NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1026 (10/1/14)

Topic: Ethical duties of lawyer-mediator; confidentiality duties as to work of fiction

Digest: A lawyer-mediator who provides mediation services that are not distinct from legal services is subject to the Rules of Professional Conduct with respect to the mediation services, and those Rules protect confidential information that the lawyer-mediator learns about a client. The lawyer-mediator may not include such information in a work of fiction if there is a reasonable likelihood that readers will be able to ascertain the client's identity.

Rules: 1.6; 1.9(c); 2.4; 5.7(a)

FACTS

1. The inquirer is an attorney who also serves as a private mediator in divorce cases. The inquirer does not advertise, but potential parties to a mediation learn that he is a lawyer because, among other things, his answering machine greeting says, "You have reached the law and mediation offices of [name of inquirer]," and parties who wish to retain the inquirer must sign retainer papers making clear that the inquirer is a practicing attorney. In fact, many divorcing parties come to the inquirer precisely because he is also a lawyer.

2. Inquirer's services for divorcing parties are not limited to mediation services. When mediation is successful – *i.e.*, the parties reach a settlement – the inquirer drafts the court papers to formalize the divorce according to the settlement terms. In advance of the mediation, divorcing parties sign both a mediation retainer agreement and a separate retainer agreement by which they retain the inquirer, in his capacity as an attorney, to draft and file with a court the papers necessary to obtain a divorce.[1]

[1] We have not been asked whether a lawyer-mediator may ethically represent the mediating parties in filing for a divorce in court, but we note N.Y. State 736 (2001) ("An attorney-mediator may prepare divorce documents incorporating a mutually acceptable separation agreement and represent both parties only in those cases where mediation has proven entirely successful, the parties are fully informed, no contested issues remain, and the attorney-mediator satisfies" the applicable conflict Rules). In addition, Rule 1.12(b) – which did not exist when N.Y. State 736 was issued – provides that the inquirer may not represent either party after the mediation (in court or otherwise) "unless all parties to the proceeding give informed consent, confirmed in writing." The inquirer should also consult Rule 1.12(c), which provides that a lawyer "shall not negotiate for employment with any person who is involved as a party … in a matter in which the lawyer is participating personally and substantially as … an arbitrator, mediator or other third-party neutral." This rule may prohibit the inquirer from asking the party to sign a retainer for post-mediation legal services *during* the mediation, but we have not been asked whether it is permissible to propose a retainer for post-mediation legal services *before* the mediation begins.

3. The mediation retainer agreement contains a section governing confidentiality, which promises "complete confidentiality" from all outside parties and proceedings, unless all parties to the mediation give their written consent. The mediation retainer agreement also states that the inquirer in his role as a mediator does not represent the parties and is not providing legal advice or legal assistance to either party in the context of the mediation. But, as provided in the legal retainer agreement, he will represent the parties in drafting and filing the court papers to obtain a divorce if the mediation results in a settlement.

4. The inquirer now wants to write a book containing stories and events drawn from information about his divorce mediation clients. He would change the clients' names and geographic locations, and would fictionalize various segments by adding children, addictions, extramarital affairs, etc. He would also sometimes blend the stories of multiple clients to safeguard against revealing sensitive and personal information that he obtained in confidence as a divorce mediator. He wants to know whether he may ethically do this without violating the New York Rules of Professional Conduct (the "Rules").

QUESTION

5. May a lawyer-mediator who handles divorce mediation, and subsequently provides legal services to those parties when the mediation is successful, publish a book of fiction that is based in part on facts relating to the mediation parties without obtaining the consent of those parties?

OPINION

6. Service of a lawyer as a mediator is expressly addressed by Rule 2.4 ("Lawyer Serving as Third-Party Neutral"), which had no equivalent in the former New York Lawyer's Code of Professional Responsibility. Rule 2.4 provides, in full, as follows:

> (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a ***mediator*** or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client. [Emphasis added.]

This Rule, which refers to mediation parties as persons who are not law clients represented by the lawyer-mediator, does not by itself make a lawyer's service as a mediator subject to all the duties imposed by the other Rules. In particular, the Rule, by itself, imposes no duty of confidentiality. *See* Rule 1.12, Cmt. [3] (noting generally that "lawyers who serve as third-party

neutrals do not obtain information concerning the parties that is protected under Rule 1.6"). But there are other possible sources of confidentiality duties.

7. We do not consider whether substantive laws (such as statutes or court rules) or private sources of guidance (such as ethics codes promulgated by mediation groups) impose duties of confidentiality on mediators. Our jurisdiction is limited to interpreting the Rules. The inquirer should therefore research substantive law and ethics codes that may apply to him in his capacity as a mediator. *See* Rule 2.4, Cmt. [2] ("the lawyer may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics"); Rule 1.12, Cmt. [3] (lawyers who serve as third-party neutrals "typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals").

8. Rather, the question before us is whether the New York Rules of Professional Conduct impose a duty of confidentiality on a divorce mediator who also drafts and files divorce papers with the appropriate court if the mediation results in an agreement. We think they do, even though the duty is not based on Rule 2.4.

9. Mediation is a "nonlegal service" as defined by Rule 5.7(c), and it therefore implicates Rule 5.7 ("Responsibilities Regarding Nonlegal Services"). Rule 5.7(a)(1) provides:

> A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

10. The mediation services that the inquirer provides to the mediating parties are "not distinct" from the legal services that he provides. The mediation itself (the nonlegal service) is designed to result in a "Memorandum of Understanding," and the inquirer's separate retainer for drafting and filing the divorce papers in court (the legal services) says that he will draw up the legal divorce documents in accordance with the Memorandum of Understanding. Thus the legal and nonlegal services that the inquirer provides, far from being "distinct," are intimately bound up with each other. *Cf.* N.Y. State 1015 ¶14 (2014) (discussing factors bearing on whether legal and nonlegal services are distinct). Consequently, the inquirer is subject to the Rules – including their confidentiality provisions – not only when he provides legal services (representing the parties in court) but also when he provides nonlegal services (serving as a divorce mediator). [2]

[2] Given the relationship between the legal and nonlegal services in this inquiry, the disclaimer found in Rule 5.7(a)(4) is not available. Rule 5.7(a)(4) provides:

> For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services….

Because paragraph (a)(1) is not listed, the disclaimer is not effective when, as here, the legal and nonlegal services are not distinct from each other.

11. Under Rule 5.7(a)(1), therefore, the inquirer is "subject to" the duty of confidentiality articulated in Rule 1.6 with respect to information that the inquirer learns from the parties during the mediation process.[3] Unless there is informed consent or some other applicable exception:

> A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person….
>
> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, ***(b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.*** "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

Rule 1.6(a) (emphasis added).

12. Applying this Rule to the mediation process, the inquirer wishes to use information "gained during" the mediation and the post-mediation court proceedings. The information is not protected by the attorney-client privilege (because both opposing parties take part in the communications with the inquirer), but much of the information is "likely to be embarrassing or detrimental to the client if disclosed," and is also "information that the client has requested be kept confidential" by signing a retainer agreement in which the client is promised "complete confidentiality." Such information is thus confidential within the meaning of Rule 1.6. Under that Rule, the inquirer may not publish a book revealing that information in the absence of informed consent or some other applicable exception to the duty of confidentiality. And that duty continues even after conclusion of the post-mediation legal representation. *See* Rule 1.9(c)(2) (providing that a lawyer "who has formerly represented a client in a matter … shall not thereafter … reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client).

13. However, the conclusion that the inquirer owes a duty of confidentiality to the mediating parties does not end our analysis. The inquirer plans to write what is essentially a work of fiction based on confidential information that will be altered, augmented, rearranged, and amplified with details from the inquirer's imagination. Comment [4] to Rule 1.6 briefly addresses the issue of hypotheticals, saying:

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[3] We have previously opined that even if nonlawyers may engage in divorce mediation, *lawyers* who serve as mediators "should be presumed to be rendering a legal service". N.Y. State 678 (1996). That presumption too would support our conclusion that there is a duty of confidentiality, but the presumption is controversial, especially after the adoption of Rule 2.4. *See* N.Y. State 979 ¶¶ 6-7 (2013) (citing conflicting authorities but not opining as to continuing validity of N.Y. State 678). Here, Rule 5.7(a)(1) gives rise to a duty of confidentiality even if the mediation services by the inquirer are not legal services. Thus we again have no need to address the status of N.Y. State 678.

> Paragraph (a) [of Rule 1.6] prohibits a lawyer from knowingly revealing confidential information as defined by this Rule. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal confidential information but could reasonably lead to the discovery of such information by a third person. ***A lawyer's use of a hypothetical to discuss issues relating to the representation with persons not connected to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client.*** [Emphasis added.]

14. The issue addressed by Comment [4] arises not only in the context of hypotheticals but also in the context of fiction. Indeed, there are many well-known lawyer-novelists (such as Scott Turow, David Baldacci, Alafair Burke, John Grisham, Lisa Scottoline, Erle Stanley Gardner, and Louis Auchincloss), and their books are often apparently based in part on the authors' personal experiences as lawyers. But when a lawyer's writings could not reasonably lead to the discovery of confidential information by a third person, then the common-sense implication of Comment [4] is that the duty of confidentiality is not violated. A lawyer may publish a work of fiction inspired by issues relating to a represented client so long as there is no reasonable likelihood that the reader will be able to ascertain the client's identity.

15. Applying that standard here, if the inquirer writes a book in which there is "no reasonable likelihood" that readers will be able to identify his mediation and divorce clients, then the inquirer will not violate any duty of confidentiality imposed by the Rules. In essence, if confidential information is sufficiently altered, disguised, rearranged, and infused with the inquirer's own imagination so that no one can trace particular information to a particular client, then the book will not reveal "confidential information" within the meaning of Rule 1.6.

16. We caution, however, that this is a high standard that may be difficult to meet. The inquirer has a local practice serving individual clients. Details that would be meaningless to a person across the country may provide meaningful clues to a person living in the same county or village. The inquirer will need to pay meticulous attention, fact by fact and detail by detail, to ensure that readers cannot identify his clients. For readers of the book who know (or know of) the inquirer's clients, concealing their identities may be nearly impossible. Perhaps it can be done, but we do not want to make it sound like an easy task.

17. Finally, because the inquirer's retainer agreement for mediation services promises "complete confidentiality" to the mediating parties, the inquirer would appear to have contractual obligations of confidentiality to those who sign the retainer. Whether the scope of that contractual promise is broader than the inquirer's duty of confidentiality under the Rules is a question of law beyond our jurisdiction to decide.

CONCLUSION

18. A lawyer-mediator who serves as a private mediator in divorce cases, and thereafter represents the mediating parties by drafting and filing the papers needed to secure a divorce in court, is providing mediation services that are not distinct from legal services. The lawyer-mediator is therefore subject to the Rules of Professional Conduct with respect to the mediation services. In particular, the Rules protect confidential information about a client that was learned

in the mediation or subsequent court proceedings. The lawyer-mediator may not publish a work of fiction that includes such confidential information if there is a reasonable likelihood that the reader will be able to ascertain the client's identity.

(21-14)