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When Matrimonial Attorneys Become Divorce Mediators

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The practice of divorce mediation in New York State is largely unregulated, having never adopted the Model Standards of Practice for Family and Divorce Mediation. As a result, there are no standard rules for the practice of mediation in New York State. Nor is there a specific certification stating who may act in the capacity of divorce mediator, although as part of a statewide alternative dispute resolution program of the New York State Unified Court System, matrimonial attorneys wishing to participate as mediators must complete a 40-hour course requirement, according to Part 146 of the Rules of the Chief Administrative Judge. Many matrimonial attorneys will take on divorce mediation cases and agree to act in the capacity of divorce mediator. Sometimes, the attorneys are trained and experienced in divorce mediation, whereas other times they are not. Results may vary based upon the mediator's understanding of how divorce mediation should be conducted.

The role of a matrimonial attorney in representing a litigant differs greatly from the role of a divorce mediator in a number of ways. Foremost, a matrimonial attorney only represents one client, whereas a divorce mediator acts as a

neutral for both parties. Matrimonial attorneys who mediate are held to a higher standard than other mediators. While the legal and ethical rules regarding attorneys acting as mediators are still somewhat unclear, they pertain to largely to issues of confidentiality and conflict of interest.

Litigation v. Mediation

Generally, matrimonial attorneys seek to obtain the best result for their client, whether that means getting the largest financial settlement possible or obtaining full custody of the children. Litigators often view the divorce process as a legal problem to be resolved with the court system, judges, attorneys for the parties, attorneys for the children, business valuators, forensic evaluations of the parties and the children, and so forth. The culmination of the legal process in most litigation matters often ends with a legal settlement between the parties and their attorneys. In some cases, the parties' legal matter can result in a trial, during which time both parties will be permitted to make opening and closing statements, present evidence and call witnesses to testify on their behalf, cross examine the other party, challenge the other party's evidence and witnesses, and so forth. Trials follow the rules of procedure and evidence, after which the judge renders a final decision, directing how the parties' finances are to be distributed, as well as a parenting schedule that both parties and the children must follow.

Divorce mediators, on the other hand, follow a process based upon the guiding principal of self-determination. Mediators view divorce less through the lens of a legal problem and more as a situation the parties find themselves in which requires a solution with the assistance of the mediator. The mediator conducts the mediation sessions in an impartial manner, provides the parties with sufficient knowledge and information of the law, facilitates communication between the parties, helps establish empathy between the parties, and assists

the parties in understanding their own needs and interests. The mediator relies upon the ability of the parties themselves to voluntarily participate in the mediation process, to make their own decisions, and to construct their own divorce agreement with the support and guidance of the mediator. Mediators seek a win-win for the parties and, in the case of children, a win-win-win for all.

Case Law Seeks to Clarify

The first serious look by the New York State courts at the role of matrimonial attorneys who act in the capacity of divorce mediators was in the matter of *Bauerle v. Bauerle*, 206 A.D. 25 937, 616 N.Y.S.2d 275 (4th Dept. 1994). In that matter, the parties had a meeting preliminary to a prospective mediation with an associate attorney of a law firm who was also a trained mediator, which lasted approximately two hours. During the meeting, the attorney explained the mediation process to the parties. They discussed the Child Support Standards Act, the assets and liabilities of the parties, the income of the parties, issues of custody, visitation, child support, spousal maintenance, marital property, and equitable distribution.

Ultimately, the parties decided to forgo mediation and one of the parties retained the law firm as his attorney in the divorce action. The other party then moved to disqualify the law firm. The attorney conceded that if he had started mediation with the parties he may not subsequently represent either spouse in the divorce action but that, since he never started mediation with the parties, neither he nor his law firm was disqualified from representing either one of the parties. The lower court ruled that there was no prior attorney-client relationship between the law firm and the other spouse, since mediation never commenced and there was no disclosure of confidential information.

An appeal was filed and the Appellate Court reversed, finding that "the initial orientation session constituted an integral first step in the mediation process" and that the "preliminary orientation session is materially indistinguishable from the initial consultation with an attorney whereupon information is disclosed in confidence by a prospective client who later decides not to retain the attorney [and therefore] the attorney is disqualified from representing the spouse of that prospective client." The court further held that "there is no need to establish that confidential information was disclosed." Further, since the parties discussed issues pertaining to custody, visitation, marital property, equitable distribution, child support, and spousal maintenance, the court concluded that "information relevant and material to the divorce action was obtained by, or imparted to, [the attorney], during that initial session."

The Appellate Court further held that "because the parties are encouraged to be candid and to disclose fully their circumstances and positions in mediation, disclosures that are relevant to the subject of mediation or litigation made in the context of mediation are deemed confidential even though the adversary party is not present."

In its decision, the court failed to distinguish between the role played by a divorce mediator who is also an attorney, versus that of a matrimonial attorney, on the basis that much of the same information conveyed to a mediator would ordinarily be of a confidential nature if it had been conveyed to an attorney. Noticeably absent from its decision is the language of New York State Civil Practice Law and Rules Article 45, which covers the inadmissibility of confidential communications, and which does not explicitly mention a privilege of confidentiality between parties and mediator.

Approximately 10 years later, the New York State courts once again examined the role of matrimonial attorneys who act in the capacity of divorce mediator,

in the matter of *J.R.M. v. P.A.M.,* 5 Misc.3d 1003, 798 N.Y.S.2d 710 (Fam. Ct., Nassau County, 2004). In that matter, a matrimonial attorney represented both parties in a negotiated settlement agreement. Subsequently, the law firm sought to represent one of the parties in a family court proceeding, and the other party sought to disqualify the attorney and his law firm, on the basis that the attorney was given confidential and privileged information that was provided during mediation at the time the settlement was negotiated, which the attorney denied. The court disqualified the law firm, on the basis that the attorney previously rendered "mediation" services to the parties regarding negotiations that occurred, and which resulted in an agreement between the parties.

In its decision, the court did not attempt to distinguish between divorce mediation services rendered by a mediator who is also an attorney, versus an attorney who represents both parties in the negotiation and drafting of an agreement in a matrimonial action. Instead, the court simply chose to focus its attention on the Code of Professional Responsibility for attorneys in New York State. In its decision, the court stated that "The critical issue here...is not the actual or probable betrayal of confidences, but the mere appearance of impropriety and conflict of interest." It further stated that "a lawyer may serve in the capacity of an impartial arbitrator or mediator even for present or former clients provided the lawyer makes appropriate disclosures and thereafter declines to represent any of the parties in the dispute." The court's decision does not go on to state what those proper disclosures might be.

A few cases did attempt to clarify the issue regarding confidentiality in the mediation process where the mediator was also an attorney. In *Hauzinger v. Hauzinger*, 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dept. 2007), a nonparty witness in a divorce action appealed from an order denying his motion

seeking to quash a subpoena issued by one of the parties for his appearance at a deposition and for his records in connection with a mediation process that he conducted with the parties prior to the commencement of the action.

At the deposition, one of the parties wanted to show the circumstances surrounding the execution of the separation agreement entered into during the mediation process, to demonstrate that the terms of the agreement were not fair and reasonable at the time of the making of the agreement. The Appellate Division upheld the lower court, stating that it did not abuse its discretion in refusing to enforce the confidentiality agreement entered into by the parties as part of the mediation process.

However, in *Radoncic v. Velcek*, 20 Misc.3d 1141, 873 N.Y.S.2d 236 (Sup. Ct., Nassau County, 2008), the court took a different view, extending the statutory protection of Domestic Relations Law Section 235, which prohibits an officer of the court from releasing any pleadings, affidavits, judgments, agreements, memoranda, transcripts and other documents in a matrimonial action to anyone other than a party and his or her attorney, to "any and all documents related to any alternative dispute resolution proceedings, including, but not limited to arbitration or mediation sessions, related to...divorce and separation proceedings...including but not limited to correspondence...and any and all submissions provided to any arbitrator or mediator."

The court of Appeals attempted to resolve the conflict between these two cases in *Hauzinger v. Hauzinger*, 10 N.Y.3d 923, 862 N.Y.S.2d 456 (2008). In this matter, the parties signed a waiver, releasing the mediator from maintaining confidentiality. In its decision, the court denied the mediator's contention that a qualified privilege existed pursuant to New York State Civil Practice Law and Rules Section 3101(b), which prohibits the admissibility of

privileged material, stating that while the privilege of confidentiality existed for mediation, it was nonetheless explicitly waived by the parties in writing.

The courts have also attempted to clarify issues regarding conflict of interest. In the matter of *In re: Knight*, 308 A.D.2d 189, 763 N.Y.S.2d 94 (2nd Dept. 2003), the court held that the attorney engaged in a conflict of interest by serving as mediator for both parties in a matrimonial action, and then filing the final divorce documents as attorney for one of the parties without disclosing his service as mediator to the other party and the court. Presumably, the court relied upon the *J.R.M. v. P.A.M.* case, which permits attorneys to act as mediators upon the presentation of proper disclosures, whatever those might be.

Most divorce mediators who are also attorneys will have the parties execute written confidentiality agreements which are often times a part of their standard retainer agreements that they sign. Regarding conflict of interest, most attorneys will refrain from switching roles between attorney and mediator in either direction, once the litigation or mediation process is already under way, despite there being some vague provision in the law allowing them to do so under so called proper disclosures as referred to in the above cases.

Conclusion

As these types of switching of roles between attorneys and mediators become more commonplace, the courts will need to further clarify under what circumstances matrimonial attorneys may act in the capacity of divorce mediators, what the rules are for such attorneys as they relate to potential conflicts of interests, and what steps such attorneys may take to protect themselves when they are accused of breaching confidentiality agreements. Hopefully, this will lead to better understanding of the role of matrimonial

attorneys acting in the capacity of divorce mediators, as well as a greater appreciation of the divorce mediation process as a whole.

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