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Ethics in Mediation During Complex Construction Cases

Introduction

We have all been there, either on behalf of Plaintiff's or Defendant's in complex construction cases. There are a ton of parties and documents and since court's rarely wanting to lock up judge's and jurors for months at a time, both the court and key players move the case into mediation. While the crux of mediation is how the respective parties being sued breached the standard of care and caused Plaintiff damage, ethical consideration commonly arises between attorneys, mediators, claims adjusters, and insured. This panel will discuss issues like truthfulness, confidentiality and client authority which may seem obvious. This panel will also discuss ethical issues that may not seem so obvious as one gears up for mediation like insurance coverage issues, allegations of bad faith, and how information provided during mediation may affect the case if the case does not settle at mediation.

In construction litigation cases having a knowledge and understanding of the key players as a case moves toward mediation is critical. Issues such as the existence of consequential damages as opposed to simply defective work affect insurance coverage and can be the reason why an insurance carrier is less inclined to offer settlement money close to or exceeding what Plaintiff is seeking. Additionally, the connections between contractors and design professionals

Related to the lawyers' role in advising and counseling clients is the role of the client in different kinds of proceedings. Once again, our traditional legal ethics rules address themselves to lawyers, but what of party responsibilities-to simply attend or to actively engage in solution-seeking behavior, or to consider the needs and interests of other parties? Rules prohibiting advocates from contacting represented parties and preventing clients from doing the same, in some cases, may be dysfunctional when we want to encourage the parties to talk to each other to resolve their problems. The appropriate rules of contact for third-party neutrals, representatives, and parties in joint sessions and caucuses are complex, dependent on different caucus philosophies, and left completely unanswered by conventional ethics rules. Thus, the conceptual frameworks that inform alternative dispute resolution processes change the rules of the game being played.

I. Ethics for Insurance Professionals

Insurance professionals, many times, are forced to straddle the line between a good settlement and/or the needs of the insured(s). While some insurers have their own code of ethics, some states like Florida have their own insurance adjusters code of ethics. The Unfair Claims Settlement Practices Act is a benchmark measure on proper claims handling which many states have used as a guide to enact their own guidelines or regulations. In the context of mediation, insurance professionals need to make sure to not act in a prejudicial manner to the insured, not negotiate with third-party claimants represented by attorneys, not negotiate with persons in stress or shock from a loss, not knowingly misrepresent facts of policy provisions, or making denials without conducting the necessary due diligence.

ABA Model Rules for Attorneys Applicable to Negotiations

Section 3.1.1- An attorney should discuss with the client, promptly after retention and thereafter possible alternatives to conventional litigation, including mediation.

Section 3.1.2- A attorney should not initiate settlement discussions without authorization from client; it is the client's decision whether to pursue settlement discussions and whether to settle a case.

Section 3.1.4- An attorney must keep client informed about settlement discussions and must promptly and fairly report settlement offers and demands.

Section 4.1- While representing a client, the attorney may not knowingly make a "false statement of material fact or law to a third person."

Section 4.2.3- An attorney must not agree to refrain from reporting opposing counsel's misconduct as a condition of settlement.

attorney to possess the ability to home in on only those issues that are most likely to achieve resolution. That ability is the result of experience and the confidence in one's own legal judgment that experience fosters.

The Code of Conduct

ADR practitioners themselves are seeking ethical guidance in dealing with complex ethical issues in these processes. Further, ADR professionals perceive that codes of conduct as well as the development of a standard of care for mediators lends a recognition of respectability and credibility to the mediation process and the perception of mediation as a profession. In addition, there is a perceived need for consumers to be able to identify well qualified mediators to help them solve disputes and if the ADR profession itself does not take the lead in defining such expectations, there is concern that the standards will be defined elsewhere.

Consumer protection and quality assurance have become increasingly important given the proliferation of court annexed alternative dispute resolution. The maxim “caveat emptor” seems less relevant when we are dealing with situations where parties are mandated to attend a mediation by a court rostered mediator. It is argued that the lack of formal structure in mediation processes requires that at the very least, minimum expectations of ethical behavior are necessary.

It is further proposed that one of the many purposes of model standards/codes of conduct is to set out a general framework for the practice of mediation to encourage and ensure both substantive and procedural fairness to the parties within the mediation process and specifically address concerns relating to deceptive and unfair negotiating tactics, among other concerns.
Overall, there are three generally accepted themes to arguments for the necessity of ethical codes of conduct for mediators: to provide guidelines for mediators themselves; to protect the parties/quality assurance by informing them of the conduct they have a right to expect, and the integrity of the profession and the promotion of public confidence
in mediation as a process for resolving disputes.

II. The Question of Truthfulness

The most important ethical issues surrounding the mediations in which lawyers participate relate to: (1) the appropriate level of candor for the dialogue that occurs during the mediations and (2) the appropriate division of authority between lawyer and client before and during the mediations. These are the very same issues that surround negotiation ethics, though the addition of the mediator changes the context within which they arise. Lawyers may take a hardline with the mediator but may take a tempered approach when dealing with their client, who in cases where there is substantial exposure may be present in-person at the mediation.

At one extreme, mediation can simply be facilitated share bargaining. Here the underlying premise of a mediation is that there is a relatively fixed pie to divide and that the mediation is a "zero-sum game." One person's gain is the other person's loss and neither party gains in any way from the other party's "success." The process of the mediation, like share-bargaining negotiation, is employed both to determine whether there is a zone of cooperative success, a so-called bargaining range created by the overlap between the parties’ bottom lines,5 and then to settle as close to the other party's bottom line as possible. The ethical issues surrounding this style of negotiation are all intertwined with obligations of candor or truthfulness; and one can easily see why. Both parties to this kind of negotiation perceive themselves better off settling anywhere in the settlement

III. The Question of Client Authority

The other set of ethical issues that surround negotiation have to do with the fostering of client autonomy. Specifically, they involve the interpretation of Model Rule 1.2, which provides that “[a] lawyer shall abide by a client's decision concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued.” The Rule provides explicitly that a lawyer "shall abide by a client's decision whether to accept an offer of

settlement of a matter." This provision includes as an obvious corollary a requirement that a lawyer convey to the client any offer concerning which the lawyer does not already have clear authority to accept or reject.

Two sorts of difficulties arise in the application of this rule. The first has to do with the choice in negotiating strategy itself. Is the decision to pursue a hard positional bargaining strategy or an integrative or problem-solving approach a choice of means or a choice of the goals of the representation? It seems that it could be either.' If the client's goals in the representation are solely extrinsic to the process-maximizing recovery in a tort claim-it would seem that choice of negotiating style would be a means. If the client includes maintaining cordial relations with the opposing party as a goal of the representation, it would still seem that the choice of negotiating strategy is a means rather than an end, though here the choice of an integrative strategy might be the only competent one. One could, however, envision a client who saw it as a goal of the representation to communicate with the negotiating party in a candid and nonmanipulative manner, even if that surrendered some tactical advantages.

Such a client would consider integrative bargaining to be a matter of ethics, not of strategy. In a Kantian idiom, he might say not that honesty is the best policy, but that honesty is better than any policy. For such a client, negotiating in a certain manner could well become a goal of the representation on which, according to the casuistry suggested by Rule 1.2, the client holds ultimate authority. We will return to this subject when I consider the promise of certain forms of mediation to be intrinsically superior to adversary forms of dispute resolution and the role that a lawyer might have in mediation so conceived.

The second set of problems surrounding the application of the rule are practical. In lawyer-to-lawyer negotiation, the attorneys face a shifting set of proposals in an indeterminate relationship to each other. Often one's opponent23 is offering trade-offs between possibilities, each precise combination cannot easily be anticipated and the movement from one to the other may be fluid. Withdrawal from the negotiation to consult with the client every time a slight modification is tentatively proposed may be impractical and, from a purely strategic point of view, may reveal aspects of the client's position that ought to be withheld. I do not think there is any easy answer to this practical problem, though its force can be blunted by good initial client interviewing and a firm sense of the priorities among the client's goals.

The second difficulty in the application of the rule requiring client control of the goals of representation in negotiation is more a problem in the lawyer's moral psychology. In lawyer-to-lawyer negotiation the attorney largely controls the pattern of offers from the opponent and completely controls the flow of information to the client.

The client is dependent on the lawyer's reporting of the opponent's factual assertions and the offers made. More importantly, the client is dependent upon his lawyer's *judgment* about what resolutions are feasible and when the opponent has reached his resistance point. When a lawyer says to his or her client, this point is "non-negotiable" or "they will not budge on this," it is likely that the client will follow his lead. Finally, the ethical rules all but prevent a lawyer from contacting a represented opposing party when he or she believes that offers (and, *a fortiori,* information) are not being conveyed to that party by his or her lawyer.

The client is thus highly dependent upon the lawyer's honesty primarily with himself-about what he is saying to his client and what he is doing in the negotiation. And there are strong motives to be less than candid with oneself. Often a lawyer will honestly believe that his client is not acting in her own best interests, that she is too willing to settle on unfavorable terms in a divorce, perhaps, simply to avoid even the threat of a trial that the lawyer believes is extremely remote. The temptation to resort to the paternalistic manipulation of information here can be great. Second, every fee structure will create some potential conflict of interest27 between client and lawyer. This is true whether the lawyer is charging a flat fee, an hourly fee, or a contingent fee. In each case, it is a matter of purely contingent fact that the lawyer's financial self-interest will be exactly congruent with his client's goals in the representation. Only the lawyer's sense of professional obligation-his or her "purity of heart" -can assure that it is the client's goals that are being advanced.

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Mediator's Need for Candor and Competency

The narrow ethical issue this raises is the level of candor which a lawyer owes to a mediator. The mediator is surely entitled to that degree of candor required by Rule 4.1. But the latter is heavily qualified in the ways we have discussed above. The remaining question is whether the mediator is entitled to a higher level of candor-specifically, whether a mediator is entitled to the protection of Rule 3.3, which provides in relevant part:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client:

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

The Model Rules do not provide a definition of a "tribunal... The Ethics 2000 recommendations remedy this omission in a way that is, I think, consistent with the current rules:

RULE 1.0: TERMINOLOGY

(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.

It is clear that mediation would not fall under this definition of "tribunal." Indeed, it almost seems that the definition has been written carefully to exclude mediation from its scope. It appears then, that the same ethical obligations concerning candor that apply when negotiating with an "opposing party" apply to statements to the mediator. Although the case could be made that a party owes a higher level of candor particularly to an "evaluative" mediator than to an opposing party, I know of no authority so holding.

Competence

The Standards provide the mediator must show competency in relation to skills, knowledge, and ethical understandings of, among other things, conflicts of interest, confidentiality, neutrality and impartiality, and fiduciary obligations, supporting fairness and equity in mediation, and withdrawal from and termination of process, when necessary. The requirement of competency in relation to ethical understandings creates further tension between the underlying values of neutrality/impartiality and self-determination. An understanding of the ethical requirements invoked by clause 7.3(c) may require the mediator to act in ways that conflict with the values of neutrality and self-determination. For example, this clause raises the fraught issue of the extent to which a mediator should support fairness and equity in mediation.

Another matter that arises is the requirement that mediators act as fiduciaries and understand their fiduciary obligations. It may be that the mediator owes fiduciary duties to both parties and must, accordingly, act in the best interests of both. Acting in the best interest of both parties necessitates a mediator be neutral and impartial, but neutrality precludes the mediator from certain interventions that may jeopardize the interests of a party and lead to an unjust outcome.

From the discussion above, it can be concluded that while the Standards provide some guidance to mediators on the requirements of ethical practice, they do not supply answers when mediators face the ethical dilemmas of competing values. These dilemmas might call into competition self-determination versus supporting fairness and equity in mediation; neutrality/impartiality versus supporting fairness and equity in mediation;

neutrality/impartiality versus recognition of and addressing power imbalances; neutrality/impartiality versus ensuring informed decision making/consent; self-determination versus ensuring informed decision making/consent/reality testing of options; and self-determination versus the public interest.

Another source of ethical challenge occurs when there is a conflict between a mediator's personal values and mediation values. These dilemmas arise because mediators constantly need to decide between different strategies and types of interventions when faced with competing mediation values. As stated by Lawrence Boulle: "All mediator interventions are based on mediators' perceptions and judgments which are never fully independent and disinterested in any absolute sense."

Mediators rely on their personal values, consciously or not, to make these decisions. The Standards cannot cater to all situations. Macfarlane explores the link between fairness, mediating ethically, and the mediator's choice of intervention strategies. She argues, "[E]thical judgment making occurs constantly, intuitively, and often unconsciously," and mediations present myriad ethical choices. It could be argued that everything a mediator says or does has the potential to influence outcomes. Macfarlane suggests codes of conduct are unable to deal with the "complex and moral dilemmas of practice" and proposes a reflective practice approach to complement codes of conduct. Samantha Hardy and Olivia Rundle argue for an inclusive approach to mediation ethics that can "provide guidance for mediators to engage in ethical practice" and "attempts to balance the need for consistency and accountability with the critical element of reflection on practice. It is based on four 'essential dimensions' of decision-making and good practice: accountability, critical reflection, cultural sensitivity, and consultation." This approach, it is argued, will address the issue of competing mediation values and the inadequacy of mediation standards (codes) in addressing ethical dilemmas

When asked for examples of ethical issues (other than those raised in the scenarios), the research participants—drawing on their own experience—provided a wide range of situations:

- Confidentiality of settlement in a mediation involving an abuse victim and a church organization raised questions about the preservation of the victim's legal rights.
- Lack of good faith by one party and deceptive conduct (mediation terminated).
- Inequality and power differentials, particularly where one party was uninformed or misinformed.

A study conducted for the National Institute of Dispute Resolution by Robert A Baruch-Bush based on interviews with approximately eighty mediators sought to identify the most common situations or types of ethical dilemmas faced by practicing mediators. R. Baruch Bush, *"The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications"* (1994) 1 Journal of Dispute Resolution 8. In the study, Bush defined ethical dilemmas as those which cause some discomfort or ambiguity for practicing mediators because choices or courses of action produce conflicting possibilities given potentially conflicting values. The primary purpose of the study was to identify the range of ethical dilemmas in which practicing mediators need guidance. The study found a range of categories or major types of dilemmas reported by practicing mediators. Broadly speaking, they center around dilemmas relating to competency,

impartiality, confidentiality, consent, self-determination, non-directiveness, separating mediation from counseling and legal advice, avoiding party exposure to harm, preventing party abuse and conflicts of interest.

It is important to state that Bush laid out many subdivisions and specific subtypes within each general category. It is beyond the scope of this paper, however, to discuss these subtypes. Of interest, though, is that Bush's findings strongly suggest the dilemmas of mediation practice is similar in all the fields of practice studied – community, divorce and civil mediation.

One of the key conclusions arising from Bush's study is encouraging. He states that in order for parties in a mediation to realize the benefits while avoiding the risks of abuse inherent in an informal process such as mediation, "it is crucial that mediators themselves be sensitive to what the risks are and committed to avoiding them." Bush reports that the findings of his study strongly support the existence of such sensitivity on the part of mediators. He concludes that his study evidences that mediators are concerned about good practice, are sensitive to what the dilemmas are, and are anxious to resolve them responsibly. Given such findings, one wonders whether the
concern/argument for codes relating to the protection of the public is really a valid concern and one that really needs to be addressed.

Bush further suggests that mediators' concerns relate not only to narrowly defined ethical dilemmas such as conflict of interest for example, but also include broader value dilemmas including conflicts between different values and objectives at stake in mediation. Thus, Bush concludes that many of the dilemmas described by the mediators go to the central question of what their functions or roles are as mediators, and what they should consider the primary purpose of the mediation process when different objectives clash.