Ethical Requirements of Attorneys at Mediation – A Refresher

By Beth Deragon

As a litigator, my clients often question the value of attempting mediation based on a concern that the other party will not participate in the mediation in good faith. While there is no ethical requirement per se that attorneys must participate in good faith, attorneys must comply with ethical rules at mediations.

In 18 years of practice, I have never heard a mediator remind the attorneys participating in the mediation of their ethical obligations – either in the mediation agreement, during the mediator's introductory remarks, regarding mediation statements, or during negotiations. Ethical violations do occur at mediations and, perhaps because the matter is likely resolved and all involved want to put the matter to rest, the misconduct goes unaddressed. Since that dynamic is unlikely to change, it is time for mediators and attorneys to revisit the ethical rules related to mediations and associated strategies that they can use to effectuate more advantageous settlement outcomes.

While attorneys are familiar with their ethical obligation to be truthful to a tribunal, they should also be mindful of their ethical obligations in the context of

a mediation: not to make a false statement of material fact to the mediator. Lawyers who represent clients at mediations are governed by the New Hampshire Rules of Professional Conduct and the ABA Model Rules of Professional Conduct (ABA Model Rules). Specifically, Rule 4.1(a) of the ABA Model Rules prohibits a lawyer, "in the course of representing a client" from "knowingly" making "… a false statement of material fact or law to a third person." As Comment [2] of the ABA Model Rules explains:

> 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. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortuous misrepresentation.

As Comment [1] of the ABA Model Rules notes, while "[a] lawyer is required to be truthful when dealing with others on a client's behalf" and to not make false statements or misrepresentations, there is "generally [] no affirmative duty to inform an opposing party of relevant facts." Comment [1] continues that a misrepresentation can occur if:

> . . . the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

This article aims to address a lawyer's ethical obligation of truthfulness when representing a client in a caucused mediation before someone other than a judge. In a caucused mediation, the mediator meets privately with each party, outside the earshot of the other party. Typically, the information learned by the mediator during the party caucus is considered confidential, unless the party disclosing the information permits the mediator to convey the information to the opposing party. Effectively, the mediator controls the flow of informa-

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were meant to explore the issues brought forward between parents and the school district impartially, to ideally resolve conflict through mediation and this bill is intended to further open communication and reduce conflict between the parties involved."[2]

According to New Hampshiare DOE representative Stephen Berwick, who testified before the Senate Education Committee on February 21, 2023, "the conference extension would prove beneficial because sometimes one day of mediation does not always afford resolution, and further, the extension would accommodate for scheduling issues between parties." Mr. Berwick noted that in more complex cases, "follow-up sessions were necessary for particularly difficult cases which involved educational placements and compensatory services."[3]

These types of complex matters are often the subject of cases that are resolved using the ADR process.

Notably, by the time a case reaches the DOE, the importance of the outcome is significantly heightened. In such cases, parties often rely on expert reports or evaluations that can take longer than the prescribed 30 days allowed, if such reports were not previously completed. As a result, and especially in those more complex cases, ADR is a challenging but critical procedure to navigate, and time limitations on the process can negatively impact the ability of the parties to reach a satisfactory outcome for students.

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The primary focus of this recent change in the law was to strengthen the ADR process by promoting further communication and reducing conflict amongst parents and school districts. Ultimately, this objective, guided by the IDEA's overall policy focus, is furthered by this simple yet meaningful adjustment to the ADR process for special education cases in New Hampshire. ■

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Endnotes

1. N.H. Laws of 2023, Chapter 72 (amending RSA 186-C:23, II and RSA 186-C:24).
2. See Senate Hearing Report, p. 2 (Feb. 3, 2023)
3. *Id.*

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tion received from the parties' legal counsel which the parties rely upon in their assessment of the merits and value of the case.

The ABA Model Rules do not require that the attorney disclose their client's "bottom line" monetary position. They permit the attorney to downplay their client's willingness to resolve the matter and other typical "puffing" statements. While the ABA Model Rules provide an attorney at a mediation leeway to characterize the strengths and weaknesses of their case and of its factual or legal position, they do not permit the attorney to misrepresent material facts related to the matter to the mediator, even indirectly.

For example, in an employment-related dispute, an attorney cannot represent to the mediator that documentation of the employee's alleged ongoing performance issues that lead to termination will be submitted at trial when the lawyer knows there is no such evidence or knows that the evidence will be inadmissible. In matters where insurance policy limits are material, the attorney with that information must be truthful regarding the policy limits when asked. Attorneys can refuse to answer questions posed by the opposing party or the mediator, but they cannot mislead the mediator into reaching a factual conclusion.

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If the mediation takes place prior to the completion of discovery, attorneys who represent the party with the bulk of the documentary evidence must be mindful of the ABA Model Rules and ethical obligations discussed above and ensure that they do not make a factual representation that contradicts the documentary and other evidence in their possession.

In addition to advocating for their client, parties to the mediation should challenge the basis of the material facts to the claims that the opposing party articulates. If a party cannot substantiate a material fact, then the value of their claim or defense should be reduced appropriately. Likewise, a good mediator will challenge all parties' factual assertions during the caucus sessions to ensure that the parties negotiate with full knowledge of the substantiated material facts, can assess the risk accordingly, and work toward resolution.

While ethical violations that occur at mediations often go unaddressed, the ABA Model Rules provide mediators and attorneys the tools to reduce such conduct and, as a last resort, to end the mediation if a party is non-compliant with the ABA Model Rules.

Furthermore, in addition to disciplinary action, attorneys could be held liable civilly for such misrepresentations and the settlement agreement could be rendered unenforceable. Mediations should be less about posturing and more about quality advocacy. When mediators and parties participate meaningfully and ethically, mediations become investments in resolution. ■

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