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ETHICS IN NEGOTIATIONS AND MEDIATION

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ETHICS IN NEGOTIATIONS AND MEDIATION

"Ethical decision making requires tough, sometimes tragic, choices."[1]

The Existing Rules

The parameters of attorney ethical conduct in a court setting are well defined, largely understood, and for the most part followed by practitioners. On the other hand, the conduct of the advocate in negotiation or in a mediation is murky and ill-defined, at best.

Deception and "white lies" permeate all aspects of social practice. Modern society tolerates outright lying in a variety of circumstances – to avoid harm, produce an overriding benefit, maintain fairness or preserve confidence or reputation. Also, lying to protect one's self or someone else from physical harm, the government using undercover agents, lawyers manipulating facts and arguments before juries, physicians withholding information from dying patients to spare them fear and anxiety, and parents concealing from children for years that there really isn't an Easter Bunny or a Santa Claus. This begs the question as to what types of deception should be then considered "constructive" and ethically or professionally acceptable.

The problem is that confidential information conveyed to the mediator by any party cannot be disclosed by the mediator absent certain circumstances. Mediation

[1] Ellen Waldman, Mediation Ethics 1(2011)

rarely occurs absent deception because the parties (and their counsel) are normally engaged in the strategies and tactics of competitive bargaining during all or part of the mediation, the goal to get the best deal for the client.

Parties rarely share with the mediator all the information relevant, or even necessary, to the achievement of an agreed resolution. Thus deceptive behavior, although within the "rules of the game" often times cause negotiations to fall apart.

A good starting point, or frame of reference, for these discussions would be the Louisiana Rules of Professional Conduct. The Louisiana Rules are largely based on the ABA Model Rules, however, the Louisiana State Bar Association adopted none of the official comments of the ABA Model Rules.[2]

Rule 3.3, *Candor Toward the Tribunal.*

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if

[2] For a fascinating discussion of the history of the adoption of the Rules of Professional Conduct in Louisiana, see N. Gregory Smith, *Missed Opportunities: Louisiana's Version of the Rules of Professional Conduct*, 61 La. L. Rev. 1 (2000)

> necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule.
>
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Professor Dane Ciolino makes the following observation about Rule 3.3. "This Rules applies only in matters pending before a 'tribunal'. Thus, while it applies to matters pending before arbitrators it does not necessarily apply in matters before non-judicial mediators or in a non-adjudicative proceeding." Dane S. Ciolino, *Louisiana Professional Responsibility Law and Practice*, 175 (2001). La. R.P.C. 1.0 defines tribunal as

> "…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."

If Rule 3.3 is to apply only to tribunals which adjudicate matters in a public forum to the exclusion of mediations, Rule 3.3 does not make that clear. Thus, the rule apparently applies to private proceedings before arbitrators as Professor Ciolino suggests, then what about hybrid ADR forms such as med/arb? Lots of questions are unanswered.

The rule which has the most direct effect on negotiations is 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.

A reading of this rule quickly illustrates the problem. Is a mediator a "third party"? What is "knowingly"? It requires actual knowledge. Should have known is not the standard. What is a material fact? There are no Louisiana cases which define the word "material" within the context of the Rules of Professional Conduct. Professor Ciolino suggests that "….a fact should be considered to be 'material' for the purposes of this rule if an ordinary person would consider the fact 'important' in

the context asserted". *Id.,* p. 212. The question of whether the statement actually influenced the hearer is not the point.

The problem is further complicated by the long-standing recognition that puffery, in the context of negotiations, is acceptable conduct in negotiation. *ABA Commission on Ethics and Professional Responsibility*, Formal Opinion 93-370(1993). The ABA Model Rules specifically state "estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement or a claim are not considered to be statements of fact." *ABA Model Rules for Professional Conduct*, Rule 4.1, Comment [2]. Since Louisiana elected not to adopt the comments of the Model Rules, it is unknown whether Louisiana courts will place the same meaning on material fact as expressed in the comments to the Model Rules.

Professor Smith makes some interesting observations about this long-standing rule.

> "In short, it is 'ethical' to lie, at least about those things." [price and value]. "What about the things themselves? First, we should note that the word 'estimates' may carry a lot of freight. Price and value are inevitably subject to change. At some level, it is possible to regard most calculations of price and value as estimates. So there would appear to be nothing wrong, according to the comment, for a lawyer knowing it to be false, to say: 'the painting that was destroyed had a value of between

> $175,000 and $200,000'. The comment also grants broad permission to knowingly make false statements about client intentions. It would permit a lawyer to say, even when he or she knows it is false: my client will pay no more than $10,000 to settle this case;' or 'my client will not settle this case for less than $750,000'. False statement like these might be tactfully helpful in negotiations, especially against unskilled negotiators, but that is not a good justification for an ethics code to permit them." N. Gregory Smith, *Missed Opportunities: Louisiana's Version of the Rules of Professional Conduct*, 61 La. L. Rev. 1, 36 (2000)

The Points of View

Almost 50 years ago, Judge Alvin Rubin suggested an appropriate standard for conduct of attorneys who negotiate.

> "Surely if it's practitioners are principled, a profession that dominates the legal process in our law-oriented society would not expect too much if it required its members to adhere to two simple principles when they negotiate as professionals: negotiate honestly and in good faith; and do not take unfair advantage of another-regardless of his relative expertise or sophistication. This in inherent in the oath the ABA recommends to be taken by all who are admitted to the bar: 'I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor'." Alvin B. Rubin, *A Causerie on Lawyers Ethics in Negotiations*, 35 La.L.Rev. 577,593(1975)

Some twenty years later another Rubin offered a slightly different formulation of appropriate conduct.

> "If you would not do something in a courtroom context, if you would not make a misleading statement in a settlement conference with a judge, and if you would not remain silent about a misstatement made by your client or partner during discussions in court chambers or in open court, then you should not do any of these things in non-litigation negotiations, whether or not they take place prior to or after the filing of a lawsuit." Michael H. Rubin, *The Ethics of Negotiations: Are there any?*, 56 La.L.Rev. 447,476 (1995).

Another writer suggested the following rule.

> "Obligation, fairness, and candor in negotiation. When serving as an advocate in court a lawyer must work to achieve the most favorable outcome for his client consistent with the law and the admissible evidence. However, when serving as a negotiator, lawyers should strive for a result that is subjectively fair. Principled negotiation between lawyers on behalf of clients should be a cooperative process, not an adversarial process. Consequently, whenever two or more lawyers are negotiating on behalf of clients, each lawyer owes the other an obligation of total candor and total cooperation to the extent required to insure that fair result." Walter W. Steel, Jr., *Deceptive Negotiating and High Tone Morality*, 39 Vanderbilt L. Rev. 1387, 1403 (1986).

One writer has suggested that there be a requirement for attorney advocates to have a rule of good faith in mediation which in part would prohibit a lawyer from conveying information which is intentionally misleading or false to the mediator or other participants. Kimberly K. Kovach, *Good Faith Mediation-Requested, Recommended, or Required? A New Ethic.* 38 S.Tex.L.Rev. 575, 622(1977).

Professor James J. White has observed that the drafting of a rule concerning truthfulness in a negotiating setting would be extremely problematic.

> "On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, in a variety of ways he must facilitate his opponent' inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled." James J. White, *Machievelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 American Bar Foundation Research Journal 926, 927.

Or as another observed, "truth is such a precious quantity, it should be used sparingly." Godfrey M. Peters, *The Use of Lies in Negotiation*, 48 Ohio St. Law Journal 1 (1987).

The issue could be framed in this fashion.

> "A lawyer who would tell the whole truth in court might tell a half-truth if the same matter were being resolved in the privacy of negotiations. The difference between the lawyer's ethics in the court and at the negotiating table cannot be explained entirely by the presence or absence of judicial and written authority or by the lawyer's personal ethics. Ethics in bargaining, as in other human activities, are conditioned in party by personal character, belief systems, and other idiosyncratic features." Eleanor Holmes Norton, *Bargaining in the Ethics of Process*, 64 N.Y.U. L. Rev. 493, 504 (1989).

The problem with trying to articulate a coherent set of ethical standards for advocates in negotiations or in a mediation context lies in the anecdotal observation that consensual deception is an integral feature of caucused mediation. One author

observed that consensual deception exists for three reasons. The first is that information shared by the parties in a caucus with the mediator is normally considered to be confidential. Consequently, this information cannot be disclosed to the other parties. Second, the parties and their advocates are normally engaged in the strategies and tactics of competitive bargaining during all or part of the mediation conference and the goal of each is to get the best deal for himself or herself. Third, the information which is given to the mediator is normally imperfect. The parties and their counsel rarely share with the mediator all the information relevant or even necessary to achieve the mediator's goal, an agreed resolution of conflict. Thus, if deception is a central ingredient in the process, then the question becomes what type of deception is ethically unacceptable? John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 Loyola University of Chicago L. Rev. 1, 5-6(1997).

CONCLUSION

Lawyers lie in negotiations because lying helps one secure a larger piece of the pot. Simply put, negotiations are about protecting sensitive information of one's own to prevent oneself from being exploited while extracting information from the other parties. Good negotiators must therefore (1) engage aggressively and relentlessly in asking the questions and digging for answers, (2) take other proactive steps to secure the most accurate information from all parties, and (3) at the same

time be mindful of the information you are disclosing and how the other party might use that information. The goal of negotiations is to balance the ever-present tension of growing the largest possible pie and trying to win the largest share possible when the pie is finally divided. Be mindful of truthfulness in negotiation – Model Rule 4.1 and the duty of disclosure in good faith. One must balance lawyer ethics rules to various negotiation scenarios. Rather than focus on rules, assume that lying might occur in any given situation.

With this in mind, lawyers will be better able to understand, interact with and protect themselves from others who would try to gain an unfair advantage through lies and deception. Remember, it is impossible to prevent lying in the context of negotiation. Be mindful and use that to your advantage to avoid exploitation of yourself and your client.

REFERENCES

LOUISIANA RULES OF PROF. CONDUCT, RULE 1.0, *Terminology*

LOUISIANA RULES OF PROF. CONDUCT, RULE 4.1, *Truthfulness in Statements to Others*

ABA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, Formal Opinion 95-397, (1995) (Discussing *Duty to Disclose Death of Client*).

ABA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, *Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation*, Formal Opinion 06-439 (2006).

ABA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, *Disclosure to Opposing Party and Court That Statute of Limitations Has Run*, Formal Opinion 94-387, (1994).

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State ex.rel Neb State Bar Ass'n v Addison, 412 N.W. 2d 855 (Neb. 1987)

N.Y. Cnty. Lawyers Ass'n Op. 731(2003)

Spaulding v Zimmerman, 263 Minn. 346 (1962)

PA Eth. Op. 01-26 *(Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp.)* 2001 WL 1744874.

ABA COMMISSION ON ETHICS AND PROFESSIONAL RESPONSIBILITY, *Pretrial Settlement Negotiations,* Formal Opinion 93-370(1993).

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §98, cmt.*e*.

Vignette 1

Attorney represents a seller of an ongoing business in a negotiation to sell. The owner has provided the attorney with a set of unaudited financial statements which he gives to attorney for the potential buyer as part of the negotiation. Unknown to the seller's attorney, the financials are false showing inflated income.

Does the seller's attorney violate any RPC?

Vignette 2

Attorney represents a client trying to sell an office building located on a 1.9 acre tract. Both client and attorney Bob know the lot size.

Scene at Attorney Bob's office

Attorney Bob represents the owner of a commercial building in a negotiation with Attorney Karen, the buyer's attorney.

Attorney Karen: My client Mr. Warbucks likes this building, and he is interested in acquiring it for the good rental income. I hope we can reach a deal.

Attorney Bob: Well, it is a good deal, and the building is located on 2.5 acres of land. (Attorney Bob knows that is only on 1.9 acres)

Does Bob's statement violate Rule 4.1?

Vignette 3

Attorney's office, call comes through from daughter of one of attorney's personal injury client.

Attorney: Hello, this is Bob Arrowsmith

Client's daughter: Bob, this is Cheryl Longwood. I am Patrick Longwood's daughter. My dad died last night and I wanted to let you know.

Four days later a meeting between Bob Arrowsmith and defense lawyer Patricia King.

Patricia: Bob we have looked at the accident report and the meds you have sent over on your client and after speaking with our client we are prepared to settle this matter for $22,000.

Bob: Ok, I have authority to accept the $22,000.

Is it ethical for Bob not to disclose his client has died?

Vignette 4a

Attorney Bob represents a call center that purchased $750,000 worth of phone equipment from Digital Solutions that continues to malfunction causing approximately half of the employees not to be able to receive calls. Bob filed a suit on behalf of Call Center against Digital Solutions for 2 million dollars representing the cost to replace the equipment and lost profits for the time the equipment was down. He and the client agree to mediate the case and agree that Call Center will accept 1.25 million to resolve the matter.

At the mediation

Bob and his client Call Center are in their caucus room.

Mediator: Digital Solutions has offered to pay your client $950,000 to resolve this dispute.

Bob: That is a ridiculous offer. There is no money for the lost profits my client incurred. Call Center can't accept anything less than 1.7 million.

Question: Does the statement by Bob violate the RPC?

Vignette 4b

Same facts except when Bob says he won't accept anything less than 1.7 million.

Mediator: Do you have authority to accept 1.25 million?

Can Bob ethically say no?

Vignette 4c

What if Bob made this statement at the negotiation?

"We have corporate records that show a loss of 2.1 million dollars.

And in fact those records don't exist.

Vignette 5a

Attorney Bob has a client that has sustained a personal injury which is the fault of another driver. Unfortunately, prescription on the claim has run. Bob tells the client he will attempt to negotiate a settlement with the attorney for the party at fault.

Attorney Bob: Well Rachel I have sent you the police report, and my clients meds to date. I would like to see if we can settle this before I have to file suit. She is prepared to settle for $25K.

Attorney Rachel: Well, the demand seems a little high. I believe I can get authority for 22K. Will you client accept that?

Bob: I have authority to accept 22K. We have a deal.

Is it ethical to negotiate for a claim Bob knows is prescribed?

Does he have to inform Attorney Rachel that the claim has prescribed?

Vignette 5b

What if Bob represents that the statute of limitations has not run?

Vignette 6

Attorney Elaine represents a client in an employment discrimination case. She is seeking back wages, medical expenses, and future earnings. Prior to the mediation Elaine provides defense counsel with information showing her client's attempts to obtain other employment.

The day before the mediation

Receptionist in Attorney Elaine's office: Elaine, your Client Lisa is on the line. Do you want the call?

Attorney Elaine: Yes, put her through.

Client Lisa: Hey Elaine, I just wanted to let you know that I got a job yesterday and I am going be making $25,000.00 more per year in my new position.

At the mediation, Mediator in caucus with defense counsel Jane.

Attorney Jane: Look, I looked at Elaine's client attempts to get new employment and based on that I am prepared to increase our settlement offer by 50,000 to deal with the future wages part of the claim.

Now the mediator moves to caucus with Attorney Elaine and her client Lisa.

Mediator: Jane has increased her offer by $50,000 to $250,000 to account for the lost of future wages claim.

Attorney Elaine: Let me visit in private with my client. I will come get you when we are ready.

Attorney Elaine and client Lisa:

Client Lisa: Elaine, take the offer and don't mention my new job.

Attorney Elaine: Ok.

Mediator is waiting in the hall.

Attorney Elaine: We have a deal. My client will accept the $250,000.

Can Elaine ethically do this?

Vignette 7

Attorney Bob represents a hospital in a claim against a computer systems company for breach of contract.

Attorney Jane represents the computer systems. Computer Systems has insurance of 1 million with an excess policy of 5 million. Jane has copies of both policies.

The parties are engaged in negotiations.

Attorney Bob: Well, our claim is for 3million but your client only has 1 million in coverage and is out of business so the hospital will settle for the 1million.

Attorney Jane: Ok, we have a deal.

Can Jane ethically settle case without disclosing the excess policy?

Vignette 8

Karen represents a defendant in an auto accident case brought by the parents of a minor injured an accident caused by Karen's client.

Karen had the minor examined by a doctor of her choosing and in his report to her he advised that in addition to the injuries noted by the treating doctor he found that the minor had an aneurysm of the aorta which is a life-threatening condition.

A negotiation takes place.

Attorney Rachel: Well Karen, we have given you all the medicals which show multiple rib fractures; a severe concussion and fractures of the clavicles. This case merits a significant award. We will accept 375,000 to settle.

Attorney Karen: Ok, we will agree to settle for $375,000.

The aneurysm was never discussed. Did Attorney Karen have a duty to reveal the knowledge of the existence of the aneurysm?

Vignette 9

Attorney Patricia represents a worker who received a disabling injury in an on-the-job accident. The employer has acknowledged its responsibility for the injury.

The defendant has requested a mediation to try to settle the case.

Unknown to counsel for the defendant, Patricia's client has a non-occupational condition which makes his life expectancy of less than a year.

At the mediation.

Mediator Russell: Patricia, I believe your client's employer has made a good offer of three years of continuing workers' compensation benefits.

Attorney Patricia: Ok, we have a deal.

Does Patricia have an obligation to notify counsel for the employer of the client's non-occupational illness?

Vignette 10

Attorney Ellen represents a small painting contractor that has filed a suit in federal court against a general contractor for failing to pay for work done on a job in Louisiana.

Attorney Charles represents the general contractor, a large national firm that is headquartered in Dallas, Texas.

The trial judge has referred the case to a Magistrate Judge for a settlement conference.

At the settlement conference

MJ: Well Attorney Charles what is your client's "bottom line" to settle this case?

What should Attorney Charles do?

Vignette 11

Attorney Paula is defending in a medical malpractice case. Her defense medical expert generated a report which was shared with plaintiff's counsel weeks prior to the mediation. The report appears to clear Paula's client of malpractice. Paula's medical expert then reverses his opinion and now says the defendant's conduct caused plaintiff's injuries. The day before the mediation, Attorney Paula has a telephone conference with her expert. It was at that time she was alerted to the doctor's change of opinion. Attorney Paula decides to go forward with the mediation without revealing this information to plaintiff's counsel, Attorney Kylie.

AT THE MEDIATION:

Kylie and her client are in their caucus room:

Attorney Kylie: Their expert's opinion is sound and may be a problem for us at trial. Since my client does not want to take a chance with competing experts, we are prepared to settle for less than our original demand. Can we make this happen? Say $50,000?

Mediator: I read the report and can't say I disagree with you. Let me talk to Paula.

Mediator moves to Paula's caucus room

Mediator: Paula, tell me about Dr. Smith's opinion?

Attorney Paula: Dr. Smith always provides sound logic for his opinions. His report is clear that my client's conduct did not cause plaintiff's injuries.

Mediator: Can you make it happen at $50,000?

Attorney Paula: Although I am confident the jury will believe my expert over their guy, I can do $50,000.

Does Attorney Paula have to reveal to the mediator and plaintiff's counsel that her expert has changed his mind?

Vignette 12

Attorney Karen is defending her client at the mediation of an automobile case. Liability is disputed as both defendant driver and plaintiff driver offer conflicting testimony as to who had the green light at the intersection. The credibility of the parties will tell the tale at trial. Full value of plaintiff's injuries could exceed $150,000. However, Karen's client has a recent felony conviction for forgery. Her opponent, Attorney Sharon, is unaware of the felony conviction.

The parties are engaged in negotiations:

Attorney Karen: Look, this is a classic he said she said scenario. Credibility will play a big part at trial. My client is clean and will make a good witness.

Attorney Sharon: Well, it's not like your client is a convicted felon or anything like that. If he was, I am confident I can get that into evidence which could sway the jury.

Attorney Karen: My client is prepared to make a business decision. They are willing to up their offer to $75,000.00. Will that do it?

Attorney Sharon: We have a deal. My client will accept the $75,000.00.

Does Attorney Karen have an obligation to voluntarily reveal the felony conviction of her client?