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Ethical Issues for Construction Professionals – The Boundaries of Zealous Advocacy and Confidentiality in the Mediation Process

A. The Mediator. Ethics Issues for Neutrals.

1. What is the mediator's obligation to educate when he or she knows a party is not aware of a key case in its favor?

One of the fundamental issues mediators face is when there is an information gap that could affect the settlement posture of one of the parties. The ABA's Model Standards of Conduct for Mediators addresses this issue in Standard I(A)(2). That section states: "A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices." Similarly, Standard VI(10) states: "If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination."

Under this Standard, it is clear the mediator may suggest to a party that he or she consult with others to obtain missing information, or obtain a second opinion on the case or a particular issue. The issue is when does a mediator go over the line and move from a facilitator providing missing information, to an advocate?

2. Tautology when the amount offered by Defendant is more than the "private bottom line" confidentially shared with the mediator by Plaintiff. Does the mediator have the right to hold back some of the authority?

The issue here is whether a mediator has the right to offer less than the authority he or she has. While the ABA Model Standards state at Standard VI(4) that a "mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation" it is standard ethical practice for a mediator to only offer what is necessary to settle a case. The mediator does, however, have an ethical obligation

to provide information if it is clear there is an information disconnect that results in one party overvaluing or undervaluing his or her case.

3. Does the mediator have to correct a misstatement of the law?

Neither JAMS' Mediators Ethics Guidelines nor the ABA's Model Standards of Conduct for Mediators provide express guidance on this issue. However, under both sets of rules, it is the mediator's obligation to encourage "self-determination" which is defined by the ABA as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcomes." Thus, if a party is relying on a mistake of law, is he or she able to make a settlement decision that is "informed"? Under this view, the mediator must correct a misstatement of the law. Under an opposing view, by correcting a misstatement of law, the mediator has strayed over the line from a "neutral intermediary" and is now acting as a "representative of or advocate for" the party. The answer may lie in the egregiousness of the misstatement and whether it will have a material impact on the outcome of settlement negotiations.

4. Is the mediator required to correct mistake a fact, when the correction will change the outcome of the negotiations?

As part of the self-determination process, it is certainly part of the mediator's role to correct a mistake of fact if he or she knows it will change the outcome of settlement negotiations.

B. Attorney issues. The Applicability of the Bar's Ethics Rules During Mediation

1. Does the attorney have the same duties to a mediator to accurately cite case authority and the facts as the attorney has to a Court?

No. ABA Model Rules draw a sharp distinction between proceedings litigated before a tribunal, and those conducted in a private mediation. Courts are "tribunals" under the Model Rules. *See,* Rule 1.0 (m). A lawyer's conduct in a tribunal is governed by Model Rule 3.3, which prohibits knowingly making false statements or failing to correct false statements, failing to disclose adverse authority, or offering false evidence. This strict duty of candor does not apply to mediation proceedings.

Mediators are not tribunals. They do not have the capacity to "render a binding legal judgment directly affecting a party's interests in a particular matter." *See,* Rule 1.0 (m). Still, lawyers are bound by ABA Model Rule 4.1, which requires truthfulness in statements to others. The commentary to the Model Rules helps in drawing a distinction between this ethical obligation, and that imposed by Rule 3.3. For instance, comment 1 to Rule 4.1 states:

> A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.

This provides the lawyer leeway with a mediator that does not exist with a tribunal. As discussed below, puffery that does not rise to the level of making a false statement about a material fact is also permitted. This allows the parties to engage in an adversarial process that is inherent in negotiating.

2. When does puffery end and lying begin?

Comment 2 to Model Rule 4.1 expressly addresses a lawyer's conduct in negotiations. It states:

> 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. 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 ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

The ABA has issued formal opinions that provide guidance in determining where puffery ends and misrepresentation begins. It seems clear that a lawyer may properly "understate their willingness to make concessions to resolve the dispute." *See,* Formal Opinion 06-439. As the opinion explains, such permissible conduct includes statements that a party requires a certain amount of money to settle a case, when the party will actually accept less. However, if a lawyer representing a corporation states "our board deliberated and voted to accept no less than 200 dollars to resolve this case," when the board actually voted to accept a lesser amount, then that would violate the rule, because the lawyer is knowingly making a misstatement of material fact.

Similarly, a lawyer who misrepresents the client's bottom line authority when directly asked by a judge could be subject to discipline. In Formal Opinion 93-370, lawyers are cautioned never to deliberately misrepresent bottom line settlement authority or lie to a settlement judge. Acknowledging that a client's final settlement authority reached in consultation with counsel is a confidential matter protected by ABA Model Rule 1.6, the opinion instructs lawyers to decline to answer the question when it is posed, unless the lawyer has consulted with the client and obtained informed consent. Settlement judges are permitted to inquire regarding bottom line settlement authority, but must respect the position of a lawyer who declines to answer, and not pursue the matter further. This is distinguished from generalized statements concerning a willing to compromise, the perceived value of a claim, and a party's general willingness to accept certain terms as part of a settlement.

Another subject addressed by Formal Opinion 067-439 concerns insurance policy limits. A lawyer who represented to opposing counsel that his client's insurance limits were $200,000 when documents in his file demonstrated that the client possessed $1 million in coverage was unethical and subject to discipline.

3. Can an attorney withhold facts or omit facts when speaking to the mediator?

Yes. As long as the omission does not expressly or implicitly convey false material facts, facts can be omitted. For instance, ABA Formal Opinion 95-397 held that it was unethical for a lawyer in a pending personal injury action to conceal that the client had died. In contrast, Formal Opinion 06-439 imposes no duty on a lawyer to disclose that the statute of limitations has run on the client's claim. That is for the opposing party to recognize and exploit.

4. Does the attorney have the right to ask the mediator to withhold important law or case authority?

The lawyer can ask a mediator to withhold this information, and in fact is under no obligation to disclose adverse law to the mediator or opposing counsel in the mediation process. Caution should be exercised in disclosing such information to a mediator. The lawyer violates no ethical obligation in asking the mediator to withhold legal authority from the opposition, but is subject to the mediator's willingness to comply, and the mediator's ethical obligations.

5. Can an attorney ask the mediator to withhold information or to phrase settlement offers in a certain way?

There is nothing that prohibits a lawyer from asking, but before communicating information that the lawyer wants kept confidential, the lawyer should verify that the mediator is willing to withhold the information. However, the lawyer should not ask the mediator to do anything that would put the mediator in the position of violating Rule 4.1, such as disclosing that a personal injury client had died, and asking the mediator to conceal it, to use the example cited above.

6. Does the attorney have the right to ask the mediator to withhold information from other similarly situated parties such as the amount of contributions being made on their behalf?

There is nothing unethical about making such a request, so long as the mediator is not put in the position of holding materially factual information that puts the mediator in the position of making materially false statements by omission.

C. Carrier Representatives and Coverage counsel. Duty to the Carrier versus Duty to the Insured.

1. If the insured is mistaken as to the policy terms, does the carrier representative have to correct that mistake (such as, the insured is unaware of an after-issued endorsement that changed the policy in the insured's favor)?

The dialogue between the insured and the carrier representative should always be continuously open, honest and forthright. A well prepared carrier representative should have had at least one thorough conversation regarding any potential coverage issues with the insured prior to any mediation. This conversation would include any and all applicable policy terms, conditions, endorsements and coverages. If it becomes known the insured does not appear to have a correct understanding of any of their coverages, the carrier representative must immediately take the necessary steps to make certain the insured is fully informed of the correct policy language, endorsements and any applicable coverages and correct any mistakes by the insured. The carrier representative at all times must be professional and courteous in explaining any issues as they are looking out for the best interests of their insured.

2. Can the carrier representative tell the mediator that he or she has full authority when that is not true?

Often when ordered to participate in a mediation or settlement conference, the order may state the carrier representative must have full policy or settlement authority. The carrier representative must be fully prepared with the facts, coverages, damages and probable settlement outcome prior to the mediation.

Often the claim does not give rise to a policy limits settlement and the communication with the mediator can be in that gray zone depending upon the individual matter's circumstances and the prior history with that particular mediator. If asked if one has full authority, the response to the mediator may well be "yes" based upon the value assessed. If asked if the carrier representative has policy limits authority, the response may be it is not seen as a policy limits case, so should not be an issue as the carrier representative is there to resolve at a fair settlement commensurate with their insured's exposure. Again, depending upon those involved, this dialogue is based truly upon a case-by-case basis while the carrier representative continues to maintain professional and open communications with the mediator.

3. Can the carrier representative allow the insured to proceed on a mistake of fact that would change the coverage picture in the insured's favor.

If the carrier representative is aware the direction of the insured is due a mistake of fact, whether in favor or against the insured, the mistake must be corrected. This is part of the continuation of an open and honest dialogue with the insured, no matter the outcome. Any sign of misinformation erodes any trust that may be in place. If mistrust is generated, it often results not only in bad feelings between the insured and the carrier representative, but also may result in Department of Insurance Complaints as to the carrier representative and the carrier. It may also go to the extent of an Extra-Contractual claim if the insured feels they were wronged by the carrier.

Many of the States' Department of Insurance require their licensed insurance professionals to complete not only continuing education courses on a regular basis, but also satisfy a specified number of Ethics credits in order to maintain respective adjuster licenses in good standing.