The Kentucky Bar Association
Alternative Dispute Resolution Section
presents:

Advanced Topics in Mediation Advocacy: Confidentiality and Competence

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Advanced Topics in Mediation Advocacy: Confidentiality and Competence

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WHAT YOU SAY IN ONLINE MEDIATION MAY BE DISCOVERABLE

Jeff Kichaven, Teresa Frisbie, and Tyler Codina

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You cannot promise your clients their online mediation is confidential. What you say in an online mediation may be discoverable. And there may not be anything you can do about it.

The problem has always been that, if your mediation takes place in State 1, whose laws protect mediation confidentiality, and what you say in that mediation is relevant to a lawsuit in State 2, whose laws do not protect mediation confidentiality, the courts of State 2 may apply their own evidence laws and order you to testify.

Now, the problem is worse. When you mediate commercial cases online, participants may be in different states. This makes it more difficult to say where the mediation actually takes place. If only some of the participants in your mediation are in State 1, the courts of State 2 have even greater discretion to disregard the laws of State 1.

The idea that online mediations – or any mediations, really – are confidential is therefore a myth. Let's prove it.

Our saga begins on the prairie with *Larson v. Larson*,[1] a sibling rivalry between Arny Larson and Arla Harris, on the one hand, and Charles Larson, on the other. They were fighting over various family assets.

The lawsuit was in Wyoming. They mediated in Colorado, face to face. Their mediation agreement said, "All communications, whether oral or written, made in the course of the mediation process … are confidential by this agreement and the Colorado Dispute Resolution Act."

At the end of their mediation, they signed "basic terms of settlement," but then could not agree on final documentation. Back in Wyoming, Arny Larson and Arla Harris moved to enforce the term sheet. They sought production of a PowerPoint Charles Larson used at the mediation in Denver. The magistrate judge allowed discovery and admission of the PowerPoint. The U.S. Court of Appeals for the Tenth Circuit reviewed for abuse of discretion.[2]

There was a true conflict of laws. Colorado privileges these documents, while Wyoming expressly allows discovery of confidential mediation communications when a party seeks judicial enforcement of a purported mediated settlement agreement.[3] There was also their mediation agreement.

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[1] 687 Fed.Appx. 695, 706 (10th Cir. 2017).

[2] Slip Op. at 18.

[3] Slip Op. at 19.

The Tenth Circuit didn't care:

> Although Wyoming's choice of law rules state that "the law of the state chosen by the parties to govern their contractual rights and duties will apply [citations omitted]," this general rule was overridden by the longstanding principle that Wyoming courts will "not apply another jurisdiction's law 'when it is contrary to the law, public policy, or general interests of Wyoming's citizens. [citations omitted].'" Therefore, the magistrate judge applied Wyoming law and allowed discovery of the presentation.
>
> We conclude the magistrate judge did not err in his decision.[4]

While this disregard of Colorado's more protective law might surprise or even shock you, it might not bother those of you who don't see a realistic possibility that what happens in your mediation could later become relevant to a lawsuit in Wyoming. But *Larson* is hardly an outlier.

Let's take our saga to the Big Apple. As recently as 2017, New York courts used similar choice-of-law analysis to compel disclosure of material seemingly privileged under the laws of another state. And it's much more possible that what you say in your mediation could become relevant to a lawsuit in New York.

The key case is *Matter of People of the State of New York v. PriceWaterhouseCoopers LLP*.[5]

There, then-Attorney General Eric Schneiderman sought to compel Exxon Mobil Corp. and PwC to comply with a subpoena to PwC in connection with New York's climate change suit against Exxon. The Appellate Division affirmed an order granting a petition to compel production of documents.

PwC and Exxon contended that communications between them took place in Texas, Texas protects those communications from discovery under an accountant-client privilege (New York has no such privilege), and under the "balancing test" of the Second Restatement of Conflict of Laws, Texas privilege law should apply to protect those documents from discovery.

The Appellate Division didn't care, either:

> We reject Exxon's argument that an interest-balancing analysis is required to decide which state's choice of law should govern the evidentiary privilege. Our current case law requires that when we are deciding privilege issues, we apply the law of the place where the evidence will be introduced at trial, or the place where the discovery proceeding is located.

A remarkable result, especially considering that New York's "current case law" hardly required it, and in fact seemed to the contrary.

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[4] Slip op. at 20.

[5] 2017 NY Slip Op. 04071, 150 A.D.3d 578, May 23, 2017.

Just one year before, New York law was synthesized by the chief judge of the U.S. District Court for the Southern District of Ohio, Judge Edmund A. Sargus Jr., in *Wilmington Trust Co. v. AEP Generating Co.*:[6]

> Under New York's choice of law principles, the governing law is that "of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."[7] New York courts "apply an interest-balancing test to determine which state has the greatest interest in applying its law."[8] "In cases requiring a choice of privilege law, the interest analysis usually has led New York courts to apply the law of the jurisdiction in which the assertedly privileged communications were made."[9]

Since some New York courts are willing to swim against the current and disregard another state's accountant-client privilege, even when the assertedly privileged communications were made in that state, does that mean they will also disregard another state's mediation privilege? At least one case points in that direction.

In *Hauzinger v. Hauzinger*,[10] a divorce action, Carl Vahl served as mediator. After the mediation, Aurela Hauzinger subpoenaed Vahl to produce records and to testify in a proceeding to determine whether the terms of the Hauzingers' separation agreement "were fair and reasonable at the time of the making of the agreement." Vahl moved to quash the subpoena on grounds, among others, that the Hauzingers had signed a confidentiality agreement. The trial court refused to quash the subpoena, and the Appellate Division affirmed, notwithstanding the confidentiality agreement that the Hauzingers had signed.

In 2008, the New York Court of Appeals issued its memorandum opinion,[11] affirming the Appellate Division. The Court of Appeals conveniently noted something the Appellate Division did not – that both spouses had waived whatever confidentiality attended their mediation. Therefore, Vahl was required to produce documents and testify. But the larger issue of New York courts' insensitivity to mediation confidentiality, as demonstrated by the Appellate Division, remains an open question.

While *PwC* and *Hauzinger* seem result-oriented, New York courts' hunger to get all relevant evidence before them is not all bad. Society needs courts to get decisions right. And in order to get decisions right, courts want to consider all evidence relevant to those decisions. That's why the general rule everywhere is that all relevant evidence is admissible. (In New York, it's

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[6] Case No. 2:13-cv-1213, S.D. Ohio 2016, slip op. at 6.

[7] *Lego v. Stratos Lightwave Inc.*, 224 F.R.D. 576, 578 (S.D.N.Y. 2004).

[8] *Condit v. Dunne*, 225 F.R.D. 100, 107 (S.D.N.Y. 2004).

[9] *Lego*, 224 F.R.D. at 579.

[10] 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dep't 2007), *aff'd*, 10 N.Y.3d 923, 862 N.Y.S.2d 456, 892 N.E.2d 849 (2008).

[11] https://www.nycourts.gov/reporter/3dseries/2008/2008_05781.htm.

Evidence Rule 4.01.) A corollary of that rule, as the U.S. Supreme Court held in *United States v. Euge*, obliges everyone who has relevant evidence to testify:

> The scope of the "testimonial" or evidentiary duty imposed by common law statute has traditionally been interpreted as an expansive duty limited principally by relevance and privilege. As this court described the contours of the duty in *United States v. Bryan*, 339 U.S. 323, 331 (1950): "[P]ersons summoned as witnesses by common authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery ... We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned."
>
> While the Court recognized that certain exceptions would be upheld, the "primary assumption" was that a summoned party must "give what testimony one is capable of giving" absent an exemption "grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth."[12]

How do mediation privileges of other states stand up in New York under this standard, "a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth"?

Not well.

Centuries of experience? The Uniform Mediation Act was approved by the National Conference of Commissioners on Uniform State Laws in 2001. In almost 20 years, only 11 states and the District of Columbia have adopted it. The last state to adopt it was Hawaii in 2013. It has been introduced as legislation in only two other states – Georgia and Massachusetts.[13]

While some other states, such as California, have mediation confidentiality laws more protective than the Uniform Mediation Act,[14] New York has only minimal statutory protection for mediation confidentiality. New York's Civil Practice Law and Rule 4547 makes settlement negotiations inadmissible solely "as proof of liability for or invalidity of the claim or the amount of damages." It is therefore consistent with New York policy for New York courts to be inclined to disregard the more protective mediation confidentiality laws of other states.

Would it help to seek confidentiality protection in New York under federal law, rather than the law of another state? No.

Beyond the minimal protections of Rule 408 of the Federal Rules of Evidence (which generally parallels CPLR 4547), there is no federal mediation privilege. There isn't even much of a settlement privilege in federal law:

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[12] *United States v. Euge*, 444 U.S. 707, 712-13 (1980) (IRS empowered to compel handwriting exemplars under its subpoena power).

[13] https://www.uniformlaws.org/committees/community-home?communitykey=45565a5f-0c57-4bba-bbab-fc7de9a59110&tab=groupdetails.

[14] Cal.Ev.C. 1115 *et. seq.*

> Did you know there is a settlement privilege? Not many do, primarily because few courts have adopted the privilege. The Sixth Circuit adopted a federal common-law settlement privilege in *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (C.A.6 2003), but other courts reject the *Goodyear* decision. *See, e.g., In re MSTG Inc.*, 675 F.3d 1337 (Fed. Cir. 2012); *Matsushita Elect. Indust. Co. v. Mediatek, Inc.*, 2007 WL 963975 (N.D. Cal. 2007).[15]

The U.S. Court of Appeals for the Federal Circuit stated plainly that a settlement privilege does not outweigh the public interest in the search for truth:

> [W]hile there is clearly an important public interest in favoring the compromise and settlement of disputes, disputes are routinely settled without the benefit of a settlement privilege. It is thus clear that an across-the-board recognition of a broad settlement negotiation privilege is not necessary to achieve settlement.[16]

So here is the key conclusion: It is easier to ask a New York court to apply *Lego* as described in *Wilmington Trust* rather than *PwC*, and use the evidence law of a more protective state to keep your mediation confidential, if the "assertedly privileged communications" were made in that other state. Even then, though, a New York court might order disclosure.

When you mediate online, with participants in different states, it's harder to show where their mediation communications were "made." If even one mediation participant was in New York or another less protective state, then even under *Lego*, the chances a New York court will order disclosure increase.

The lesson, therefore, is this: Don't assure your clients any mediation is confidential. Be wary of mediation agreements that promise the law of any more protective state will apply. Nobody can guarantee that result.

However, do assure your clients mediation is still valuable. Your clients can still participate actively and meaningfully, with unparalleled opportunities for collaboration and teamwork between clients and lawyers.

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[15] https://presnellonprivileges.com/2015/02/10/important-lessons-about-the-settlement-privilege/.

[16] *In re: MSTG Inc.*, 675 F.3d 1337, 1345 (Fed. Cir. 2012).

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MEDIATING WITH GOLIATH

Jeff Kichaven

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How can solos and small-firm lawyers – the Davids – ever get a fair shake in mediation against the Goliaths? Actually, it's easy, and this article will explain how.

First, let's ask, who are these "Goliaths" whom the solo and small-firm "Davids" fear? Are they your big-firm opposing counsel? The international corporations and insurance carriers you're suing? No. If you're well-prepared and conscientiously put your client's interests ahead of your own, big-firm opposing counsel and their hoary clients won't scare you.

I learned this in dramatic fashion from a small-firm "David" who was actually named Don. Don's clients had a legal malpractice claim against a senior partner in a big firm, the kind of firm that has its name on the side of its building. This defendant was represented by two senior partners from another big firm, which also has its name on the side of its building (probably several buildings across the country). We had four mediation sessions spanning fifteen months. The two big firms tried to wear Don down, but he wore them down instead. His clients received a large, fair, settlement.

Afterward, Don told me his secret, the key to his approach. He said that he'd been in small firms for his entire forty-year career, almost always against large opponents. As he recounted it to me, his mentor taught him always to remember that it comes right down to – whether it's the key deposition, standing up in court on major motions, trial – it's always really just one lawyer against one lawyer. If you're better prepared, there's nothing to fear.

One lawyer against one lawyer! Like Dempsey against Tunney, the Dodgers against the Giants, Evert against Navratilova, it's a battle of titans and a fair fight. No, big-firm opposing counsel and their clients are not the "Goliaths" the small-firm "Davids" fear.

Rather, the "Goliaths" the small-firm "Davids" have to fear are, sadly, mediators. If the mediator is against you and aligned with your big-firm opponents, you're on the short end of a two-on-one, and the fight is not fair.

Over the years, countless solo and small-firm "Davids" have expressed this concern about mediators. This fear will never go away. Solo and small-firm "Davids" will always ask, "How can

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we protect ourselves from the risk the mediator will put his thumb on the scale for the big guy, the repeat player, the fellow member of his establishment?"

To find the answer, we first need to identify the source of the mediator's potential power to tilt the scales against you. Then, we can figure out what to do about it.

While this may surprise you, the source of the mediator's potential power to tilt the scales against you is… You! Yes, your own decisions and conduct in the mediation are what give the mediator the potential power to abuse you and your client.

Let's consider the nightmare scenario solo and small-firm "Davids" fear most. As you enter the mediation, you and the plaintiff you represent have analyzed the case and decided you should settle for no less than 80 (on a scale of 1-100). After hours of wrangling, you have reduced your demand from 125 (admittedly, an extreme opening demand) to 85, and told the mediator you're getting close to the end of your rope.

Down the hall, the defendant's team tells the mediator that while they could pay up to 90 to settle, it would really make them look good in their supervisors' eyes if they could bring this in around 75. They remind the mediator – as if they need to – that they are big clients for him, and for the mediation company where he works, and (cracking their knuckles as they speak), they look forward to many, many more mediations together.

As this nightmare scenario continues, the duly chastened mediator walks into your room, head bowed, shoulders slumped. He sits down and slowly looks up, brow furrowed. His eyes balefully look skyward. "I've tried everything, everything, with them," he sighs and shrugs. "I'm so sorry. They are just so stubborn. It's like talking to a wall. I begged them to be more reasonable. But the most I can tell you they will pay, the top, is… 70."

Seventy! You're shocked. The case is worth more and everyone knows it. Your client can barely handle the stress of litigation, though, and would sure rather get cash now instead of years from now, after trials and likely appeals. Still… 70…? You look the mediator dead in the eye and tell him you need more. You lower your demand to 80 and tell the mediator it's your bottom line. You look serious. The mediator nods glumly and leaves.

Next, the mediator goes downstairs for a smoke. He returns a couple of unrelated calls. After a while, he comes back and tells you he has decided to make a "Mediator's Proposal" at (you guessed it) 75. The mediator says that, while it may be a tough sale, he thinks the other side will bite. In fact, he may or may not have communicated a Mediator's Proposal at 75 to the other side at all. It's not actually necessary; he knows he has the 75 in hand as his repeat customer's dream-come-true number.

You are in a pickle. While 75 is not enough to be fair, it's not so unfair as to be dismissed out of hand. And, the mediator has put his imprimatur behind it. When you talk to your client about 75, he starts to sweat. Seventy-five! It's not enough. But, he's not a wealthy man, either. When was the last time he saw that much money in one place? His thinking dances with what he could buy

with the 75 in hand (less your fee and his costs, of course). He starts thinking about getting his life back when litigation ends. Then he blinks. He says yes. He takes 75.

Despite lingering doubts because of the lack of transparency of it all, you think the mediator is somewhat of a hero for getting the big, bad defendant all the way up to 75. But the defendant would have settled at anything up to 90. The mediator has played you for a fool.

Have you been there? Have you been there, and not been aware you were there?

More importantly, what can you do to make sure you are never stuck there (again)? How can you take care that a mediator never becomes "Goliath" to your "David," and uses his power to tilt the playing field against you? To answer this question, we must return to the issue of how mediators get the powers of "Goliath." Then, the contours of an appropriate ounce of prevention become clear.

REMEMBER THE SOURCE OF THE MEDIATOR'S POWER – IT'S YOU!

A famous anecdote proves the point. It's the story of the extraordinary Brendan V. Sullivan, Jr., of Washington, D.C.'s Williams & Connolly, best known for his defense of U.S. Marine Lieutenant-Colonel Oliver North in the aftermath of the Iran-Contra scandal in the 1980s. According to Sullivan's Wikipedia page,

> Sullivan shot to national prominence in 1987, when he represented Oliver North in televised congressional hearings over the Iran-Contra scandal. During the hearings in front of the Joint House-Senate Iran-Contra Committee, chairman Daniel Inouye suggested that North speak for himself, admonishing Sullivan for constantly objecting to questions posed to North. Sullivan famously responded, "Well, sir, I'm not a potted plant. I'm here as the lawyer. That's my job."[1]

Yes, a lawyer is not a potted plant. Yet at too many mediations, lawyers act like potted plants allowing mediators to take primary (or even sole) responsibility for conducting face-to-face communications with the other side and drafting the contracts (confidentiality agreements at the beginning, and settlement agreements at the end) which often bookend the mediation day. Lawyers too often sit by, intimidated by the mediator's high status or forceful personality, as mediators seize, and lawyers acquiesce in the mediator's seizure of, excessive responsibility for what goes on.

This acquiescence by lawyers can raise serious ethical as well as practical problems. Rule 3-110, California Rules of Professional Conduct, limits the extent to which lawyers can delegate responsibility for lawyering tasks to others who do not have the lawyer's professional responsibilities – including the duty of undivided loyalty – to their clients. This limitation continues in new Rule 5.3, California Rules of Professional Conduct, effective November 1, 2018. Mediators, whatever their ethical duties are or aren't, do not have a duty of undivided loyalty to anyone. Mediators work for all sides. Therefore, mediators are clearly in the class of

[1] Brendan Sullivan, Wikipedia (May 1, 2018), https://en.wikipedia.org/wiki/Brendan_Sullivan_(lawyer).

people to whom lawyers cannot delegate excessive responsibility for lawyering tasks. Drafting contracts and conducting face-to-face negotiations are, equally clearly, lawyering tasks.

DON'T GIVE MEDIATORS THE POWER TO HARM YOU

The solution to the problem is now straightforward. Remember that the mediator works for you, you do not work for the mediator. You must supervise the mediator, the mediator must not supervise you. Ultimate responsibility for the representation of your client's interests belongs to you and you alone, not to the mediator. While lawyers work in concert with mediators and value the mediator's counsel and input (the mediator, after all, sees things at the other end of the hall which you never see), as far as your client is concerned, the buck always stops with you. So, you must keep more responsibility for lawyering tasks yourself. When you do not delegate those tasks to the mediator, the mediator never gets the opportunity to use the power to perform those tasks against you.

Here are some concrete steps you can take:

Exchange Mediation Briefs

When you exchange mediation briefs, you control the message the other side gets about your case, and the message you get about theirs. You and the other side can prepare more comprehensively to join the issues and move them forward more efficiently on the mediation day. Sure, the mediator will have input, some of it perhaps highly evaluative. But both you and the other side will have the primary sources for evaluation, your respective analyses of the case in the mediation briefs, unfiltered by the mediator's biases (and everyone has biases).

Have an Opening Joint Session

A critical part of the mediator's job in 2018 is to determine whether an agenda can be tailored for an Opening Joint Session which will be productive and constructive. The so-called "plenary" Opening Joint Session of the 1990s (where the mediator asks one side's lawyer "what do you have to say?" and then asks the other side's lawyer "what do you have to say?") is no more utilized today than the 1990s hit "Macarena" is still played at weddings and Bar Mitzvahs. Both seem quaint and outdated.

In 2018, when a mediator can read the briefs and talk to the lawyers before the mediation day, and the lawyers can read each other's briefs, all involved can often work together to find issues which can be discussed directly in an Opening Joint Session, without being filtered through the mediator's biases, to move the negotiation forward. Many times, a good issue for this agenda is the measure of damages. This issue rarely involves direct criticism of a party's conduct and is often key to the appropriate settlement amount.

When you insist on delivering and receiving messages directly, you take power back from the mediator. The mediator loses the power to deliver messages in a way that doesn't serve your

interest. Neither can the mediator deliver the other side's message to you in a way that may exaggerate its merit.

Of course, there will always be a few cases where mediation briefs should be confidential and the sides should not sit in a room together. When Opening Joint Sessions are curated, not plenary, though, the number of cases where you should avoid them will fall.

Conduct Face-to-Face Negotiations Yourself

As long as mediators take sole responsibility for running offers and demands back and forth with so-called "shuttle diplomacy," solo and small-firm "Davids" will never lose the fear that the mediator may manipulate the negotiation against them and in favor of the large repeat players on the other side. The answer? Do more of this important work yourself, in consultation with and chaperoned by the mediator as necessary.

Here's how it may look, in a nutshell:

After a curated Opening Joint Session, the mediator meets (typically) with the plaintiff's side to discuss the issues further and formulate an opening demand. The mediator, having had some communication with the defense side, can offer some informed opinions (without violating confidences) about how the defense might respond to whatever the demand might be.

Plaintiff's counsel and the mediator might then meet with defense counsel, an "attorney summit." Either the mediator, or more likely plaintiff's counsel, might express the opening demand. It generally has greater conviction when plaintiff's counsel does it. Plaintiff's counsel can judge defense counsel's response directly and answer any questions. This provides valuable, unfiltered information in both directions. It deprives the mediator of the power to tell plaintiff's counsel that defense counsel was any more shocked by the opening demand than they actually were. Counsel then report back to their clients, with or without the mediator's assistance as appropriate. This process of attorney summits and private conversations between lawyers and their respective clients can continue through several rounds of negotiation. Sometimes, but less frequently, it may be appropriate for a mediator alone to shuttle an offer or demand.

Ultimately, the defense may make an offer and say it's their top dollar. When plaintiff's counsel reports this to her client, her client will almost surely ask, "Do you believe that's all we can get?" Plaintiff's counsel must be able to answer with a convincing "yes" before plaintiff will consider accepting, for this "top dollar" will almost certainly be below plaintiff's subjective evaluation of what the case is worth. How much better it is for plaintiff's counsel to be able to answer that question after hearing defense counsel say it directly, rather than relying on what may be the manipulative or biased hearsay statement of the mediator as to the defense side's state of mind. Again, direct communication deprives the mediator of the power to tilt the negotiations against you.

When picking mediators, solo and small-firm "Davids" should ask mediators, as part of their due diligence, whether those mediators employ processes such as these or instead hoard power over the negotiation. "Davids" cannot just ask the open-ended question, "Can you be fair to me and my clients?" Who would ever answer "no"? It would be as useless as the same question in jury *voir dire*. "Davids" should ask mediators for references to other solo or small-firm

practitioners, to ask whether the mediator treated them fairly and respected their responsibilities toward their clients, or instead became “Goliaths.”

Solo and small firm “Davids” must guard their own roles in mediations jealously to ensure they retain the power necessary to discharge their fiduciary duty of undivided loyalty to their clients. To do this, they must conduct more lawyering tasks for their clients themselves.

MEDIATOR CONFIDENTIALITY PROMISES CARRY SERIOUS RISKS

Jeff Kichaven

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The purpose of this article is to explain some reasons why mediators might decide not to promise people that their mediations are confidential. Someday, that promise will result in a mediator being on the wrong end of a serious malpractice case. The consequences could be severe. You don't want to be that mediator.

In the COVID-19 era, the risk has increased. Mediation has gone online. More cases involve participants in multiple states. The choice of which state's confidentiality or privilege law should apply is less obvious.

The result? A court adjudicating a confidentiality claim has more discretion to pick and choose the evidence law of a state that allows mediation-related evidence to be admitted – regardless of whether the mediator has promised, or the participants have agreed, to keep that evidence confidential. If a court does so after a mediator has promised confidentiality, that mediator has a problem.

Analytically, here's the vice of mediation confidentiality agreements in a nutshell: The promise of confidentiality is not a promise a mediator has the power to keep. The only people who can keep (or not keep) that promise are judges ruling on later motions to compel document production or testimony regarding what happened in that mediation. And sometimes, those judges don't come through.

A recent Law360 guest article I co-authored with professor Teresa Frisbie and law student Tyler Codina proved this. All we had to do was examine the 2017 decision in *Larson v. Larson* from the U.S. Court of Appeals for the Tenth Circuit.[1]

In *Larson*, the parties mediated in Colorado, a state with strong mediation confidentiality protection. On top of that, they signed a confidentiality agreement. In a later proceeding in Wyoming, some parties to the Colorado mediation sought discovery of another party's mediation PowerPoint. The Tenth Circuit affirmed a lower court's decision to disregard the Colorado confidentiality statute on which the parties presumably relied, disregard the confidentiality agreement the mediator provided, and ordered production.

Critically for our purpose, the mediator's promise of confidentiality, in the confidentiality agreement he provided, made no difference. The result could easily be the same in other states, such as New York.[2]

The confidentiality agreement on which the *Larson* mediator procured everyone's signatures probably had a paragraph something like this oft-copied passage:

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[1] *Larson v. Larson*, 687 Fed.Appx. 695 (10th Cir. 2017).

[2] Compare *Matter of the People of the State of New York v. PriceWaterhouseCoopers*, 2017 NY Slip Op. 04071, 150 A.D.3d 578 (May 23, 2017).

> In order to promote communication among the parties, counsel and the mediator and to facilitate settlement of the dispute, each of the undersigned agrees that the entire mediation process is confidential. All statements made during the course of the mediation are privileged settlement discussions, and are made without prejudice to any party's legal position, and are inadmissible for any purpose in any legal proceeding. These offers, promises, conduct and statements (a) will not be disclosed to third parties except persons associated with the participants in the process, and are privileged and inadmissible for any purposes, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions.[3]

When a mediator plunks that contract under people's noses and gets them to sign it as a condition of proceeding with the mediation, it's hard to deny the mediator is responsible for the promises that contract contains.

When a later court, in another state, breaks the mediator's promise, refuses to enforce that contract, and orders document production or testimony regarding what happened in the prior mediation, what ills could befall the responsible mediator? And, are the benefits of making the confidentiality promise worth the risks? My conclusion is that the ills are serious, and the risk outweighs the minimal benefits the confidentiality promise provides.

First, the ills.

Assume the mediator obtains signatures on a confidentiality agreement in a case where private, even embarrassing, information is disclosed in reliance on the promise of confidentiality. Examples might include an intellectual property case where profitability information is disclosed, or a sexual harassment case where personal misconduct is disclosed.

Next, assume a breach of contract case in another state to which the profitability information is relevant, or a wrongful termination case in another state to which the personal misconduct is relevant. Finally, assume that the courts of those other states compel document production or testimony regarding what happened in the prior mediation, as happened in *Larson* and could well happen again, and the documents or testimony adversely affect the outcomes of those cases.

What claims could be asserted against the mediator whose promise of confidentiality was broken?

Could the mediator be liable for negligent misrepresentation? Consider this statement of the elements of that tort:

> The elements of negligent misrepresentation are: (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies 'false information' for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.[4]

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[3] https://www.jamsadr.com/adr-forms/, Mediation Agreement.

[4] *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 (Tex. 2002).

The shoe seems to fit. The mediator made a representation of confidentiality in the course of his business, it was false, the representation guided others in their business negotiations, the mediator was not competent in communicating information which was, after all, false, and the plaintiff suffered pecuniary loss from having to disclose the information.

What about a claim for breach of contract? The elements of the claim are familiar:

> To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff.[5]

This shoe seems to fit, too. The confidentiality agreement is the contract, the plaintiff mediated and disclosed sensitive information, the mediator did not secure its confidentiality, and the plaintiff was damaged. Mustn't that mediator bear responsibility?

Would there also be claims for garden-variety negligence and malpractice? Almost certainly, but with a twist.

Yes, there would be a claim styled "mediator malpractice." As a twist, there would likely also be a claim styled "legal malpractice," because the confidentiality agreement is a contract that affects the legal rights of other people, and to draft or even select that contract is the practice of law, according to the ABA Task Force on the Model Definition of the Practice of Law:

> (c) A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:
>
> ...
>
> (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;[6]

What will happen when this lawsuit is filed? Sure, the mediator might get lucky, dodge the bullet, and get a defense verdict. But who wants to risk being the mediator with the lump in their throat and the acid churning in their stomach while the jury mulls it over?

Even if this mediator survives the civil justice system, there could be more problems afoot. In a worst-case scenario, a state bar disciplinary system could also take note. The confidentiality agreement, with its promise that future courts will honor the confidentiality promise, could violate the American Bar Association's Model Rule of Professional Conduct 7.1. Consider the California statement of and comment to this rule:

> Rule 7.1, California Rules of Professional Conduct, Approved by the Supreme Court, Effective November 1, 2018:

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[5] *Richman v. Hartley*, 224 Cal.App.4th 1182, 1186 [169 Cal.Rptr.3d 475] (2014).

[6] American Bar Association Task Force on the Model Definition of the Practice of Law, Definition of the Practice of Law, Draft (9/18/02), https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition/.

> (a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.
>
> Comment [2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this rule.

The confidentiality agreement guarantees or warrants that future courts will keep the mediator's confidentiality promise. Under Comment [2], that's false or misleading, and violates Rule 7.1.

Why do I raise these issues? I acknowledge that, in any individual case, the likelihood is small that things will go so horribly wrong. Yet given enough time and enough cases, it will happen. History can be our guide.

I graduated from law school in 1980. In the early years of my practice, there were virtually no appellate cases regarding arbitration or arbitrators. Then, as the number and types of arbitrations grew, that changed. Now, it seems that barely a month goes by without some important court deciding some important case regarding some important aspect of arbitration. As time goes on, my bet is that mediation follows the same path.

I don't want to be the mediator whose conduct is the subject of a lawsuit or disciplinary proceeding. I also don't want the shame of disserving mediation participants by inducing a degree of candor from them that they later come to regret. That's why I never promise anyone that any particular mediation privilege or confidentiality rule or statute, or any particular degree of mediation privilege or confidentiality, will apply.

Do I lose any benefits by not making a confidentiality promise? I don't think so. In the commercial cases I mediate, I don't think people are all that candid, whether or not they think the process is confidential. They are instead cagey and strategic about what they do and do not disclose. I can't remember the last time someone in a mediation voluntarily bared their soul and disclosed a negative or harmful fact or case of which the other side was unaware.

Yes, people have to deal with negative or harmful facts and cases when the other side presents them; but that's different than volunteering whatever is negative or harmful. Lawyers in mediation are still fiduciaries to their clients, with duties of undivided loyalty. They can't ethically disclose things that might prejudice their clients in the negotiation. It's risky. Once negative information is disclosed to a mediator, there is a chance the mediator will leak that information to the other side, even if only unconsciously through body language, facial expression, or tone of voice.

So, the risks of a mediator's confidentiality promise are real, the benefits are not. To the mediators who will persist in promising confidentiality, you've got to ask yourself one question: "Do I feel lucky?"

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ETHICAL ADVOCACY IN MEDIATION: YOU MAY NEED A NEW PLAN

Jeff Kichaven

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The purpose of this article is to warn lawyers that much of their conduct in mediation may violate Rule 1.1, ABA Model Rules of Professional Conduct (in California, Rule 3-110, Rules of Professional Conduct), and to suggest how lawyers can make their mediation advocacy more ethical and more effective at the same time.

Here's the problem: Lawyers too often delegate to mediators tasks which clients are entitled to have professionals with a duty of undivided loyalty – their own lawyers – perform, and which the ethical rules require those lawyers to perform. The solution? Lawyers must understand which tasks they must perform themselves, then perform those tasks.

To understand this fully, we will explore the governing rules, lawyers' obligations to their clients under those rules, how lawyers' conduct in mediation commonly violates those obligations and how lawyers can do better.

The Rules

The ABA's model governing rule is straightforward: "A lawyer shall provide competent representation to a client."[1] The California analog is similar: "A member shall not intentionally, recklessly or repeatedly fail to perform legal services with competence."[2] The official discussion of rule 3-110 makes clear that "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents."

The Obligations

Flowing from these rules, what obligations do lawyers have in the delegation of client responsibilities to others and the supervision of those others' work?

The California Supreme Court described those obligations well in *Moore v. State Bar*.[3] In that case, David Moore was a lawyer hired to represent a client in what appears to have been a collection action. Moore delegated virtually all responsibility for the matter to another attorney, who was suspended from practice at the relevant times. The second lawyer ignored the file. The client ended up with a default judgment against him. Moore had his license suspended for 90 days.

Here's why:

The court initially held a lawyer to "professional obligations of service and protection to a client."[4] Those obligations are largely non-delegable. The court rejected Moore's assertion that he hired

[1] Rule 1.1, ABA Model Rules of Professional Conduct.

[2] Rule 3-110(A), California Rules of Professional Conduct.

[3] *Moore v. State Bar*, 62 Cal.2d 74 (1964).

[4] 62 Cal.2d at 75.

the second lawyer to assist and "had the right to rely upon [the second lawyer's] integrity and ability."[5]

In the key sentence of the opinion, the court chastised Moore for relying on another so completely: "(Moore) thus mistakenly places himself in the position of his client rather than in that of his client's lawyer."[6]

What was Moore obligated to do? The court continues: "It was (Moore) who had accepted [the client] and it was upon (Moore) that [the client] was entitled to rely for the required legal service for which he had advanced costs and a retainer."[7]

This language leaves open the next question to which we must turn: What is within the scope of the "required legal service" a lawyer herself is required to provide?

In 1990, the California Supreme Court answered that question in *Morgan v. State Bar*.[8] There, Morgan was disbarred for practicing law while still under suspension for previous misconduct. The court held:

> The practice of law includes not only appearing in a court of law but also the giving of legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court. … Similarly, we conclude that engaging in negotiations with opposing counsel regarding settlement …constitutes the practice of law.[9]

In short, when clients hire lawyers, they are entitled to have lawyering tasks performed by their lawyers, the professionals who must "conform to professional standards."[10]

Lawyers may not delegate lawyering tasks without supervision, and surely may not delegate lawyering tasks without supervision to someone who does not conform to a lawyer's professional standards. So problems arise when a mediator is assigned, or is allowed to seize, lawyering tasks.

Even if the mediator is a lawyer, when she functions as a mediator she does not function as your client's lawyer and does not conform to the same professional standards as you do. You owe your client a duty of undivided loyalty.[11]

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[5] *Id.* at 77.

[6] *Id.*

[7] *Id.* at 80.

[8] *Morgan v. State Bar*, 51 Cal.3d 598 (1990).

[9] *Id.* at 604, internal quotes and citations omitted.

[10] *Crawford v. State Bar of Cal.*, 54 Cal.2d 659, 667-86 (1960).

[11] ABA Model Rule 1.7, Comment 1; Rules 3-300 and 3-310, California Rules of Professional Conduct; *Flatt v. Superior Court*, 9 Cal.4th 275, 286 (1994).

The mediator (whether a lawyer or not) owes your client no such duty; the mediator is hired by both sides, is compensated by both sides, works for both sides. While the mediator's professional standards may not always be settled or clear, one thing is sure: The mediator's professional standards are not the same as yours. A lawyer may not delegate lawyering tasks without supervision to a mediator or allow a mediator to seize those tasks.

The Violations

Lawyers' conduct in mediation commonly violates these obligations, and therefore violates ethical rules, in at least three ways: Lawyers delegate, or allow mediators to seize, unsupervised authority to draft confidentiality agreements; to engage in settlement negotiations with opposing counsel; and to draft settlement agreements.

Confidentiality agreements

When was the last time you drafted, or negotiated, a mediation confidentiality agreement? Probably never. Commonly, the mediator gives you her preprinted form at the beginning of the mediation day. You don't read it, you just sign.

Yet we know from *Morgan v. State Bar* that "the preparation of legal instruments and contracts by which legal rights are secured" is a lawyering task. And the mediation confidentiality agreement is just such a document. It secures – or, more frequently, forfeits – your client's legal rights. When you blithely sign whatever the mediator puts under your nose, can you honestly say that you have discharged your ethical obligation to supervise the mediator adequately, or even at all?

The forfeiture of legal rights you commonly agree to in a mediator's standard confidentiality agreement can be substantial, and prejudicial to your client, in at least two ways.

First, you may forfeit the ability to hold the mediator accountable for malpractice. Mediators commonly slip prospective waivers of liability into confidentiality agreements, a la this: "The participants hereby agree that the Mediator has no liability for any act or omission in connection with or arising out of the mediation."

This has nothing to do with confidentiality. It just forfeits rights your client otherwise may have. What's the chance you would include this forfeiture in a confidentiality agreement you drafted yourself? What's the chance you would allow this forfeiture to remain in a confidentiality agreement whose preparation you adequately supervised?

Second, you may forfeit contract-based defenses – fraud, duress and mistake – to the enforcement of mediated settlement agreements. This was the situation in which the famous Winklevoss twins found themselves when they settled their securities litigation against Mark Zuckerberg.[12]

The twins asserted that Zuckerberg had misled them, at the mediation, about the value of their Facebook shares, and opposed enforcement of the mediated settlement agreement on grounds of fraudulent inducement. In the absence of the mediator-drafted confidentiality agreement, Rule 408, Federal Rules of Evidence, would have governed, and the twins would have been allowed to introduce their evidence of the alleged fraud. But the mediator induced everyone to sign a

[12] *Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d 1034 (9th Cir. 2011).

confidentiality agreement which provided that "(n)o aspect of the mediation shall be relied upon or introduced as evidence in any arbitral, judicial or other proceeding."[13]

The district court excluded the proffered evidence and enforced the settlement agreement, and the Ninth Circuit affirmed. Query: Did the twins' lawyers fulfill their ethical obligations to represent their clients competently when they delegated to the mediator, unsupervised, responsibility for a confidentiality agreement which prejudiced their clients so badly?

Negotiations with opposing counsel

How often does your mediation start with your mediator (or a receptionist) escorting you to Conference Room East, and the other side to Conference Room West, and never the twain do meet? How often does the mediator ferry all offers and demands back and forth? You never quite know how faithfully the mediator is reporting your message to them or theirs to you.

How often does the mediator school you as to what your next number really has to be? And, finally, how often does the mediator lay down the law that once the number reaches a certain point, you have to take the deal? Isn't mediation of this type starting to sound like, under the forbidden standard of *Moore v. State Bar*, you are placing yourself in the position of your client rather than your client's lawyer? It's hard to find any part of the negotiations with opposing counsel which you are conducting yourself.

The problems with mediation of this type are not merely abstract, they are quite concrete. Consider the oft-discussed hypothetical where the plaintiff's bottom line and the defendant's top dollar overlap. For example, a plaintiff's bottom line is to take anything over $80, a defendant's top dollar is to pay anything under $100. Obviously, this case should settle. But where?

A lawyer is obligated to push the number as close to their end of the range as possible. A mediator is not. If a mediator tells this plaintiff the best he can get her is $80 or tells this defendant the best he can get her is $100, the case settles and the problems are obvious. The mediator may have picked a number that benefits a repeat-player or otherwise-favored client; the mediator may have a bias or prejudice, conscious or subconscious, for or against one side or another (opportunistic plaintiffs? stingy insurance companies?); or the mediator may have opera tickets that night and just want to get out of there once he gets the other side to the minimally-acceptable point in your zone of possible agreement.

The lawyers may have been able to do better for their clients. But they didn't even try. Responsibility for the negotiation has been abandoned to the mediator. How can these lawyers say they have discharged their duty to represent, to act on behalf of, their clients competently?

Settlement agreements

How often does your mediation end with your mediator springing a settlement agreement on you, as full-blown as Athena from the brow of Zeus? In defense of this practice, mediators commonly say they are lawyers too; they know all about whatever kind of case is being mediated and how these cases typically settle; they have seen a million settlement agreements and know, often better than the lawyers, what these settlement agreements should say; there's no need to waste

[13] *Id.* at 1041.

time letting a bunch of contentious lawyers draft something from scratch; and everyone is entitled to the benefit of the fruits of the mediator's lawyering skills.

Actually, no.

Clients are entitled to the benefits of their own lawyers' lawyering skills. Those are the lawyers the clients have hired to perform lawyering tasks on their behalf. From the mediator, everyone is entitled to the benefits of mediation skills. Mediation skills are different than lawyering skills, and to be a mediator is different than being a lawyer.

Were it otherwise, every lawyer would be a good mediator, and we know that's not so. Because being a mediator is different than being a lawyer, non-lawyers can (and do!) serve as mediators at very high levels of skill. It's also why mediators who are also lawyers can serve as mediators without violating certain fundamental rules of legal ethics, such as the prohibition against lawyers working for both sides to the same lawsuit.

Lawyers are generally competent to prepare their own settlement agreements. It's likely that not only the mediator, but also the lawyers, have worked on similar cases before and have precedent forms of settlement agreements on their laptop computers. With the mediator as a chaperone, lawyers are usually able to work collaboratively enough to produce a settlement agreement.

And not every term of a settlement agreement is cookie-cutter. Some, such as the scope of a release or the extent of a confidentiality obligation, are frequently customized. What if the mediator's "standard" language does not protect your client? It can be an uphill fight to eliminate language the mediator has blessed as "standard."

When the lawyers work together to draft these terms, they eliminate the risk that the mediator's language will prejudice their ability to produce an agreement that protects their client. As with confidentiality agreements, a mediator-drafted settlement agreement mistakenly places a lawyer in the position of their client rather than in the position of their client's lawyer.

The safest harbor for lawyers is never to allow a mediator to hold the pen or touch the keyboard when it's time to draft the settlement agreement. Even if the mediator is coaching or suggesting language, the ultimate decision as to the language to include will then belong to the lawyers, who appropriately will be the settlement agreement's authors.

The Cure

The cure is obvious. In mediations, to discharge your ethical obligations to your clients, lawyers must neither delegate nor allow mediators to seize inappropriate responsibilities. When lawyers do delegate responsibilities to mediators, lawyers must make sure they are supervising the mediator, not the other way around.

Lawyers should not blithely sign whatever confidentiality agreement a mediator puts under their nose. Lawyers themselves should conduct as much of the face-to-face settlement negotiations as possible, and when they delegate to the mediator the task of face-to-face communication, lawyers should make sure they are supervising the mediator.

Lawyers should always draft their own settlement agreements. Then, lawyers are engaging in good mediation, in which the mediator is facilitating the lawyers' negotiation. This is in contrast to bad mediation, in which lawyers rely excessively on the mediator to negotiate for them.

The dividing line between ethical and unethical conduct by lawyers in mediation will depend on all the facts and circumstances and will be a matter of degree. This much, though, is pretty clear: If the mediator drafts a nonnegotiable confidentiality agreement, if you have no face-to-face communication with anyone from the other side and if the mediator drafts a nonnegotiable (or even awkward-to-negotiate) settlement agreement, you're probably on the wrong side of that line.

Finally, why should we bother with this as an ethical issue at all? After all, your state bar disciplinary cops are not likely to raid your mediation or haul you up on charges for excessive delegation of responsibility to mediators. Fear of getting caught, though, is not the reason most lawyers follow the ethical rules.

While Model Rule 1.1 and California Rule 3-110 hold lawyers to a standard of competence, almost all lawyers I know hold themselves to a standard of excellence. The best lawyers won't play cute with these rules and test their boundaries. The best lawyers will want to stay well within these rules and make sure they provide excellent and ethical representation to their clients. To accomplish that, the best lawyers will perform lawyering tasks themselves, and not delegate excessive or unsupervised responsibility for those tasks to mediators.

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