

ETHICS FOR LAWYERS REPRESENTING CLIENTS IN MEDIATIONS

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Today, a progressively larger percentage of the activity in civil dispute resolution occurs through mediation, and it is now the preferred method of alternative dispute resolution (ADR) for business disputes.² In addition to offering potential cost savings, mediation is consensual, with the mediator acting as a neutral facilitator, and thus offers the possibility of maintaining long-term business relationships between disputants.

As the popularity of mediation has increased, rules and standards have been adopted to address the ethical standards to which mediators must adhere. There is far less formal guidance, however, regarding the ethical standards that the attorneys representing the mediation participants should follow. Some commentators assert that the role of the lawyer in mediation should go beyond advocating for the client by requiring the attorney to help ensure that the process itself is a fair one that seeks to attain the goal of a settlement satisfactory to all participants.³ Yet, should the goals of representation within mediation be any different from those in the more traditional adversarial setting of litigation or arbitration? This article addresses emerging ethical standards for mediators, ethics for mediation advocates, allocation of authority between lawyers and their clients in mediation, the obligation for truthfulness in mediation, mediation confidentiality, and good faith requirements in mediation.

Emerging Standards - Ethics for Mediators

As mediation has become more widely used, much has been written and many sets of rules and standards have been adopted to address the ethical responsibilities of mediators. These standards include requirements for mediator neutrality, an obligation to assure that each party has the capacity to participate in the mediation, and admonitions against coercion of parties to obtain a settlement. In September of 2005, the American Bar Association (ABA), the Association for Conflict Resolution, and the American Arbitration Association (AAA) jointly adopted

Model Standards of Conduct for Mediators (the “Model Standards”).⁴ Although only advisory, the Model Standards addressed many of the ethical issues facing mediators, including self-determination; impartiality; conflicts of interest and competence of the mediator; confidentiality; quality of the process; and the advancement of mediation practice.

Muddier Waters - Ethics for Mediation Advocates

At the threshold level, should attorneys be mandated by ethical standards or rules to behave differently in mediations than when representing clients in other dispute resolution settings such as arbitration or litigation? Alternatively, do clients have the right to expect their attorneys to also zealously represent them within mediation by acting to maximize their interests? Or, would such a supposition mean that mediation is merely another adversarial proceeding that must be handled in the same manner as litigation? To address these issues, it is helpful to consult the ABA Model Rules of Professional Conduct (“Model Rules”).⁵

The Preamble to the Model Rules notes the various functions that an attorney assumes. These functions include the obligation as an advocate to “zealously [assert] the client’s position under the rules of the adversary system,” as well as the lawyer’s duty as a negotiator to seek “a result advantageous to the client but consistent with requirements of honest dealing with others.”⁶ This acknowledgement within the Model Rules of the multiple roles that an attorney performs supports the proposition that the Model Rules are intended to apply to lawyers representing clients in mediation, as well as in traditional adversarial settings. In fact, the Preamble specifically mentions that “a lawyer may also serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter”⁷, confirming the applicability of the Model Rules to lawyers acting as neutrals.

Zealous Advocacy is Not Incompatible with Mediation

Some commentators seem offended by the notion that litigators should play a meaningful role in mediation.⁸ Lawyers who represent clients in mediation, however, should not allow this argument to compromise the fundamental principle that an attorney

should zealously advocate on behalf of his/her client in mediation, just as is required in arbitration or litigation. Nevertheless, the lawyer representing a client in mediation may find it appropriate to exercise that zeal in a less adversarial manner that is more consistent with the tone of mediation.⁹

Allocation of Authority in Mediation Between Lawyer and Client

Rule 1.2 of the Model Rules (“Scope of Representation”) states in pertinent part as follows:

(a) A lawyer shall abide by a client’s decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.¹⁰

Again, the rule makes no setting-based distinction as to its application, and thus it applies to representation in business transactions, mediation or litigation. Indeed, a client often may play a bigger role in the mediation process than he/she might assume in a business transaction or in the trial of a case. Additionally, it is important to remember that it is also up to the client to describe the objectives of representation, which may range from complete vindication to preserving a continuing business relationship with the other party. In all cases, however, the objectives and means of representation should be defined through consultation between lawyer and client.¹¹

Of course, the client must decide whether he/she wants to enter into mediation in the first place, as well as deciding whether to accept an offer of settlement that arises during the course of a mediation.¹² The attorney, however, must provide the client with the information necessary to make such decisions. Specifically, Rule 1.4 of the Model Rules (“Communication”) obligates the lawyer to explain the matter “to the extent reasonably necessary to permit the client to make an informed decision.”¹³ Further, Rule 2.1 (“Advisor”) requires that the attorney deliver this advice in a

candid manner and “not be deterred . . . by the prospect that the advice might be unpalatable to the client.”¹⁴

In Georgia, the State Supreme Court has adopted the ABA Model Rules as the Georgia Rules of Professional Conduct (“GRPC”), and has made them binding on Georgia lawyers, delegating to the State Bar of Georgia the authority to administer and enforce the GRPC. The Bar has added advisory comments to the GRPC to assist Georgia lawyers in determining their ethics responsibilities. The Georgia advisory comments to Rule 2.1 go into more detail with respect to a lawyer’s duty of candor in providing information and advice to a client, and are instructive. The Georgia commentary states that a client is entitled to straightforward advice expressing the lawyer’s honest assessment, which often may involve presenting unpleasant facts and alternatives.¹⁵ Furthermore, in providing advice, an attorney may refer “not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.”¹⁶ Accordingly, an attorney’s advice in mediation must address issues beyond the mere merits of the controversy. Rather, the attorney must invite the client to examine issues such as reasonable alternatives to a monetary settlement; the client’s psychological preparedness to endure the expense, delay and intrusiveness of a trial; and the likelihood and cost of a total victory. Nevertheless, because no case is risk free, after all is said and done, the final decision on all of these issues belongs to the client.¹⁷

Telling Lies – Obligation for Truthfulness in Mediation.

Rule 4.1 of the Model Rules (“Truthfulness in Statements to Others”) in pertinent part, states:

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 to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client

. . .¹⁸

In litigation or arbitration, a lawyer is bound by Rule 4.1 insofar as the lawyer is dealing with third parties. To the extent the lawyer is dealing with a tribunal (i.e., a court or an arbitration panel), then Rule 3.3 of the GRPC (“Candor Toward the Tribunal”) would control the truthfulness requirement. It is generally recognized, however, that a mediator is not a “tribunal” as defined by Rule 3.3, and that the requirements of Rule 4.1, therefore, govern the conduct of lawyers in mediation as to the obligation for truthfulness.

Accepting that Rule 4.1 applies to mediation,¹⁹ ethical issues abound when attempting to define a material fact that must be accurately represented. First, there is the “puffing” issue. Although Rule 4.1 requires lawyers to be truthful, again, comments to the Georgia Rule 4.1 recognize puffing as part of the negotiation process, so long as that puffing does not materially misstate facts. Specifically, Comment 2, in pertinent part, reads as follows:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Comments which fall under the general category of “puffing” do not violate this rule. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category....²⁰

The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 06-439,²¹ which also analyzed the obligations of Model Rule 4.1 (“Truthfulness in Statements to Others”) even more thoroughly in the context of mediation. Referring to the Restatement of the Law Governing Lawyers, the Opinion states:

Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole, are 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 regarded as merely an expression of the speaker's state of mind.²²

The Opinion goes on to add that “statements regarding negotiating goals or willingness to compromise . . . ordinarily are not considered statements of material fact within the meaning of the Rules.”²³

The final footnote to Opinion 06-439 opines that there may be circumstances in which a greater degree of truthfulness may be required in mediation in order to achieve the client's goals. The footnote states that additional information may be required “to gain the mediator's trust or provide the mediator with critical information regarding the client's goals or intentions so that the mediator can effectively assist the parties in forging an agreement.”²⁴ In such cases, a failure to be forthcoming, though probably “not in contravention of Model Rule 4.1, could constitute a violation of the lawyer's duty to provide competent representation under Model Rule 1.1.”²⁵

Telling Secrets – Confidentiality in Mediation.

It is a well-recognized proposition that confidentiality is necessary to the success of mediation because parties may be hesitant to engage in settlement discussions if statements made during the negotiation process can be used against them later in subsequent litigation. In addition, if a mediator is required to

testify with respect to the mediation proceedings, the mediator's neutrality might be compromised.

Rule 1.6 of the Model Rules ("Confidentiality of Information") states, in pertinent part, as follows: "(a) A lawyer shall maintain in confidence all information gained in the professional relationship with a client" ²⁶ In the mediation context, the confidentiality and inadmissibility of communications made and information generated during mediation are generally accepted. ²⁷ In an interesting Georgia opinion, the privilege was first clearly enunciated and discussed at length in a criminal case, *Byrd v. State*. ²⁸ In *Byrd*, the Court of Appeals reversed the defendant's conviction of theft by taking because it found that the trial court erred in allowing evidence from an earlier related mediation proceeding in a related civil proceeding. ²⁹ The court hearing the criminal matter had initially stayed the prosecution to see whether a resolution could be reached in the civil case before proceeding, but settlement was not reached. ³⁰

The Georgia Court of Appeals noted that "no criminal defendant would agree to 'work things out' and compromise his position if he knows that any inference of responsibility arising from what he says and does in the mediation process will be admissible as an admission of guilt in the criminal proceeding which will eventualize if mediation fails." ³¹ The court pointed out that the policy reasons for excluding from later court proceedings offers of compromise and other information from mediation were based partially upon the fact that offers of compromise are privileged ³² because public policy encourages the settlement of disputes without trial.

The bottom line is that in most jurisdictions, any statement, evaluation, document or other evidence generated in connection with mediation is not subject to discovery, and the neutral or anyone present at the mediation may not be subpoenaed or otherwise required to testify concerning any of this information created during a mediation process. ³³

Another instructive decision from Georgia is the Georgia Commission on Dispute Resolution's Committee on Ethics' Advisory Opinion 6. ³⁴ Based upon the principle that

“confidentiality is the attribute of the mediation process which promotes candor and full disclosure,”³⁵ the Opinion states that a mediator (and presumably parties and counsel, as well) “may not directly or indirectly share with courts any information, including impressions or observations of conduct, from a mediation session.”³⁶ The Opinion also cites certain instances in which this confidentiality principle does not apply, such as when there are threats of imminent violence; possible child abuse; or a statutory duty to report information.³⁷ In addition, confidentiality does not apply to documents relevant to a disciplinary complaint against a mediator arising out of the ADR process or to the executed mediation agreement itself.³⁸ The Opinion, however, emphasizes that in Georgia, even information falling within one of these specific exceptions may be revealed only “to the extent necessary to prevent the harm or meet the obligation to disclose.”³⁹

However, there are numerous cases from various jurisdictions around the country that indicate that this confidentiality principle may not be ironclad. The Georgia Supreme Court recently issued a troubling decision that permitted the admission into evidence of a mediator’s testimony concerning his observations on the capacity of one of the parties to enter into the written settlement agreement reached at the mediation. In *Wilson v. Wilson*,⁴⁰ the parties in a divorce action participated in a mediation without their attorneys and entered into a settlement agreement as a result. When Mrs. Wilson sought to enforce the agreement, Mr. Wilson raised issues concerning his mental capacity to enter into the agreement on the day of mediation.⁴¹ Citing concerns for fairness and the integrity of the mediation process, the court created an exception to mediation confidentiality based on case law and section 6(b)(2) of the Uniform Mediation Act,⁴² which exception had not previously been adopted in Georgia by either the courts or the Georgia Commission on Dispute Resolution.⁴³ The court noted that Section 6(b)(2) provides as follows:

[W]hen a party contends that a mediated settlement agreement is unenforceable, the mediator may testify regarding relevant mediation communications if a court determines that ‘the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise

available, [and] that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.⁴⁴

The Georgia Supreme Court found that the trial court did not err in calling the mediator to testify where the “mediator did not testify about specific confidential statements that [a party] made during the mediation, but only testified about his general impression of [that party’s] mental and emotional condition.”⁴⁵ The court noted that the mediator was the only witness to virtually all of Mr. Wilson’s conduct during the mediation, as well as the difficulty the court would face in resolving the issue of enforceability without the mediator’s testimony.⁴⁶ The court, however, also recognized the importance of mediation confidentiality along with supporting policy considerations and “urge[d] trial courts to exercise caution in calling mediators to testify.”⁴⁷

In a California case, *Olam v. Congress Mortgage Co.*,⁴⁸ Judge Wayne Brazil, a United States Magistrate who is well-respected with regard to ADR-related issues, ordered a mediator to waive confidentiality and testify about what had led to the alleged agreement reached at the mediation. Judge Brazil explained that he was balancing the benefits to justice of receiving the evidence against the burden on the mediator and the mediation process, and he allowed the testimony after concluding that in the case at hand the benefit was great and the burden was modest.⁴⁹ Similarly, in *Lawson v. Brown’s Day Care Center*,⁵⁰ the Vermont Supreme Court held that reporting unethical or illegal conduct in mediation was appropriate and was not a violation of mediation confidentiality unless the complaint was made in bad faith by the reporting party.⁵¹

Nevertheless, it remains clear in most jurisdictions that a strong presumption of confidentiality generally exists for any document or information created or developed in connection with mediation. Accordingly, the confidential nature of these documents or information must be honored by lawyers and clients involved in the mediation process.

“Using” Mediation – Is Good Faith Required?

It has been suggested by some commentators that a good faith requirement in mediation should be imposed by rule or statute.⁵² If good faith participation in mediation were to be required, however, how would good faith be defined? For instance, would lawyers and parties be required to alter their negotiating style to meet this requirement, and, if so, what would that mean? Further, although lawyers are obligated not to pursue litigation tactics solely for delay,⁵³ if a lawyer believes that mediation may bring the parties closer to settlement, should he/she be able, in good faith, to recommend mediation, even though other motivation to mediate also may be present, such as the desire to obtain “free discovery” or even to secure a needed delay? When considering many of the issues that would be involved, the inevitable conclusion is that trying to define what constitutes good faith in some, or all, aspects of mediation would be extremely difficult and might well create more problems and issues than the imposition of any such obligation would solve. Furthermore, the principle of mediation confidentiality would probably prevent any effective enforcement of such a requirement.⁵⁴

Several other adjacent states are in agreement that mediators cannot testify about the parties’ good faith or lack thereof during a mediation. For example, a Florida Mediator Ethics Advisory Committee expressed similar concerns about mediation confidentiality as related to a requirement to mediate in good faith. The Committee acknowledged that while “[t]here are no [Florida] statutes, rules, or common law governing court-ordered mediation that require the parties to negotiate in good faith,” a mediator may be faced with a court order that incorporates a good faith requirement and calls for the mediator to report a party’s non-compliance to the court.⁵⁵ The Committee, however, went on to find that that the mediator who sought guidance on this issue could not comply with both the applicable Florida rules for court-appointed mediators and any such order requiring the mediator to “report a party who fails to mediate in good faith.”⁵⁶ In fact, the Committee advised that a mediator should decline to participate in mediation “when a mediator is informed by the court in advance of the mediation that the confidentiality of the session would not be honored.”⁵⁷ Further, in a decision of the

Tennessee Supreme Court Alternative Dispute Resolution Commission, the Commission suspended a mediator, finding that the mediator's disclosure to the court that a party did not mediate in good faith violated court rules, including the rule providing for confidentiality of ADR proceedings.⁵⁸

Therefore, although everyone generally agrees that parties and counsel should approach mediation in good faith to make the process effective and successful, there unfortunately appear to be no legal consequences to a party or lawyer who fails to bargain in good faith in a mediation.

Conclusion.

There are few bright-line requirements that differentiate the ethical obligations of lawyers representing clients in mediations from those in other types of representation. Conclusions and inferences from the materials cited above, however, do provide guidance on appropriate conduct for lawyers and clients in mediation. In particular, the mediation advocate certainly must be familiar with, and prepared to explain, the subtleties of mediation to the client, especially if the client is not familiar with the mediation process. The lawyer should assist the client in the identification of the his/her goals and should put together the right mediation team to achieve those goals. The attorney also must be cognizant of the nuances of employing negotiating techniques that fall within the parameters of the requirement for truthfulness found in Rule 4.1 of the Model Rules, as well as the requirement for confidentiality in the mediation process, and the admonition that parties should be prepared to negotiate in good faith. When all is said and done, however, the primary objective of the lawyer representing a client in mediation is and must be the same as in any other representation – the successful implementation of the client's overall goals and objectives.

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² See, e.g., David B. Lipsky and Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the*

Growing Use of ADR by U.S. Corporations, 9 (1998), available at <http://digitalcommons.ilr.cornell.edu/icrpubs/4> (“We conclude that ADR has made substantial inroads into the fabric of American business, with [general] counsel overwhelmingly preferring mediation (63 percent); arbitration was a distant second (18 percent”).)

³ See Steven H. Hobbs, *Facilitative Ethics in Divorce Mediation: A Law and Process Approach*, 22 U. RICH. L. REV. 325, 338-39 (1988); Cary Menkel-Meadow, *Ethics in ADR Representation: A Roadmap of Critical Issues*, DISPUTE RESOLUTION MAGAZINE (Winter 1997), at 2.

⁴ THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf>.

⁵ ABA MODEL RULES OF PROF'L CONDUCT (2002).

⁶ *Id.* at pmbl. § 2.

⁷ *Id.* at pmbl § 3.

⁸ See, Cary Menkel-Meadow, *Ethics in ADR Representation: A Roadmap of Critical Issues*, DISPUTE RESOLUTION MAGAZINE (Winter 1997), at 2.

⁹ *Id.* at 4-5.

¹⁰ *Id.* R. 1.2.

¹¹ *Id.* R. 1.2 cmt. 1.

¹² *Id.* R. 1.2(a).

¹³ *Id.* R. 1.4.

¹⁴ *Id.* R. 2.1 cmt. 1.

¹⁵ *Id.*

¹⁶ *Id.* R. 2.1 cmt. 2.

¹⁷ *Id.* R. 1.2.

¹⁸ *Id.* R. 4.1.

¹⁹ See, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 n. 2 (2006) (“Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a ‘tribunal.’ It does not apply in mediation because a mediator is not a ‘tribunal’ as defined in Model Rule 1.0(m).”)

²⁰ GEORGIA RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2001).

²¹ ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Op. 06-439 (2006).

²² *Id.* at 3, n.3 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 98 cmt. c (2000) (citations omitted)).

²³ *Id.* at 6.

²⁴ *Id.* at 8, n.22.

²⁵ *Id.*

²⁶ ABA MODEL RULES, R. 1.6(a). This principle of confidentiality also is effectuated in a related doctrine, the attorney-client privilege.

²⁷ *See*, RDM Holdings, Inc. v. Equitex, Inc. (*In re RDM Sports Group, Inc.*), 277 B.R. 415, 426-432 (Bankr. N.D. Ga. 2002)(summarizing the federal mediation confidentiality privilege).

²⁸ 186 Ga. App. 446, 447-49, 367 S.E.2d 300, 427-30 (1988).

²⁹ *Id.* at 448-49, 303.

³⁰ *Id.* at 448, 302.

³¹ *Id.*

³² The evidentiary principle dealing with the inadmissibility of offers of compromise is found in Federal Rule of Evidence 408 and, in Georgia, in O.C.G.A. section 24-3-37. Of course, these evidentiary rules address only the inadmissibility of settlement negotiations and offers; the broader principle of mediation confidentiality means that the mediator and all parties in mediation agree to forego any further use of the protected information.

³³ The general rule excludes from protection any information or document that is “otherwise discoverable.” Accordingly, if a document was created outside the context of mediation, it is not protected from discovery by the mere fact that it was used or referred to in a mediation.

³⁴ Georgia Comm’n on Dispute Resolution’s Comm. on Ethics, Advisory Op. 6 (2005).

³⁵ *Id.* at 1 (citing GEORGIA ALTERNATIVE DISPUTE RESOLUTION RULES, app. C, ch. 1, § II).

³⁶ *Id.* at 1.

³⁷ *Id.* at 2.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 282 Ga. 728, 653 S.E.2d 702 (2007).

⁴¹ *Id.* at 731-32, 706.

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- ⁴² UNIFORM MEDIATION ACT (2003).
- ⁴³ Wilson, 282 Ga. at 732-33, 653 S.E.2d at 706.
- ⁴⁴ *Id.* at 732, 706 (citing UNIFORM MEDIATION ACT, § 6(b)).
- ⁴⁵ *Id.* at 733, 707.
- ⁴⁶ *Id.*
- ⁴⁷ *Id.*
- ⁴⁸ 68 F. Supp. 2d 1110 (N.D.Cal. 1999).
- ⁴⁹ *Id.* at 1136-39.
- ⁵⁰ 172 Vt. 574, 776 A.2d 390 (Vt. 2001).
- ⁵¹ *Id.* at 576-77, 393-94.
- ⁵² See, e.g., Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith*, DISPUTE RESOLUTION MAGAZINE (Winter 1997).
- ⁵³ ABA MODEL RULES, R.1.8 (2001).
- ⁵⁴ In the aforementioned Advisory Opinion 6, the Georgia Committee on Ethics notes that the principle of confidentiality trumps any ability of a mediator to report a lack of good faith participation in the mediation to a referring court. The Committee stated that the mediator must maintain confidentiality regarding a party's good faith or lack thereof, and that the unwillingness of a party to bargain in good faith is consistent with the party's right to "refuse the benefits of mediation."
- ⁵⁵ Mediator Ethics Advisory Comm. Advisory Op. 2004-006 at 3 (citing *Avril v. Civilmar*, 605 So.2d 988, 989-90 (Fla. 4th DCA 1992), available at http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEAC%20Opinion%202004-006.pdf).
- ⁵⁶ *Id.*
- ⁵⁷ *Id.*
- ⁵⁸ *In re Finney*, Decision of Tennessee Supreme Court Alternative Dispute Resolution Commission on Grievance filed January 3, 2006, available at: <http://www.tsc.state.tn.us/geninfo/Publications/ADR/Rule%2031%20Mediator%20ADRC%20Grievance%20Decision%2011-2-06.pdf>.