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ETHICS AND NEGOTIATIONS

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SUMMARY OF CASE

Nicky Dollar is the beneficiary of a trust created by his grandfather, who was a banker who spent his whole career with a small community bank. That bank was merged five years ago into In God We Trust Company ("IGWT").

The trust provides all income to Nicky until he reaches 75 years old. He is currently 50 years old. The trust also allows the trustee to terminate the trust in its discretion and give the corpus to Nicky.

75% of the trust corpus is held in stock in IGWT, since Nicky's grandfather had accumulated stock in the small community bank that became IGWT. When IGWT became trustee, Nicky signed an Agreement prepared by IGWT's counsel, which approved the retention of that stock. That Agreement did not approve the administration of the Trust.

The IGWT stock has lost value in the last five years and has dropped from $10 million to $5 million. Nicky claims that the Agreement was never explained to him and that in any event IGWT should have liquidated the stock.

Nicky has filed suit against IGWT. The court has directed the parties to mediation.

The parties attend the mediation with their attorneys. The Chief Fiduciary Officer of IGWT attends, with counsel. Nicky and his counsel attend. Nicky also has his financial advisor – his cousin Vinny – attend the mediation.

Roles for the mediation:

Moderator/mediator:	Steven Mignogna
Nicky Dollar:	Dick Nenno
Nicky's Lawyer	Matt Triggs
Nicky's Financial Advisor:	Rob Steele
IGWT Officer:	Jo Ann Engelhardt
Attorney for IGWT:	Terry Franklin

THE FOLLOWING IS AN EXCERPT FROM THE BOOK, *MEDIATION FOR ESTATE PLANNERS*, EDITED BY SUSAN L. GARY, WITH THE FOLLOWING CHAPTER BY MICHAEL D. SIMON. THE MATERIAL IS RE-PRINTED WITH THE PERMISSION OF MS. GARY AND MR. SIMON. THE BOOK IS PUBLISHED THROUGH THE ABA REAL PROPERTY, TRUST AND ESTATE LAW SECTION.

Chapter 3

Ethics in Mediation

Michael D. Simon

Properly applying the ethics rules for lawyers involved in mediation can be challenging. This chapter discusses some of the more common ethical issues that arise for lawyers representing clients in mediation (mediators have their own ethical standards). The materials will provide a good resource to help the reader identify the applicable American Bar Association Model Rules of Professional Conduct, ethics opinions, and case law. Because each state has its own ethical rules, review of a state's particular rules will be important. This chapter identifies some common issues and the application of the Model Rules to those issues, as a way to help the reader identify the issues that require further exploration and thought in the context of a particular state.

Note: References in this chapter to "Rule _____" are to the ABA Model Rules of Professional Conduct.

I. SETTLEMENT

A. Authority to Settle

Sometimes, in connection with a mediation, a client may delegate settlement authority to the lawyer. A number of ethical rules apply in connection with authority to settle, and under most circumstances there are simply too many variables in a settlement for a lawyer to make settlement decisions without a client's participation and informed consent.

This issue can arise in several different ways: (1) a client may not want to travel to mediation in another state, may have a vacation planned on the mediation date, or may simply not want to attend mediation; (2) a client who planned to be at mediation, but is unexpectedly unavailable (e.g. missed a plane, got sick, etc.), hastily delegates settlement authority to his lawyer, who attends mediation without the client; (3) as the hour grows late and the mediation-weary clients fade, the lawyers go into a room, without their clients, and "cut a deal." Regardless of the reason for the client's absence, the common thread in these scenarios is that based on previously delegated settlement authority (actual or perceived), the lawyer is deciding whether to settle and on what terms, without further input from the client.

It is well-established that the client has the ultimate authority to settle a claim.[i] Thus, under Rule 1.2 a lawyer must have the client's authorization to settle a matter on the client's behalf. Very few lawyers would disagree with the forgoing, in concept. The difficulty comes in applying these concepts in practice.

Delegated settlement authority is an ethical quagmire for lawyers, and can be a trap for the unwary. For example, Comment [3] to Rule 1.2 states: "At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation." A reading of Comment [3], in isolation, could easily lead one to conclude that a lawyer could obtain settlement authority from a client before mediation and then safely attend mediation and settle the client's matter without the client being present and without the need for further consultation with the client. If only it were that simple.

[i] *See* Rule 1.2 ("A lawyer shall abide by a client's decision whether to settle a matter."); *see also, Fennell v. TLB Kent Co.* 865 F.2d. 498 (2d Cir. 1989) ("We begin with the undisputed proposition that the decision to settle is the client's to make, not the attorney's").

Only under very limited circumstances may a lawyer accept or reject a settlement without communicating the particulars of that settlement to the client in a manner sufficient to obtain the clients "informed consent."[ii] Even if a client previously agreed to accept a certain sum to settle a matter, there could be any number of non-monetary terms associated with the settlement that require the client's consideration (e.g. payment over time or the requirement of a broad release). The best practice is for the client to attend the mediation and actively participate in all phases of the settlement process. If the client cannot attend the mediation in person, the lawyer would be well advised to make arrangements, in advance, for the client to participate in the mediation by video conference or by telephone. These arrangements should include a way for the client to be able to receive and review documents (particularly drafts and the final version of any settlement agreement), and for the client to be able to sign and return a settlement agreement on the day of mediation.

B. Bullying the Client into Settlement

In the midst of mediation, a settlement offer is presented which the lawyer thinks is excellent but the client finds to be lacking due to his inflated opinion of the case. The lawyer informs the client that if he or she does not accept the offer, the lawyer will withdraw. May a lawyer apply pressure to a client, who he or she believes is unreasonably refusing to settle, by threatening to withdraw if the client does not settle?

A lawyer has an obligation to counsel his or her client, and in some circumstances, proper counseling includes blunt advice. However, a lawyer crosses the line when the counseling becomes coercion. Where that coercion line may lie is a judgment call that each lawyer must make on a client-by-client basis. Courts have held that under Model Rule 1.16, a disagreement about whether to settle, alone, is not good cause for a lawyer's withdrawal.[iii] Thus, a lawyer's threat of withdrawal due to a client's refusal to follow his or her advice on settlement will be considered unfounded and made purely for the purposes of coercion. Such a threat may be considered a violation of Model Rule 1.2(a) as infringing on the client's right to decide on settlement; therefore, it should be avoided.

II. INTERACTIONS WITH THE OPPOSING PARTY AND OPPOSING COUNSEL

A. Obligations on Becoming Aware of Legal Malpractice

A lawyer representing a creditor of an estate learns during the course of mediation that his client's former lawyer failed to follow the procedures required under the Probate Code and that, as a result, the client's creditor's claim is likely to be barred. Does the lawyer have a duty to report another lawyer's malpractice?

In general, a lawyer's duty to report malpractice is limited to circumstances of which the lawyer has actual knowledge, rather than mere suspicions. Rule 1.6 (Confidentiality of Information) trumps the Rule 8.3 reporting requirements. Thus, if the reporting of misconduct would reveal information relating to the representation of a client, a lawyer must obtain the client's informed consent prior to making such a report. Keep in mind that Rule 1.6 is broader than attorney-client privilege and as such, all information relating to the representation is within the scope of Rule 1.6.

The application of Rule 8.3, Reporting Professional Misconduct, in a mediation setting is tricky. The lawyer is at mediation to resolve issues, not to create them. Reporting another lawyer to the bar will be a major distraction to the task at hand. Thus, the issue becomes "Is this something I really need to report or is it just something that looks bad?" Further, the client may not want her lawyer to sidetrack the mediation or to reveal her confidential information. Thus, the client may not consent to the revelation of the information necessary to report the malpractice. Because Rule 1.6 trumps Rule 8.3, an attorney may not report malpractice if it will require the divulgence of information relating to the

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[ii] *See* Rule 1.0 (Terminology: Informed consent). *See, also,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 27 (illustrations 3 and 4 discuss situations where the lawyer does and does not have authority to settle); Arizona Ethics Op. 06-07 (A lawyer is precluded from obtaining a blanket authorization from a client allowing the lawyer to decide whether to settle the client's claim.)

[iii] *Nehad v. Mukasey*, 535 F.3d 962, 971 (9th Cir. 2008). *See, also, When a Client Repudiates a Settlement, What Can You Do?,* OREGON STATE BAR BULLETIN (May 2008) (explaining that a client's right to refuse settlement is unqualified under Rule 1.2 and by itself is not good cause for an attorney's withdrawal under Rule 1.16); Stephen Ellman, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987) (stating that a lawyer who threatens to withdraw in an effort to change the client's behavior is engaging in coercion if the attorney does not have proper grounds for withdrawal).

representation.[iv]

What if during the mediation a lawyer comes back from the lunch break where he enjoyed his typical seven martini meal? Or perhaps, the lawyer nods off during the mediation and seems to have trouble focusing on his client's concerns. Does another lawyer present have a duty to report this lawyer?

A lawyer may be impaired by senility or dementia due to age or illness or because of alcoholism, substance abuse, or mental illness. Because lawyers are not health care professionals, they cannot be expected to discern when another lawyer suffers from mental impairment with the precision of, for example, a psychiatrist, clinical psychologist, or therapist. Nonetheless, a lawyer may not shut his eyes to conduct that reflects generally recognized symptoms of impairment (e.g., patterns of memory lapse, or inexplicable behavior not typical of the subject lawyer, such as repeated missed deadlines).[v] Each situation must, therefore, be addressed based on the particular facts presented.[vi]

B. Threatening the Opposing Party with Criminal Prosecution

In a mediation relating to litigation centered on the testator's capacity, the estate's attorney threatens that if a settlement is not reached that day, the attorney will notify immigration authorities that the petitioner's wife is in the country illegally. Alternatively, the attorney for a trust beneficiary threatens criminal prosecution against a trustee who has allegedly stolen trust funds if a settlement for the return of the funds cannot be reached. May the lawyer on one side pressure the opposing lawyer with prosecution?

If an attorney uses the threat of unrelated criminal prosecution to coerce the opposing party into settlement, he or she violates Rule 4.4. That Rule, Respect for Rights of Third Persons, says that a lawyer cannot, as part of a representation of a client, use means that serve only to "embarrass, delay, or burden a third party."[vii] However, if the facts giving rise to the potential criminal prosecution are related to civil litigation and the lawyer does not attempt to exert improper influence over the criminal process, using the threat of criminal prosecution to gain an advantage in civil litigation will not violate the Model Rules of Professional Conduct.[viii] However, a lawyer may only use a threat of criminal prosecution if there are facts to support such a claim; otherwise, it is a violation of prohibition against non-meritorious claims per Rule 3.1 and perhaps, a violation of truthfulness requirements per Rule 4.1.

C. Threatening to File a Grievance/Refraining from Filing a Grievance

In a will contest, the Personal Representative's lawyer, who drafted the will at issue, is accused of swapping pages of the will after the testator died but before the will was admitted to probate. One of the beneficiaries threatens to file a grievance against the Personal Representative's lawyer if the case does not settle at mediation. The Personal Representative says that any settlement will have to contain an agreement by the beneficiary that no grievance will be filed against his lawyer.

May a lawyer threaten to file a grievance against opposing counsel if the matter does not settle? Is it permissible to condition a settlement on the opposing party's agreement to forego the filing of a grievance against the party's lawyer?

The threat of a grievance is not necessarily a violation of the Rules of Professional Conduct. However, if a lawyer feels that there are facts that would support such a threat, she has a duty to report those facts under Rule 8.3. For that reason, there is a certain catch-22 to the situation, because if a person feels strongly enough to lodge such a threat, she

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[iv] *See* ABA Formal Op. 04-433 (Aug. 2004) (Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law).

[v] *See* ABA Formal Op. 03-431 (Aug. 2003) (Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment).

[vi] *See* Gerald Lynch, *The Lawyer as Informer*, DUKE L.J. 491, 544-46 (1986).

[vii] Rule 4.4(a) – Respect for Rights of Third Persons.

[viii] ABA Formal Op. 92-363. *See, also*, *Rattling the Saber: The Ethics of Threatening Criminal and Disciplinary Prosecution*, 61 J. OF MO. BAR 13 (2005) ("Resolution of clear violations of criminal law that relate to and arise from the same conduct as the civil claim can and should be used as added incentives to settle a case.").

likely is already required to report the violating conduct of the other party, regardless of the opposing party's actions in response to the threat.[ix]

On the other hand, if the threat is wholly unsubstantiated, the threatening lawyer is in violation of Rule 8.4(c) for conduct involving dishonesty or deceit.[x] Thus, the threat is more likely to come in the context of: "I think you did this bad thing, but I don't yet have enough information to be sure. If we don't settle, I'm going to have to continue with my investigation, which, I believe, will reveal facts that will require me to turn you into the Bar."

Similar policies support the proposition that the forbearance from filing a grievance is not a proper subject for settlement discussions.[xi] Once a party knows that another lawyer has committed a violation of the Rules of Professional Conduct, raising substantial questions as to that lawyer's trustworthiness, the other lawyer is required by Rule 8.3(a) to file a grievance. There is no provision in the Rules for the waiver of such duty upon agreement between the noticing party and the violating lawyer. However, a situation may arise in which settlement is reached prior to the time at which a lawyer knows of a violation, as knowing has been found to be a higher standard than merely being suspicious of a violation.[xii] In such a case, a settlement provision that no further factual investigation will be performed may be appropriate.

III. INTERACTIONS WITH MEDIATOR AND OPPOSING PARTIES DURING MEDIATION

A. Representations to Mediator and Opposing Parties

As lawyers and their clients evaluate settlement proposals in mediation, they want to have as much information as possible. Thus, there will be frequent requests from one side to the other for information relating to the facts upon which a claim is based, damages allegedly suffered by the plaintiff, the legal basis for a claim, the knowledge possessed by witnesses, the client's willingness to settle for a particular amount of money, etc. Obviously, the parties and their attorneys have some information that they are glad to reveal, and other information, that they are reluctant to reveal.

1. Interactions with the Mediator – Mediation not a Tribunal

In caucus style mediation, the mediator will be the one interacting directly with the parties and seeking this information on behalf of the requesting party. The question that can arise is what level of candor, if any, is required in interactions with a mediator during an ongoing mediation?

Rule 3.3 addresses the issue of candor toward a tribunal, but because a mediation is not a tribunal, Rule 3.3 is typically not implicated during mediation.[xiii] However, the Arizona Supreme Court upheld sanctions against a lawyer, holding that a lawyer has the same duty of candor toward a settlement judge acting as a mediator as he would toward a trial judge sitting on the bench.[xiv]

2. Truthfulness and Omissions

May a lawyer be less-than-completely truthful in dealing with the mediator or opposing counsel? Under Rule 4.1, a lawyer has the duty to be truthful with the mediator, as he does with any third party with whom he communicates in the course of representing his client. ABA Formal Op. 06-439 explains: "Under Model Rule 4.1, in the context of negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as

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[ix] ABA Formal Op. 94-383. Although a threat to file a complaint in order to obtain advantage in a civil matter is not expressly prohibited, there will frequently be circumstances in which such a threat will violate Model Rule 8.3 or one of the more general restraints on advocacy imposed by the Model Rules.

[x] FL Ethics Op. 94-5.

[xi] People v. Moffitt, 801 P.2d 1197 (Colo. 1990). An attorney's effort to condition settlement of a malpractice claim against him on an agreement not to file a grievance against him constitutes conduct prejudicial to the administration of justice in violation of the ethical rules.

[xii] *See* Rule 8.3 cmt. 3.

[xiii] ABA Formal Op. 06-439.

[xiv] Matter of Fee, 898 P.2d 975 (Ariz. 1995).

well as statements that can fairly be characterized as negotiation 'puffing,' are ordinarily not considered 'false statements of material fact' within the meaning of the Model Rules."[xv]

Does a lawyer have a duty to inform an opposing party or their counsel of a material fact that they would clearly want to know, or to correct a significant misunderstanding about a material fact held by an opposing party or their counsel? Under Rule 4.1, a lawyer does not have an affirmative duty to provide the third party with all relevant facts, only to avoid making a false statement of a material fact. Thus, a lawyer may not lie to the mediator or the opposing party about a material fact in order to boost his settlement position, and also may not omit facts if the omission would intentionally lead the mediator to wrongfully understand a fact. However, the attorney has no duty to reveal every fact of which he is aware. What constitutes a material fact will differ in each case.[xvi]

Cases and other authorities have taken a rather narrow reading of the language of Rule. 4.1. For example, Rule 1.0(f) states: "'knowingly' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." In Brown v. Genesee County, 872 F. 2d 169 (6th Cir. 1989), the court ruled that defense counsel who only "believed it probable" that the plaintiff and her lawyer were mistaken about a damage computation in the employment discrimination case were "under no legal or ethical duty" to correct them. Similarly, in In re: Tocco, 984 P. 2d 539 (Ariz. 1999), the court stated that "mere showing that the attorney reasonably should have known her conduct was in violation of the Rules, without more, is insufficient" to be considered a violation. Statements regarding estimates of price or value and a party's intentions regarding acceptable settlement are ordinarily not taken as statements of "fact."[xvii] Finally, ABA Formal Op. 06-439 states that Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus, does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law.

A lawyer should also be aware of statements she has made in the past as, on occasion, it may be necessary to supplement information already provided in order to avoid rendering a prior statement implicitly fraudulent. For example, a Pennsylvania Ethics Opinion concluded that a lawyer was required to divulge that his client had a life expectancy of less than one year due to a newly discovered illness when the settlement was to include the equivalent of three years of wage loss benefits.[xviii] Thus, a lawyer who makes statements regarding his or her factual position should take steps to ensure that those material statements are not rendered faulty by information revealed later.

A lawyer has limited duty to divulge information to the mediator. Therefore, if a mediator poses a question that a lawyer feels will reveal adverse facts, it may be best for the lawyer to simply decline to answer rather than giving an answer, which either misleads or omits material facts.

Note that the duty to voluntarily disclose to the opposition material facts, which would significantly reduce the size of settlement, arises only if not disclosing the facts would render another statement as being implicitly fraudulent. The lawyer must be careful in considering what to disclose, because disclosure when implicit fraud is not an issue would be a breach of the confidentiality requirements per Rule 1.6.[xix]

B. Advising Client to Talk to Opposing Party Directly

Settlement discussions have come to a standstill and the client believes he could break the ice if he could sit down with the opposing party without the lawyers. Alternatively, the lawyer is concerned that the settlement offers being proposed to the opposing lawyer is not being properly communicated to the opposing party. Can the lawyer advise his or her client to talk directly with an opposing party who is represented by counsel? What, if anything, can the attorney instruct his or her client to say?

[xv] ABA Formal Op. 06-439 (an excellent resource regarding a lawyer's obligation of truthfulness in mediation). *See, also*, Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119 (2007). This article reviews an impressive wealth of statistical analysis of the various methods of "puffing" used by attorneys.

[xvi] ABA Formal Op. 93-370 states that a party's actual bottom line or the settlement authority given to a lawyer is a material fact.

[xvii] *See* Comment [2] to Rule 4.1.

[xviii] PA. Eth. Op. 01-26.

[xix] *Id.*

An individual has a right to initiate conversations with the opposing party without the need to go through their counsel. However, a lawyer representing a party must be careful not to use his or her client as a way around the ethical rules, that prohibit a lawyer from directly contacting a represented party. Rule 4.2 prohibits the lawyer from talking with the opposing party, but how much can a lawyer do without violating Rule 8.4(a), which prohibits him or her from violating the Rules "through the acts of another?"

All authorities are in agreement that a lawyer may advise his or her client of the right to initiate communications with the other side. However, authorities are less clear about what a lawyer can say to the client regarding the substance of those communications. Courts have held that a factual analysis, on a case-by-case basis, is necessary to determine when a lawyer's advice constitutes overreaching.

ABA Formal Op. 11-461 provides "… [A] lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used." The opinion explains, however, that once an attorney begins advising a client to get the opposing party to do something without giving the opposing side the opportunity to consult with counsel and make a fully informed decision, he is in violation of Rule 4.2 and Rule 8.3.[xx] Accordingly, telling a client to discuss the litigation with the opposing party, or suggesting that a client begin settlement discussions directly with the opposing party, or even suggesting the client might reach a deal directly with the opposing party, may be considered above board. However, instructing a client to ask for materials from the other side or to garner admissions is probably going too far.[xxi]

IV. DISCLOSURE OF CONFIDENTIAL INFORMATION OBTAINED IN MEDIATION

As codified by many jurisdictions under the Uniform Mediation Act ("UMA"), communications made during mediation are deemed confidential and privileged. However, as with the majority of privileges, there are exceptions that may allow for the disclosure of those communications.[xxii] The most common of these exceptions is when the parties agree to waive the confidential nature of the communications under UMA § 5. Of pivotal importance to waiver is a focus on who must agree to the wavier as there are, in effect, three privileges under UMA § 5: (1) the party privilege, (2) the mediator's privilege, and (3) the non-party participant's privilege. Each is held separately and who made the communication at issue determines which parties must agree.

Other notable exceptions are listed under UMA § 6. From a mediator's perspective, perhaps, the most difficult exception to apply is when a threat of violence must be disclosed, as provided for under UMA § 6(a)(3). In such a circumstance, a mediator is instructed to disclose the communication only if he or she believes it is necessary to avoid a future crime or act of violence.[xxiii]

The disclosure of an otherwise confidential communication by a lawyer is a violation of Model Rule 1.6 unless the client consents to the disclosure.

V. CONFLICTS OF INTEREST

A. Fees

During ongoing settlement negotiations, the defendant offers to grant all relief requested in the Complaint but for the claim for attorney's fees. Or, during settlement negotiations in a contingency fee case, the plaintiff is offered all of the injunctive relief he or she sought but little or no monetary relief on his damages claims. These scenarios raise ethical issues for the lawyers involved in the mediation. Is it ethical for a settlement offer to require the waiver of a claim for lawyers' fees? Does a conflict of interest develop when a lawyer's fee may be severely diminished under proposed settlement terms?

[xx] ABA Formal Op. 11-461.

[xxi] *See* Holdren v. Gen. Motors Corp., 13 F. Supp. 2d 1192, 1195-96 (D. Kan. 1998) (lawyer may not *mastermind* a client's communication with a represented party); *see, also,* Illinois State Bar Assoc Op. *92-3* (client may send copies of correspondence, but lawyer must avoid assisting client); Penn. State Bar Op. 91-105 (lawyer is prohibited from recommending that his client initiate contact with the other side).

[xxii] Uniform Mediation Act §§ 5-6.

[xxiii] Diane K. Vescovo et al., *Ethical Dilemmas in Mediation*, 31 U. MEM. L .REV. 59 (2000).

Courts agree that a lawyer must put the interests of his client in front of his own interests, even when those interests may directly conflict, such as in the case of settlement negotiations involving the attorney' fee.[xxiv] During most litigation, a time will arise in which the interest of the lawyer and the client do not completely meld. For example, in litigation where the lawyer is charging by the hour, some would argue that the lawyer's interest is served by pushing the litigation all the way through trial, driving up billable hours regardless of the eventual outcome. These conflicts are considered implied and acceptable to the attorney-client relationship.

Under ABA Ethical Guidelines for Settlement Negotiation § 4.2.2, the lawyer is required to make the sacrifice when his or her interest conflicts with the interests of the client: "When an attorney's fee is a subject of settlement negotiations, a lawyer may not subordinate the client's interest in a favorable settlement to the lawyer's interest in the fee."[xxv] Thus, the lawyer must evaluate the settlement offer on the basis of the client's interest and then accept the client's decision to accept or reject the offer.[xxvi]

The courts' ruling on this issue have found that while a lawyer should take any and all procedural steps possible to decrease the possibility of his or her professional judgment being swayed due to inherent conflicting interests with the client, failure to take such steps is not fatal to a settlement just because a conflict arose.[xxvii]

B. Representing Multiple Parties in Mediation

Under Rule 1.7, a lawyer is required to clearly identify the clients. In a mediation setting, especially when a lawyer is representing one or more family members, this can be more difficult than it appears. In many states, the existence of an attorney-client relationship is based on the reasonable belief of the client, and the lawyer's belief is virtually irrelevant.

It is fairly common for lawyers to represent several members of a family in estate and trust disputes. Although the Model Rules permit the representation of multiple parties, lawyers should exercise extreme care and diligence when doing so. A number of Rules come into play when the lawyer is representing more than one client in mediation.

ABA Formal Op. 06-438 is an excellent resource for lawyers representing multiple parties in a mediation, or contemplating doing so. Most of the time, a mediation will involve an "aggregate settlement" or "aggregated agreement." ABA Op. 06-438 states that "an Aggregate Settlement or Aggregated Agreement occurs when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas. It is not necessary that all of the lawyers' clients…having claims against the same parties, or having defenses against the same claims, participate in the matter's resolution for it to be an aggregate settlement or aggregated agreement. The rule applies when two or more clients consent to have their matters resolved together."

Rule 1.8(g) deals specifically with current client conflicts of interest involving aggregate settlements. ABA Op. 06-438 succinctly sets out the interplay between the several Rules that apply to aggregate settlements as follows: "as noted in Comment [13] to Rule 1.8, differences in the willingness of each represented client to make or accept an offer of settlement are among the risks that should be considered when a lawyer undertakes to represent multiple clients in matters where a settlement or plea agreement proposal could create a conflict among them. Rule 1.8(g) provides a focused application of Rule 1.2(a), which protects a client's right in all circumstances to have the final say in deciding whether to accept or reject an offer of settlement or to enter a plea; Rule 1.6, which requires that the lawyer have his clients consent to reveal information relating to his representation of each of them to all other clients affected by the aggregate settlement or plea agreement; and Rule 1.7, which requires consent of all affected clients when the representation of one or more of them will be materially limited by the lawyer's responsibilities to the others."

As most lawyers representing multiple parties quickly discover, the application of Rule 1.6 on confidentiality can be the most challenging aspect of representing multiple parties in mediation. In order for the lawyer to represent multiple clients, each client must be willing to "show their cards" to all of the other joint clients. Unless the interests of the clients are closely aligned, they may be reluctant to reveal weaknesses in their positions, based on the reasonable fear that it will reduce the value of their individual claim.

[xxiv] *See* Evans v. Jeff D., 475 U.S. 717, 727 (1986).
[xxv] Section 4.2.2, Ethical Guidelines for Settlement Negotiations (ABA 2002).
[xxvi] Evans v. Jeff D., 475 U.S. 717, 725 (1986).
[xxvii] *See, e.g.*, Ramirez v. Sturdevant, 21 Cal.App.4th 904 (Cal. App. 1994); Evans v. Jeff. D. 475 U.S. 717 (1986).

The disclosure and consent requirements associated with the representation of multiple parties in mediation can be rather onerous. ABA Op. 06-438 states: "in order to ensure a valid and informed consent to an aggregate settlement or aggregated agreement, Rule 1.8(g) requires a lawyer to disclose, at a minimum, the following information to the clients for whom or to whom the settlement or agreement proposal is made: (1) the total amount of the aggregate settlement or the result of the aggregated agreement; (2) the existence and nature of all of the claims, defenses, or pleas involved in the aggregated agreement; (3) the details of every other client's participation in the aggregate settlement or aggregated agreement, whether it be either settlement contributions, their settlement receipts, the resolution of their criminal charges, or any other contribution or receipt of something of value as the result of the aggregate resolution. For example, if one client is favored over the other(s) by receiving non-monetary remuneration, that fact must be disclosed to the client(s); (4) the total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties; and (5) the method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be a portion among them."[xxviii]

To make matters slightly more complicated, because of the fluid nature of litigation and the settlement process, the effectiveness of advanced waivers can be seriously compromised.[xxix] It appears that most authorities agree that the disclosures required by Rule 1.8(g) must be made in the context of a particular settlement.[xxx]

VI. COMPETENCE TO NEGOTIATE MEDIATION SETTLEMENT

While mediating a will contest, the parties agree that the decedent's son will sell his interest in the decedent's company to the decedent's daughter. The son's attorney is a trust and estates lawyer with no experience with the sale of business interests. Alternatively, a settlement involves complicated tax issues beyond the scope of the lawyer's usual practice. Is it a violation of Rule 1.1 for a lawyer to negotiate a settlement that involves an area of the law outside his or her primary practice area?

Under Rule 1.1, a lawyer is required to provide competent representation. Competence, as defined in Rule 1.1, requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In the course of a successful settlement negotiation, particularly in trust and estate litigation, the final settlement agreement likely could have significant tax ramifications for each of the parties involved. Often these tax implications can mean a large amount of savings or liability depending on the structure of the settlement.

For this reason, it is often necessary for a lawyer to either have the skillset to properly advise the client or to seek assistance from another lawyer who does. The level of preparation and knowledge on any given matter will fluctuate depending on the expectations of the client and what is at stake in the litigation. The more complex and the more at stake, more is the preparation necessary in order to fulfill the competence requirements.[xxxi]

[xxviii] See text of ABA Formal Op. 06-438 for citations supporting the items in the list set forth above.
[xxix] *See* comment 22 to Rule 1.7.
[xxx] *See* New York City Bar Association Formal Op. 2009-6 and ABA Formal Op. 06-438.
[xxxi] *See* Model Rule 1.1 cmt. 2.

APPENDIX 3A

RELEVANT AUTHORITY

Michael D. Simon

ABA MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.0 – *Terminology*

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(m) "tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Rule 1.2 – *Scope of Representation and Allocation of Authority between Client and Lawyer*

(a) …a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

Rule 1.4 – *Communications*

(a) A lawyer shall:

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished.

(3) keep the client reasonably informed about the status of the matter.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6 – *Confidentiality of Information*

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosures permitted by paragraph (b)

Rule 2.4 – *Lawyers Serving as Third-Party Neutral*

Comment [5] Lawyers who represent clients in alternative dispute – resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 4.1 – *Truthfulness in Statements to Others*

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2 – *Communication with Person Represented by Counsel*

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.4 – *Respect for Rights of Third Persons*

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Rule 8.3 – *Reporting Professional Misconduct*

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

Rule 8.4 – *Misconduct*

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.

OTHER RESOURCES

I. SETTLEMENT

A. Authority to Settle

Restatement (Third) of the Law Governing Lawyers §27

Illustrations 3 and 4 discuss two situations in which a lawyer does and does not have authority to settle.

Arizona Ethics Op. 06-07

A lawyer is precluded from obtaining a blanket authorization from a client allowing the lawyer to decide whether to settle the client’s claim.

B. Bullying the Client into Settlement

Sylvia Stevens, *When a Client Repudiates a Settlement, What Can You Do?* OR. STATE BAR BULL. (May 2008)

A client's right to refuse settlement is unqualified under Rule 1.2 and by itself is not good cause for an attorney's withdrawal under Rule 1.16.

Stephen Ellman, *Lawyers and Clients,* 34 UCLA L. REV. 717 (1987)

A lawyer who threatens to withdraw in an effort to change the client's behavior is engaging in coercion if the attorney does not have proper grounds for withdrawal.

***Nehad v. Mukasey*, 535 F.3d 962 (9th Cir. 2008)**

"Similarly it is generally held that a lawyer may not withdraw merely because a client refuses to settle. It follows from these principles that a lawyer may not burden a client's decision making by threatening to withdraw if the client refuses to settle." (internal citations omitted).

II. INTERACTIONS WITH THE OPPOSING PARTY AND OPPOSING COUNSEL

A. Obligations on Becoming Aware of Legal Malpractice

ABA Formal Op. 03-431 (Aug. 2003) - *Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment*

A lawyer may be impaired by senility or dementia due to age or illness or because of alcoholism, drug addiction, substance abuse, chemical dependency, or mental illness. Because lawyers are not health care professionals, they cannot be expected to discern when another lawyer suffers from mental impairment with the precision of, for example, a psychiatrist, clinical psychologist or therapist. Nonetheless, a lawyer may not shut his eyes to conduct reflecting generally recognized symptoms of impairment (e.g., patterns of memory lapse, or inexplicable behavior not typical of the subject lawyer, such as repeated missed deadlines). Each situation must therefore be addressed based on the particular facts presented.

ABA Formal Op. 04-433 (Aug. 2004) - *Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law*

Rule 1.6 (Confidentiality of Information) trumps the Rule 8.3 reporting requirements. Thus, if the reporting of misconduct would reveal information relating to the representation of a client, a lawyer must obtain the client's informed consent prior to making such a report. Keep in mind that Rule 1.6 is broader than attorney-client privilege and as such, all information relating to the representation is within the scope of Rule 1.6.

Gerard Lynch, *The Lawyer as Informer,* DUKE L.J. 491, 544-46 (1986)

B. Threatening the Opposing Party with Criminal Prosecution

42 A.L.R. 4th 1000 (1985) – *Initiating, or Threatening to Initiate, Criminal Prosecution as Ground for Disciplining Counsel*

It is generally considered to be unethical for an attorney to present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

ABA Formal Op. 92-363

… [T]he Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a civil matter to gain relief for her client, provided that the criminal matter is related to the civil claim, the lawyer has a well-founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process.

Nick J. Badgerow, *Rattling the Saber: The Ethics of Threatening Criminal and Disciplinary Prosecution,* 61 J. MO. BAR 13 (2005)

. . . the ethical rules of conduct no longer prohibit all threats of criminal prosecution to gain advantage in

civil disputes. Resolution of clear violations of criminal law that relate to and arise from the same conduct as the civil claim can and should be used as added incentives to settle a case.

C. Threatening to File a Grievance/Refraining from Filing a Grievance

***People v. Moffitt,* 801 P.2d 1197 (Colo. 1990)**

An attorney's effort to condition settlement of a malpractice claim against him on an agreement not to file a grievance against him constitutes conduct prejudicial to the administration of justice in violation of the ethical rules.

ABA Formal Op. 94-383 – *Use of Threatened Disciplinary Complaint Against Opposing Counsel*

The Committee concludes that although a threat to file a complaint against opposing counsel in order to obtain an advantage in a civil matter is not expressly prohibited by the Model Rules of Professional Conduct, there will frequently be circumstances in which such a threat will violate Model Rule 8.3 or one of the more general restraints on advocacy imposed by the Model Rules.

14 A.L.R. 4th 209 (1982) – *Attorney's Conduct in Connection with Malpractice Claim Against Himself as Meriting Disciplinary Action*

III. INTERACTIONS WITH MEDIATOR AND OPPOSING PARTIES DURING MEDIATION

A. Representations to Mediator and Opposing Parties

1. Interactions with the Mediator – Mediation not a Tribunal

ABA Formal Op. 06-439 – *Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation*

"Under Model Rule 4.1, in the context of negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing,' are ordinarily not considered 'false statements of material fact' within the meaning of the Model Rules."

Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal,* 2007 J. DISP. RESOL. 119 (2007)

Review of applicable law on attorneys' requirements of truthfulness in negotiations as well as an impressive wealth of statistical analysis of the various methods of "puffing" used by attorneys.

PA Eth. Op. 01-26

An attorney has a duty to voluntarily disclose to the opposition material facts which would significantly reduce the size of settlement only if not disclosing the facts would render another statement as being implicitly fraudulent; disclosure without said implicit fraud would be a breach of the Rule 1.6 confidentiality requirements.

***Matter of Fee*, 898 P.2d 975 (Ariz. 1995)**

The Arizona Supreme Court upheld sanctions against the attorney holding that an attorney has the same duty of candor towards a settlement judge acting as a mediator as he would towards a trial judge sitting on the bench.

2. Truthfulness and Omissions

The Restatement (Third) of the Law Governing Lawyers §98, Cmt. c

Certain statements, such as some statements relating to price or value, are considered non-actionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker's state of mind.

ABA Formal Op. 06-439 ***Lawyers' Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation***

This is an excellent resource regarding a lawyer's obligation of truthfulness in mediation.

ABA Formal Op. 93-370

A party's actual bottom line or the settlement authority given to a lawyer is a material fact.

ABA Formal Op. 94-387

A lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client's claim, but cannot make any affirmative misrepresentations about the facts.

B. Advising Client to Talk to Opposing Party Directly

ABA Formal Op. 11-461 – ***Advising Clients Regarding Direct Contacts With Represented Persons***

"… [A] lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used." However, a lawyer overreaches in violation of Rule 4.2 if he assists the client in procuring some benefit while depriving the opposing party the right to consult with counsel.

Holdren v. General Motors Corp., **13 F.Supp.2d 1192 (D. Kan. 1998)**

There is nothing in the disciplinary rules which restricts a client's right to initiate communications with the other side or which require a lawyer to discourage such conduct. However, the lawyer violated Rule 4.2 when he aided his client in procuring affidavits from the opposition through direct client contact.

30 No. 4 ACC Docket 76 – ***A Client's Direct Contact with a Represented Party: What, if Anything, Can You Advise Your Client to Say?***

The focus of whether an attorney violated Rule 4.2 through Rule 8.3 is whether the lawyer's assistance to his client's communication was an attempt to prevent the opposition from making an informed decision as a result of undue pressure from opposing counsel.

IV. DISCLOSURE OF CONFIDENTIAL INFORMATION OBTAINED IN MEDIATION

Uniform Mediation Act § 4(b) – ***Privilege Against Disclosure; Admissibility; Discovery***

In a proceeding, the following privileges apply: (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication. (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator. (3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

Uniform Mediation Act § 5 – *Waiver and Preclusion of Privilege*

A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and: (1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and (2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

Uniform Mediation Act § 6 – *Exceptions to Privilege*

Diane K. Vescovo et al., *Ethical Dilemmas in Mediation*, 31 U. MEM. L. REV. 59 (2000)

A mediator should not disclose a threat made by a party unless he believes it is necessary to prevent a future crime or substantial bodily injury.

32 A.L.R.6th 285 (2008) – *Construction and Application of State Mediation Privilege*

State Courts have generally held that there is not an implied "interest of justice" exception to the mediation privilege. However, some states adopting the Uniform Mediation Act have chosen to explicitly include such an exception.

***Olam v. Congress Mortg. Co*., 68 F.Supp.2d 1110 (N.D. Cal. 1999)**

A mediator holds a privilege separate from that of the parties and the Court should only compel a mediator to testify over his objection after balancing the need for the mediator's testimony against the strong policy of confidentiality inherent in the mediation process.

V. CONFLICTS OF INTEREST

A. Fees

ABA Ethical Guidelines for Settlement Negotiation § 4.2.2 – *Provisions Relating to the Lawyer's Fee*

When an attorney's fee is a subject of settlement negotiations, a lawyer may not subordinate the client's interest in a favorable settlement to the lawyer's interest in the fee.

NYC Eth. Op. 1987-4

The determination of whether counsel for a party offered settlement terms requiring the waiver of a statutorily authorized fee has a conflict of interest should be decided on a case-by-case basis. The committee recommends that the possible waiver of fees issue should be worked out with the client at the inception of the representation.

***Evans v. Jeff D.*, 475 U.S. 717 (1986)**

An attorney must not allow his own interests to influence his professional advice. "…[A]n attorney is required to evaluate a settlement offer on the basis of his client's interest, without considering his own interest in obtaining a fee; upon recommending settlement, he must abide by the client's decision whether or not to accept the offer."

***Ramirez v. Sturdevant*, 21 Cal.App.4th 904 (Cal. App. 1994)**

There is an inherent conflict of interest when there is simultaneous settlement negotiations of attorneys' fees and substantive issues. The conflict does not necessarily invalidate a settlement agreement. However, the better course of action is to negotiate damages and only after such settlement is finalized, and approved, should a negotiation of fees begin.

***State v. Labonville*, 492 A.2d 1376 (N.H. 1985)**

An arrangement which increases an attorneys' fee should a case proceed to trial is acceptable notwithstanding that it provides an economic incentive to the attorney to push for trial over settlement.

B. Representing Multiple Parties in Mediation

Rule 1.8(g) – Conflict of Interest: Current Clients: Specific Rules

Rule 1.8 comment [13]: A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients…unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims…involved and of the participation of each person in the settlement.

Rule 1.2(a)

This rule protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement. Thus, each client must independently consent to the settlement.

Rule 1.6 – *Confidentiality of Information*

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Rule 1.7 – *Conflict of Interest: Current Clients*

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

The representation of one client will be directly adverse to another client; or

There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client,…

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

The representation does not involve the assertion of a claim by one client against another represented by the lawyer in the same litigation or other proceedings before a tribunal; and

Each affected client provides informed consent, confirmed in writing.

VI. COMPETENCE TO NEGOTIATE MEDIATION SETTLEMENT

Rule 1.1 – *Competence*

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.1 cmt. 1 – Legal Knowledge and Skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

ABA Ethical Guidelines for Settlement Negotiation § 2.2 Committee Note – *Duty of Competence*

With respect to settlement negotiations and any resulting settlement agreement, as is the case generally, Model Rule 1.1 requires counsel to provide competent representation. As part of this obligation of competence, a lawyer should give attention to the validity and enforceability of the end result of the settlement process and should make sure the client's interests are best served, for example, by considering tax implications of the settlement.

Christopher Sabis & Daniel Webert, *Understanding the "Knowledge" Requirement of Attorney Competence: A Roadmap for Novice Attorneys,* 15 GEO. J. LEGAL ETHICS 915 (2002)

Taking on matters with substantive principles which the attorney is not competent to handle is a violation of Model Rule 1.1 unless competent counsel is associated on the matter.

***In re Richmond's Case*, 872 A.2d 1023 (NH 2005)**

Although expertise in a particular field is generally not required to meet the minimum standards of competency, expertise may be required in certain, more complicated, circumstances.

***Attorney Grievance Com'n of Maryland v. Kendrick*, 943 A.2d 1173 (Md. 2008)**

An attorney is required to ascertain when a matter she has been hired to handle has developed to a point where she has become incompetent to continue the matter unless competent counsel is associated.

The Ethical Parameters of Certain Threats at Mediation

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52nd Annual Heckerling Institute on Estate Planning

I. Introduction

The mediation process is designed to resolve disputes but can still challenge the parties and their counsel. Amidst the intensity of the negotiations, various types of threats can arise, especially as attorneys advocate for clients.

National and state standards often govern mediation and at times even set the ethical parameters for certain kinds of threats among the parties or even counsel during the negotiations. Mori Irvine, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation*, 26 RUTGERS L. J. 155 (1994); Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U.L. REV. 753 (1997); Eleanor Holmes Norton, *Bargaining and the Ethics of Process*, 64 N.Y.U.L.REV. 493 (1989). For example, the Uniform Mediation Act ("UMA"), promulgated by the National Conference of Commissioners on Uniform State Laws in 2001 (now the Uniform Law Commission (ULC)), establishes a privilege of confidentiality for mediators and participants. The UMA is intended as a statute of general applicability for almost all mediations, except those involving collective bargaining, minors in a primary or secondary school peer review context, prison inmate mediation, and proceedings conducted by judicial officers who might rule in a dispute or who are not prohibited by court rule from disclosing mediation communications with a court, agency, or other authority. The UMA's prime concern is that a mediation communication is confidential and, if privileged, is not subject to discovery or admission into evidence in a formal proceeding.[1]

Since the promulgation of the UMA in 2001, the following jurisdictions have adopted the Act:

JURISDICTION	LAWS	EFFECTIVE DATE	STATUTORY CITATION
District of Columbia	2006, Law 16-87	April 4, 2006	D.C. Official Code, 2001 Ed. §§ 16-4201to 16-4213
Hawaii	2013, Ch. 284	July 1, 2013	H.R.S §§ 658H-1 to 658H-13
Idaho	2008, C. 35	July 1, 2008	I.C. §§ 9-801 to 9-814
Illinois	2003, P.A. 93-399	January 1, 2004	S.H.A. 710 ILCS 35/1 to 35/99
Iowa	2005, C. 68	April 28, 2005	I.C.A. §§ 679C.101 to 679C.115
Nebraska	2003, L.B. 255	January 1, 2004	R.R.S. 1943, §§ 25-2930 to 25-2942
New Jersey	2004, C. 157	November 22, 2004	N.J.S.A. § 2A:23C-1 to 2A:23C-13
Ohio	2004, H.B. 303	October 29, 2005	R.C. §§ 2710.01 to 2710.10
Utah	2006, C. 33	May 1, 2006	U.C.A.1953, 78B-10-101 to 78B-10-114

[1] Uniform Mediation Act (2001) § 5(a).

Vermont	2006, No. 126	May 3, 2006	12 V.S.A. §§ 5711 to 5723
Washington	2005, C. 172	January 1, 2006	West's RCWA 7.07.010 to 7.07.904

Estate and trust disputes are especially susceptible to such ethical questions, since the intensity of the family dynamics can more easily lead to such threats. *See* Susan L. Gary, *Mediation for Estate Planners*, ABA SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW (2017), Chapter 3, "Ethics in Mediation" by Michael D. Simon.

This article outlines the standards set by national and state authorities for addressing threats during the mediation process of: (1) criminal prosecution; (2) ethics grievances; and (3) bodily harm.

II. Threats of Criminal Prosecution at Mediation

In an effort to gain leverage at the mediation, parties and counsel sometimes threaten criminal prosecution of another party. For instance, in a family dispute about a parent's assets, one sibling may claim that another sibling stole from the parent. These threats implicate an array of ethical standards. Robbie M. Barr and Susan L. Macey, *He Said WHAT? Ethical Issues in a Mediation Setting; Challenges for Advocates and Mediators*, ABA 13th Annual Spring Conference, April 15, 2011, at 8.

In most instances, these threats are perceived as embedded in the fabric of hard negotiations. However, most jurisdictions provide relief when the threats are serious. For example, Title 2A, chapter 23C, section 4 of the New Jersey Statute sets forth the general rule regarding confidentiality: communications during mediation are privileged and not "subject to discovery or admissible in evidence in a proceeding unless waived or precluded. . . ."[2] At the same time, a privilege cannot be asserted by anyone who uses a mediation to commit or conceal a crime.[3] Indeed, pursuant to *N.J.S.A.* §2A:23C-6(a)(3)(emphasis added), "[t]here is *no privilege* under section 4 of P.L.2004, c.157 (C.2A:23C-4) for a mediation communication that is "a threat or statement of a plan to inflict bodily injury or commit a crime."

These exceptions – i.e., to the general rule regarding confidentiality of communications during mediation – come into play by agreement or as a result of the public nature or substance of the mediation communication.

For instance, *N.J.S.A.* § 2A:23C-6(b), allows a court, administrative agency, or other adjudicator to disclose an otherwise privileged mediation communication if, after an *in camera* hearing, the need for the evidence substantially outweighs the interest in protecting confidentiality. This exception applies to "a court proceeding involving a crime as defined in the 'New Jersey Code of Criminal Justice'" or a "proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation."[4]

N.J.S.A. § 2A:23C-2 defines a "mediation communication" as "a statement, whether verbal or nonverbal or in a record, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator. A mediation communication shall not be deemed to be a public record under P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented by P.L.2001, c.404 (C.47:1A-5 et seq.)."

In *State v. Williams*, 184 N.J. 432, 877 A.2d 1258 (2005), the New Jersey Supreme Court addressed whether a mediator appointed by a court may testify in a subsequent criminal proceeding regarding a participant's statements made during mediation. The State charged the defendant with various crimes arising from a physical altercation with a relative. *Id.* at 436. The defendant sought to offer the testimony of the mediator that the victim had admitted during mediation that the victim had threatened the defendant with a shovel. *Id.* The trial court interviewed the mediator outside the presence of the jury and ultimately decided to bar the mediator's testimony. The Appellate Division and the Supreme Court affirmed the trial court's decision. *Id.*

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[2] N.J.S.A. § 2A:23C-4(a). *See* N.J.S.A. § 2A:23C-4(c) (West 2006) ("evidence or information that is otherwise admissible or subject to discovery shall not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation").

[3] N.J.S.A. § 2A:23C-5(c).

[4] N.J.S.A. § 2A:23C-6(b)(1) and (2).

The Appellate Division ultimately found that the defendant had a full opportunity to present his self-defense claim and thus was not deprived a fair trial. *Id.* at 437. The Supreme Court affirmed both rulings, finding that the trial judge had properly refused to admit the mediator's testimony. *Id.*

The Supreme Court stated in pertinent part, "[t]o ascertain whether that testimony is 'necessary to prove' self-defense, we assess its 'nature and quality." *Id.* at 450 (quoting *State v. Garron*, 177 N.J. 147, 165, 827 A.2d 243 (2003), *cert. denied* 540 U.S. 1160 (2004)). The Court held, "[t]he mediator's testimony in this matter does not exhibit the indicia of reliability and trustworthiness demanded of competent evidence." *Id.* The Court noted the following instances to support its finding:

> [T]he mediator explained that the mediation participants "started to raise their voices," and all the parties were "talking at the same time." The mediator was forced to tell the participants to speak "only one person at a time," but once a question was asked, "both of them start[ed]." During this exchange, the mediator recalled, "[o]ne is saying I picked you up and I threw you; the other one said there was a shovel, I picked up the shovel." When pressed by the trial court, the mediator identified Bocoum as the one who said he had the shovel, at least "to [his] understanding, the little knowledge" he had. Moreover, all of these statements were made after the mediator explicitly informed the parties that "[t]he mediation room is confidential," and no transcript or recording was made.

Id. at 450-51.

In addition, the Court noted other indications that the mediator's testimony was not trustworthy: defense counsel conferred with the mediator outside the courtroom, elicited his recollection of the mediation, and asked him to testify. *Id.* at 451.

Furthermore, the mediator's testimony did not corroborate the defendant's version of what transpired during the fight. *Id.* Thus, the need for the mediator's testimony did not outweigh the interest in confidentiality; the Court found that the probative value of the mediator's testimony was diminished because it did not substantiate defendant's contention. *Id.* at 452.

The Court then turned to whether the mediator's testimony was "not otherwise available." *Id.* The Court began by noting that defense counsel had thoroughly cross-examined each of the State's witnesses. *Id.* In addition, the defendant and his wife had both testified as to the defendant's version of events and sought to discredit the witnesses for the prosecution. *Id.* The Court concluded that "the jury heard evidence of [the victim's] purported inconsistent statement," and thus the defendant could not sustain his burden to show that the mediator's testimony was otherwise unavailable. *Id.* at 453. Additionally, a serious question existed as to whether the defendant should have been allowed to testify at all regarding the mediation communications. *Id.*

Accordingly, the New Jersey Supreme Court found the trial court's refusal to admit the "mediator's testimony rested upon the sound policy justifications underlying mediation confidentiality." *Id.* at 454.

Other tribunals around the country have had to deal with similar threats. *See, e.g.*, Utah State Bar Ethics Advisory Opinion Comm., Op. 03-04 (2003); Conn. Bar Ass'n. Prof Ethics Comm., Informal Op. 98-19 (1998). *See also* David G. Tomeo, *Be Careful What You Say: One Court's Look at Confidentiality under the Uniform Mediation Act*, 31 SETON HALL LEGIS. J. 65 (2006).

III. Threats of Ethics Grievances at Mediation

Like threats of criminal prosecution, threats of ethics grievances – usually among the parties' counsel – arise periodically in intense negotiations. Most courts have standards applicable to reporting misconduct. Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U.L. REV. 753 (1997); Douglas R. Richmond, *Lawyers' Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249, 251 (citing *In re Robertson*, 626 A.2d 397 (N.H. 1993)). For instance, pursuant to N.J. District Court Rule 301.1(h), any grievance concerning the conduct of a mediator, attorney, or other participant in mediation shall be in writing to the compliance judge

within 30 days from the event giving rise to the grievance.[5] The compliance judge may investigate the grievance and take such action in response.[6]

The goal in disciplinary proceedings is not to punish the attorney, but to preserve public confidence in the legal profession and protect the public from unscrupulous or irresponsible attorneys.[7] New Jersey Court Rule 1:40-4(d) governs threats of ethics grievances made at mediation and whether such threats may be disclosed. Pursuant to *Rule* 1:40-4(d),

> Unless the participants in a mediation agree otherwise or to the extent disclosure is permitted by this rule, no party, mediator, or other participant in a mediation may disclose any mediation communication to anyone who was not a participant in the mediation. A mediator may disclose a mediation communication to prevent harm to others to the extent such mediation communication would be admissible in a court proceeding. A mediator has the duty to disclose to a proper authority information obtained at a mediation session if required by law or if the mediator has a reasonable belief that such disclosure will prevent a participant from committing a criminal or illegal act likely to result in death or serious bodily harm. No mediator may appear as counsel for any person in the same or any related matter. A lawyer representing a client at a mediation session shall be governed by the provisions of RPC 1.6.

As referenced in the aforementioned Rule, mediation sessions are governed by Rule of Professional Conduct 1.6, which permits a lawyer to reveal information related to a client when the lawyer reasonably believes that such disclosure is necessary to prevent reasonably certain death or substantial bodily harm.

In *Matter of Wallace*, 104 N.J. 589, 518 A.2d 740 (1986), the New Jersey Supreme Court upheld the sanctions recommended by the Disciplinary Review Board ("DRB") against an attorney. The disciplinary proceeding arose from a presentment filed by the District XI Ethics Committee, which found that the respondent had violated DR 6-101 (handling a legal matter in such a manner as to constitute gross negligence), DR 9-102(C) (for failure to keep adequate records as required by Rule 1:21-6), and DR 1-102(A)(3) (engaging in illegal conduct that reflects adversely on his fitness to practice law). *Id.* at 589.

The DRB upheld the Ethics Committee's findings that respondent violated DR 6-101 and DR 9-102. *Id.* However, the DRB found that although respondent's conduct reflected adversely on his fitness to practice law in violation of DR 1-102(A)(6), his conduct was not illegal, and therefore respondent had not violated DR 1-102(A)(3). *Id.* In addition, the DRB found that counsel's attempt to settle the ethics complaint against him was an attempt to exonerate himself from liability in violation of DR 6-102(A). *Id.* at 593-94. The DRB recommended that counsel be suspended from the practice of law for six months. *Id.*

The New Jersey Supreme Court agreed with the DRB's recommendations and concluded that the sanctions against the respondent were appropriate. *Id.* at 594. Thus, the Court ordered that respondent be suspended from the practice of law for six months and ordered him to reimburse the ethics committee for administrative costs. *Id.; see also In re Himmel*, 125 Ill.2d 531 (1988) (attorney suspended for one year for failure to report conversion of client funds by another lawyer despite client's directive not to report).

IV. Threats of Bodily Harm at Mediation

One of the most intricate challenges for a mediator is assessing whether threats of bodily harm are to be taken seriously during intense negotiations. On the one hand, the mediator's aim of settling the case will be complicated by the sharing of such hostilities. On the other hand, the risk that the threats will be carried out pressures the mediator to prioritize the safety of the parties, their counsel, and even the mediator.

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[5] District Court of New Jersey L. Civ. R. 301.1(h).
[6] *Id.*
[7] *See In re Kushner*, 101 N.J. 397 (1986); *In re Goldstaub*, 90 N.J. 1 (1982); *In re Wilson*, 81 N.J. 451 (1979); In re Stout, 75 N.J. 321 (1978).

For example, pursuant to *N.J.S.A.§* 2A:23C-6(a), a privilege is not available with regard to any mediation communication that is a plan to commit a crime or a threat to commit a crime or a threat to inflict bodily injury.[8] In the same vein, New Jersey Court Rule 1:40-4(d) requires mediators to disclose to a proper authority information obtained at a mediation session if the mediator has a reasonable belief that the disclosure will prevent an illegal act likely to result in death or serious bodily harm.

Similarly, Pennsylvania permits disclosure of an otherwise privileged mediation communication if the threat that bodily injury may be inflicted on a person is relevant evidence in a criminal matter.[9]

In the end, while all of the foregoing threats pose challenges for the mediator and the mediation process, the risk of bodily harm is probably the most complex and difficult.

[8] N.J.S.A. § 2A:23C-6(a)(3) and (4).
[9] 42 Pa. C.S. § 5949(b)(2).