New York Appellate Court Enforces Subpoena Against Mediator

By Justin Kelly, ADRWorld.com

(10.18.2007) In a ruling that observers say reinforces the need for passage of the Uniform Mediation Act, a New York appellate court recently upheld a judge's decision to enforce a subpoena against a mediator that sought information about a settlement agreement reached during mediation of a divorce case.

In a Sept. 28 opinion in Richard Hauzinger v. Aurela Hauzinger (No. CA 07-00659), New York's Fourth Appellate Division specifically refused to apply the confidentiality privilege enshrined in the UMA and quash the subpoena, ruling the judge was correct to enforce the subpoena as it was necessary for the court to determine the fairness of the separation agreement entered into by the parties.

According to the court, state domestic relations law charges courts with determining whether the terms of a separation agreement "were fair and reasonable at the time of the making of the agreement (Domestic Relations Law § 236 [B] [3])."

The court went on to say "we reject appellant's contention that the court abused its discretion in refusing to enforce the confidentiality agreement entered into by the parties as part of the mediation process (cf. Lynbrook Glass & Architectural Metals Corp. v Elite Assoc., 238 AD2d 319), and in refusing to quash the subpoena as a matter of public policy."

It added, "Although appellant urges this Court to apply the confidentiality provisions in the Uniform Mediation Act as a matter of public policy, New York has not adopted that Act and we decline to do so."

In Lynbrook Glass, the Second Appellate Division ruled the opposite way, upholding a trial court's decision not to compel disclosure of a privileged mediation report.

Adam Berger, a collaborative attorney and mediator in New York and immediate past president of the Family and Divorce Mediation Council of Greater New York, said the ruling is "not something the mediation community is happy with and does a disservice to mediators and their clients.

"It would be preferable if there was passage of the Uniform Mediation Act in the legislature," he suggested.

According to Berger, the organizational components of the mediation community are currently considering how to respond to the ruling. A task force is deciding whether to participate in any appeal by filing amicus briefs, he added.

David White, an attorney with White & Associates in New York and an adjunct professor at Fordham Law School, suggested that "despite broad-based support for adoption of the Unified Mediation Act, the New York State legislature's continuing hesitance to make the UMA the law of the land reflects uncertainties in our legal community.

"The Fourth Department, while correctly noting the absence of controlling statutory authority, failed to seize upon an uncommon opportunity to refine the evolving doctrine of mediation confidentiality," he said.

According to White, "there is a compelling public interest which militates in favor of preserving the sacrosanct nature of mediation." "Any encroachment upon this central tenet does violence to the process and serves to erode disputant confidence," he added.

Carroll E. Neesemann, an attorney with Morrison & Foerster LLP in New York, said "now that this ruling is on the books shows more graphically the need for the UMA in New York.

He said it is "unfortunate that the judge had precedent to enforce the agreement of the parties" but chose to disregard it, and uphold enforcement of the subpoena.

Richard Reuben, a professor at the University of Missouri-Columbia School of Law and reporter for the UMA drafting committee, said the ruling "is a good of example of the danger that lies out there for mediation confidentiality in states that don't have the protections of the UMA and are simply assuming that courts will be protective of mediation confidentiality.

"The UMA was drafted with the benefit of the experience of mediation in the 50 states, so we knew what problems were out there that needed to be addressed to provide comprehensive protection for mediation and participants in the process," he noted.

Hanan M. Isaacs, an attorney and mediator in Princeton, NJ, said the NY Appellate Division "rode roughshod over the parties' self-determined expression" that communications made during the course of mediation should remain confidential. "This is a court that clearly did not get the parties' stated interest in mediation confidentiality," he added.

According to Isaacs, the ruling means that "in a jurisdiction without the UMA, like New York, it is possible, as happened in this case, that mediators and parties cannot even rely on the sanctity of contractual terms, which ordinarily are deemed the bedrock law of the case." The court's ruling "violates many principles that New York mediators and their clients hold dear," he added.

He said the ruling should compel members of the New York mediation community to "lobby hard and fast for passage of the UMA." However, he counseled against appealing

the ruling, suggesting a New York Court of Appeals decision that adopted the reasoning in the opinion "could put a stake through mediation's heart, at one blow."