applied to protect client confidences without unduly hampering students' mobility following graduation.

In this connection, we note that the level of student involvement, and thus access to client confidences, varies among clinics. In many cases, the services rendered by law students may be substantial and ongoing when, for example, the students have primary responsibility for representing pro bono clients over an extended period of time. In those situations, a law firm/employer must take appropriate precautions whenever the interests of the student's client are materially adverse to those of the client of the firm, the matters in question are substantially related, and/or the pro bono client has divulged confidences or secrets to the student that, if disclosed, would be material to the matter handled by the firm. In that event, the law firm employing the student following graduation should use an ethical screen to rebut any presumption (and eliminate any risk) that the new hire would share any confidences and secrets of her former pro bono client with other lawyers at the firm.

While the Code "specifically endorses the use of screens only in cases involving government attorneys and judges," ABCNY Formal Op. 2006-2, the Code's failure to mention screens with respect to law students is not dispositive. (See id.) As noted above, the Code does not specifically regulate the conduct of individuals, such as law students, occurring prior to their admission to the bar. Moreover, the New York Court of Appeals has refused to adopt an irrebuttable presumption that all lawyers in a law firm have knowledge of all confidences or secrets disclosed to any one lawyer in the firm. Indeed, the court has held that such a rule "unnecessarily preclusive because
it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of
(1994). It therefore has found that a firm may in appropriate circumstances avoid imputation of the
knowledge of a disqualified lawyer by "erect[ing] adequate screening measures to separate the
disqualified lawyer and eliminate any involvement by that lawyer in the representation." Kassis v.
Teacher's Insurance & Annuity Ass'n, 93 N.Y.2d 611, 618 (1999). We believe that such measures
are appropriate in this context and will be effective in achieving the salutary objective of protecting
the confidences and secrets of affected clients without unduly restricting students' employment
opportunities.

The propriety of screening law school graduates finds support in the American Bar Association's
construction of its own imputed disqualification rule, Rule 1.10(a), which is substantially identical
to DR 5-101(D). Indeed, the ABA specifically has recognized that screening is an appropriate
procedure to ensure that law students refrain from communicating confidences or secrets learned
from the clients they represented while still in law school. As explained in the Comment to Rule
1.10 of the ABA Model Rules:

[The imputed disqualification rule] [does not] prohibit representation [by the law
firm] if the [conflicted] lawyer is prohibited from acting because of events before
the person became a lawyer, for example, work that the person did while a law
student. Such persons, however, ordinarily must be screened from any personal
participation in the matter [handled by the firm] to avoid communications to others
in the firm of confidential information that both the non-lawyers and the firm have a
legal duty to protect.

See also Mulhern v. Calder, 196 Misc. 2d 818, 823 (Sup. Ct. Albany County 2003) (denying motion
to disqualify law firm where firm screened potentially tainted non-lawyer from any involvement in
matters handled by non-lawyer's prior employer, an adversary of the firm); Restatement (Third) of
The Law Governing Lawyers, § 123, Comment f (2000) (for purposes of the imputed
disqualification rules, absent special circumstances, law students who clerk in law firms should be
considered non-lawyer employees of the firm whose duties of confidentiality are not imputed to
subsequent employers); D.C. Rules of Prof. Conduct, Rule 1.10(b) (2007) ("When a lawyer
becomes associated with a firm . . ., [t]he firm is not disqualified if the lawyer participated in a
previous [adverse] representation . . . prior to becoming a lawyer in the course of providing
assistance to another lawyer").

There may be some instances, however, where screening will not adequately protect the secrets
and confidences of the law student's former clients. For example, screening may be insufficient to
avoid disqualifying a law firm if the law student had substantial exposure at the clinic to
confidential information relevant to a matter handled by the law firm, and the size and structure of
the firm make it difficult to effectively screen the law student from the firm lawyers involved in the
matter. In that event, the firm may not be able to continue or accept a representation adverse to
the law student's former client unless the firm (a) obtains the informed consent of the former
client, (b) does not hire or terminates the employment of the law student, or (c) withdraws from or declines the adverse representation. See N.Y. State 774 (2004).

Of course, if the firm determines that screening would be appropriate, it must adopt measures adequate to isolate the newly-hired lawyer and eliminate any involvement in the matter in question to ensure that confidential client information will not be disclosed by the new lawyer to others at the firm. In ABCNY Formal Op. 2006-2, we discussed the factors considered by courts in determining whether a law firm has effectively screened a conflicted lawyer from the rest of the firm, thereby enabling the firm to represent a client with materially adverse interests to the lawyer’s former client in a substantially related matter. Those factors include, among others, the timeliness of implementing the screen, the size of the law firm, the size of the office space, the accessibility of files and the relative informality of office interaction, including the extent of the disqualified lawyer’s contact with the firm lawyers working on the matter in question. The same factors are appropriately considered when assessing the effectiveness of measures used to screen a law school graduate upon commencement of her employment with the firm.

IV Application of DR 5-101-a

Not all clinical representations are substantial and ongoing. Some may be limited and short-term, such as where a law student has only a single meeting with a client who seeks narrowly circumscribed advice regarding, for example, how to respond to a summons. In that event, the provisions of DR 5-101-a may become applicable. Effective as of November 9, 2007, DR 5-101-a creates certain exemptions from the conflict rules of Canon 5 of the Code for lawyers who provide limited representation to pro bono clients under the aegis of a qualified legal assistance organization. That rule provides in pertinent part as follows:

A. A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

1. shall comply with DR 5-101, DR 5-105, and DR 5-108 of these rules concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in this part, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest;

2. shall comply with DR 5-101, DR 5-105 and DR 5-108 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by those sections.

B. Except as provided in paragraph (A)(2), DR 5-105 and DR 5-108 are inapplicable to a representation governed by this section.
As set forth above, when the conditions of DR 5-101-a(A) are satisfied, i.e., a lawyer has no actual knowledge of any conflict upon commencement of a qualifying pro bono representation, neither the lawyer nor her law firm need comply with DR 5-105 or DR 5-108 to the extent either rule would otherwise be triggered by the representation. The question, then, is whether DR 5-101-a applies to a law school graduate who provided limited legal services at a clinic operated by her law school. If so, then when the graduate, L, accepts employment with a law firm, F, any conflicts resulting from L's prior work at a legal clinic will not be imputed to F when she joins the firm, and F will not be disqualified from continuing or accepting any representation adverse to the clients of the clinic, provided that L had no actual knowledge of any conflict at the outset of her representation of C, her client at the clinic.7 See ABA Model Rules of Professional Conduct, Rule 6.5, Comment 4 ("a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices").8

In construing DR 5-101-a, we note that the rule, while "not a model of draftsmanship," apparently was not adopted with the clinical training activities of law students in mind. See Roy Simon, Simon's Code of Prof'l Resp. Ann., DR 5-101-a at 771 (West 2008). Rather, it appears principally intended to encourage pro bono work by relaxing the conflict of interest rules for members of law firms who, in addition to representing paying clients, wish to simultaneously provide short term pro bono legal services through programs sponsored by legal services organizations, courts or government agencies. Id. To that end, the rule, among other things, permits lawyers to represent pro bono clients without conducting a conflicts check unless they have "actual knowledge" of a conflict with a firm client upon commencement of the representation. The rule provides this accommodation because the programs to which the rule applies "are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest . . . before undertaking a representation." Id. (quoting ABA Model Rule 6.5, Comment 1) DR 5-101-a also dispenses with the imputed disqualification rule, DR 5-105(D), because the limited nature of the services provided in a qualifying pro bono program "reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm." ABA Model Rule 6.5, Comment 4.

The provision eliminating the need to clear conflicts plainly is designed to facilitate the ability of an admitted lawyer working full time at a law firm to simultaneously represent pro bono clients under the auspices of a qualifying legal services program. Law students, in contrast, typically would not need to rely on this provision when, as is usually the case, they begin their clinical work before receiving or accepting offers of employment from a law firm. But the provision potentially could be applicable where, for example, the student accepts an offer of employment with a firm during her third year of law school while still working at the school's clinic, albeit without knowledge of any existing conflict.9 We see no reason why in this context a law student should be treated any differently under the rule than an admitted attorney already working at a law firm. Indeed, the student would have, if anything, even greater justification for relying on the rule because until she joins the firm, she would have little, if any, ability to systematically screen for conflicts of interest.
We further note that for the rule to apply to a law school graduate, the graduate's prior work at the clinic would have to be limited to "short-term limited legal services," defined to mean the provision of "legal advice or representation free of charge as part of a [qualified legal services] program with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance." DR 5-101-a(C)

If the clinical assignment meets the definition of "short-term limited legal services," there is less risk that conflicts will arise between the pro bono representation at the clinic and the other matters handled by the law firm that subsequently employs the law student. See ABA Model Rule 6.5, Comment 4.

**Conclusion**

When addressing conflicts that may arise in connection with hiring a law school graduate who represented one or more pro bono clients through participation in her school's legal clinic(s), law firms must balance a number of competing interests, including: (i) the interest of the graduate's former client in protecting her secrets and confidences; (ii) the interests of other clients in being represented by the counsel of their choice; and (iii) the interests of both law students and law firms in not unduly restricting the students' employment opportunities. In most cases, when the interests of the graduate's former client are directly adverse to a current client of the law firm, the appropriate balance is struck by permitting the law firm to continue representing its client, while effectively screening the graduate from any involvement with the matter in question or from contact with the firm lawyers handling it. There may be instances, however, where screening would not adequately protect the confidentiality interests of the graduate's former client, such as where the graduate gained significant exposure to the client's confidences, and the structure and practices of the firm make it difficult, if not impossible, to assure that the confidences will not be shared with others at the firm. In that event, the firm may conclude that it must withdraw from the adverse representation unless it can obtain the former client's consent to the representation after full disclosure of the conflict.

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2 The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct (the "Rules"), which will become effective and replace the Code on April 1, 2009. New Rule 1.9 is substantially identical to DR 5-108.

3 DR 9-101(B) in general provides that when a government lawyer accepts employment with a private law firm, other lawyers at the firm may represent a client in connection with a matter previously handled by the government lawyer, provided that the lawyer is effectively screened from any participation in the matter.

4 DR 4-101(B) provides in pertinent part that "a lawyer shall not knowingly: 1. Reveal a
confidence or secret of a client. 2. Use a confidence or secret of a client to the disadvantage of the client. 3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.”

5 Rule 1.10 sets forth the provisions governing imputation of conflicts under the new Rules. Rule 1.10 effects no change to DR 5-105(D) altering the analysis of this opinion.

6 DR 1-104 indirectly regulates the conduct of non-lawyers (including law students) by requiring lawyers who hire non-lawyers to supervise those employees, and by holding lawyers responsible for the misconduct of non-lawyers under certain specified circumstances. See N.Y. State 774 (2004); DR 1-104(C) and (D). In addition, courts have sanctioned lawyers for misconduct occurring before their admission to the Bar in the exercise of the courts' inherent power to regulate the conduct of attorneys. See In re Wong, 275 A.D.2d (1st Dep't 2000).

7 This conclusion is subject to the proviso, found in DR 5-101-a(E), that the "provisions of this section shall not apply where the court before which the representation is pending determines that a conflict of interest exists or, if during the course of the representation, the attorney providing the services becomes aware of a conflict of interest precluding continued representation."

8 ABA Model Rule 6.5, DR 5-101-a and New York Rule 6.5 are substantially identical.

9 We note that if the student had substantial responsibility for representing a client at a clinic and had knowledge of a conflict at the time she sought or considered accepting future employment with a law firm, she could not continue her representation of the pro bono client absent receipt of the client's consent following full disclosure of the conflict. See ABCNY Formal Op. 1991-1. Conversely, if the law student played a minor role at the clinic, the student might be able to continue the representation while seeking employment with the firm without needing to obtain client consent. See Peter A. Joy and Robert Kuehn, Conflict of Interest and Competency Issues in Law Clinic Practice, 9 Clinical L. Rev. 493, 549 (2002); ABA Formal Op. 96-400.

10 In addition, the legal clinic or law student "must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of DR 4-101," i.e., the student will have a continuing obligation to preserve the confidences and secrets of the client during and after the representation. DR 5-101-a(D).
Notes on Faculty

Alexandra Carter is an Associate Clinical Professor and Director of the Mediation Clinic at Columbia Law School. Professor Carter, who won the Jane Marks Murphy Prize for clinical advocacy while a student at Columbia Law School, has become a strong advocate of mediation as a valuable tool for many kinds of legal challenges, and she herself has mediated cases in contexts ranging from employment discrimination to family law. Prior to joining the Columbia faculty, Prof. Carter was associated with Cravath, Swaine & Moore LLP, where she served on a team defending against a multi-billion dollar securities class-action lawsuit related to Enron and served as the senior antitrust associate on several multi-billion dollar mergers. While at Columbia Law School, where she earned her JD in 2003, Prof. Carter also won the Lawrence S. Greenbaum Prize for best oral argument in the 2002 Harlan Fiske Stone Moot Court Competition. Prof. Carter currently serves on the New York State Unified Court System's Mediator Ethics Advisory Committee, and has lectured on alternative dispute resolution in Brazil and the Netherlands.

Jeremy R. Feinberg is the Statewide Special Counsel for Ethics at New York’s Office of Court Administration. In that capacity, he oversees the Judicial Campaign Ethics Center and provides ethics training, support and advice to the approximately 15,000 non-judicial employees of the Unified Court System. He also serves as one of the staff counsel to the Advisory Committee on Judicial Ethics, the panel of judges that provides ethical advice and opinions for all members of the New York State Judiciary. Mr. Feinberg frequently lectures on legal ethics at CLE programs around the state and contributes writings on ethics issues to the New York Professional Responsibility Report. He has taught ethics at Columbia University School of Law, NYU Law School, and Cardozo Law School. He commenced a second three-year term on the New York City Bar Association’s Committee on Professional and Judicial Ethics in 2007. He previously served on the New York City Bar Association’s Professional Discipline Committee from September 2006 to August 2007 and the New York State CLE Board from 2003 to 2006. Mr. Feinberg is also OCA’s Statewide Special Counsel for the Commercial Division. In that role, he provides support and assistance to all of the Commercial Division courts throughout New York, and serves as a liaison between the Bench and the commercial Bar. Before joining OCA in January 2006, Mr. Feinberg was a senior litigation associate at the New York office of Proskauer Rose LLP where he handled sports law, commercial litigation, and ethics matters for the firm’s clients. He served as law clerk to Hon. Judith S. Kaye, Chief Judge of the New York Court of Appeals, from December 1996 to December 1998. He is a 1995 graduate of Columbia University School of Law and a 1992 graduate of Columbia College.

Bruce J. Hector is currently a mediator with Accordance LLC, which he established to provide mediation and consulting services in civil commercial matters. Until recently, he was Associate General Counsel and Chief Litigation Counsel with Becton, Dickinson and Company (BD), a health care manufacturer located in Franklin Lakes, New Jersey. His responsibilities there included supervision of all litigation and advising on preventive law, crisis management, and product related issues. Prior to joining BD, Mr. Hector
practiced law in New York City, concentrating in civil litigation. Mr. Hector also served as President of the New Jersey Corporate Counsel Association, a chapter of the American Corporate Counsel Association (ACCA) from 2001-2003. He has previously served as a speaker or panelist for the New York City Bar, ICLE, ACCA and other organizations on many occasions, and has co-authored an article on litigation management in the ACCA Docket. Mr. Hector received an A.B. from Holy Cross College, and his J.D. from N.Y.U. Law School. Currently, he is a member of the New Jersey Association of Professional Mediators, as well as the Alternative Dispute Resolution Sections of the New York State Bar Association, the New Jersey Bar Association, and the ABA. He also serves on the Inside-Outside Counsel Litigation Group of the New York City Bar, and is admitted to practice in New York and New Jersey.

Daniel M. Weitz is the Deputy Director of the Division of Professional and Court Services and Statewide Coordinator of the Office of Alternative Dispute Resolution and Court Improvement Programs for the New York State Unified Court System. Dan assists the Director of Professional and Court Services in overseeing the statewide responsibilities of alternative dispute resolution, attorney for the child contracts, the children's centers program, the collaborative family law center, court interpreting services, criminal disposition reporting, guardianship and fiduciary services, legal information, office of the court record, parent education and awareness program, records management, workplace violence prevention and workplace health and safety functions and operational issues related to the Americans with Disabilities Act. As Coordinator of ADR/CIP, Dan oversees a statewide program of court-annexed ADR initiatives involving mediation, arbitration, neutral evaluation, parenting coordination and collaborative law. He also oversees the Community Dispute Resolution Centers Program (CDRCP), the federally funded Child Welfare Court Improvement Project (CIP), the Court Appointed Special Advocates (CASA) Assistance Program, and the Children’s Centers Program. Dan serves as Co-Counsel to the Board of Governors of the New York State Attorney-Client Fee Dispute Resolution Program and is the immediate past Chair of the New York City Bar Association ADR Committee. He also served as Co-Chair of the ABA Dispute Resolution Section, Court ADR Committee, and as a member of the Unified Court System’s Matrimonial Commission. He currently serves on the New York County Lawyers’ Association Family Law Task Force and the NYC Family Court Advisory Council. Dan has over twelve years of experience as a court administrator and over twenty years of experience in the field of ADR, serving as an administrator, professor, trainer and practitioner. He is an Adjunct Clinical Professor of mediation at Cardozo School of Law, and has taught ADR and conflict resolution related courses at Vermont Law School, John Jay College of Criminal Justice and Long Island University. Dan is an international ADR speaker having presented across the United States and beyond including Japan, China and South Africa. He has also served as mediator in a wide range of matters including, general civil, family, employment, human rights, community, and police conduct cases. Dan received his law degree from the Benjamin N. Cardozo School of Law, where he participated in the Mediation Clinic and was a Teaching Assistant in Legal Negotiation. He has worked at JAMS, Clerked for the Mediation Program of the United States Court of Appeals for the Second Circuit (The Civil Appeals Management Plan), and served as an original member of FutureLinks Inc., working in South Africa.
with youth leaders from all backgrounds to conduct workshops in non-violent social change, conflict resolution, and community development.