An Overview of the New York Rules of Professional Conduct in the Context of Mediation[1]

by Marcy Einhorn, Esq.

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, and expenses, and waste of time." Abraham Lincoln (circa 1850)[2]

In the spirit of Honest Abe, New York again celebrated Mediation Settlement Day on October 18 this year with a host of activities designed to promote mediation as a means of resolving disputes without going to court.

According to the New York State Court website, "Mediation is an efficient, user-friendly means for resolving conflicts and disputes. Instead of asking a judge to make a decision in court, parties in conflict meet with a trained mediator who helps them communicate with one another and if possible, reach an agreement that satisfies everyone."[3]

A recent survey of New York litigators reveals, surprisingly perhaps, that this group of attorneys is almost 90% behind the use of mediation as a means of resolving disputes.[4] Here, we'll take a look behind that rosy endorsement to see what litigators like and don't like about mediation in order to gain a better understanding of the obstacles to

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[1] Printed with Permission from: *NYLitigator,* Fall 2017, Vol. 22, No. 2, published by the New York State Bar Association, One Elk Street, Albany, New York, 12207

[2] http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm

[3] https://www.nycourts.gov/ip/adr/MSD.shtml

[4] "Mediation: Through the Eyes of New York Litigators," Report of the Mediation Committee of the New York State Bar Association Dispute Resolution Section and The Alternative Dispute Resolution Committee of the New York City Bar Association, January 27, 2011, p. 4.

the mediation of disputes. Next, this article will discuss some of the Rules of Professional Conduct that are relevant to attorneys who mediate. Finally, I'll discuss the ethical obligation of truthfulness to third parties as a standard of conduct in the mediation context.

The first priority of an advocate in mediation is always to further the client's goals and interests.[5] Although volumes could be written on the ways and means of meeting a client's objectives, suffice it to say here that the Rules give some general guidance, but leave the specifics to the individual practitioner, to implement in their infinite wisdom as a professional.[6]

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[5] "Ethics for Lawyers Representing Clients in Mediations," John A. Sherrill, 6 Am. J. Mediation 29, 2012, p. 38. See, New York Rules of Professional Conduct, as amended through 1/1/17, Rule 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER (a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, 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 settle a matter.

[6] See Comment (2) to Rule 1.2(a): [2] Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. On the other hand, lawyers usually defer to their clients regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Because of the varied nature of the matters about which a lawyer and client might disagree, and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(c)(4). Likewise, the client may resolve the disagreement by discharging the lawyer, in which case the lawyer must withdraw from the representation. See Rule 1.16(b)(3).

With respect to the favorability of mediation as a means of resolving disputes, participants in the State Bar's recent survey pointed to the success rate of mediation, the speed in which a resolution can be reached, the cost savings, the focus on resolution and the emphasis on realistic expectations as some of the reasons why they favored mediation.[7] To give a complete picture, participants in the survey also responded to questions about what they disliked about mediation. Top of the list were flaws in the process, followed by the lack of commitment to settle on the part of the attorneys or the parties, the low success rate, the effect it had on delaying resolution, the cost, the push for everyone to give up something in order to settle, and overly aggressive mediators.[8] It's worth noting that a high percentage of the attorneys surveyed said that even when mediation was not successful, there were several other beneficial effects that made mediation worthwhile including the opportunity to understand and assess the strengths and weaknesses of your own and your adversary's case, the chance to start a process that could ultimately lead to a settlement, the exchange of information without formal discovery, the "reality testing" of your position that mediation provides, and the opportunity to "lower the emotional temperature" of a dispute.[9]

Likes and dislikes aside, mediation raises a unique set of ethical issues that advocates are not likely to confront in litigation. While the rules regarding

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[7] *Id.*
[8] *Id.*
[9] *Id.* at p. 6.

confidentiality,[10] your role as an advisor,[11] and truthfulness in relation to third parties[12] apply to professional conduct regardless of the forum in which a dispute is heard, there are no Rules of Professional Conduct that specifically address the ethics involved in mediating disputes. In fact, a close reading of the Rules makes it quite clear that the Rules regarding conduct in a dispute apply to disputes pending before a tribunal,[13] and mediators are not included in the definition of what constitutes a tribunal under the Rules.[14]

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[10] RULE 1.6: CONFIDENTIALITY OF INFORMATION
(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, …

[11] RULE 2.1: ADVISOR
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

[12] RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS
In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

[13] RULE 3.3: CONDUCT BEFORE A 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;

[14] Rule 1.0: DEFINITION

(w) "Tribunal" denotes a court, an arbitrator in an 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 legal judgment directly affecting a party's interests in a particular matter.

The obligation of truthfulness to third parties is of particular concern in the mediation setting. This issue was addressed in an ethical opinion issued by the ABA Standing Committee on Ethics and Professional Responsibility.[15] There it was stated that certain statements are considered to be "nonactionable hyperbole," are merely a reflection of the speaker's state of mind, and are not to be considered misstatements of fact or law. In the case under consideration by the ABA Ethics Committee, a lawyer representing an employer in labor negotiations was found to have gone beyond mere puffery when he informed the union's lawyers that a particular employee benefit would cost an additional $100 per employee when the lawyer knew it would actual cost only $20 per employee.[16]

This distinction between "puffery" and misrepresentation is discussed in the Comments to New York Rule 4.1. Although the Comments have not been officially adopted as part of the Rules, they do carry great weight within the profession.[17]

At least one writer asks whether the goals of representing a client in a mediation should be any different than the advocate's goals in a more adversarial setting, such as arbitration or litigation.[18] The author concludes that there are few "bright-line"

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[15] ABA Comm. on Ethics and Professional Responsibility, formal Op. 06-439 (2006).
[16] See, "Ethics for Counsel in the Business World," James Q. Walker, PLI (2017).

[17] See Comment to Rule 4.1: Statements of Fact [2] 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 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; 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 tortious misrepresentation.

[18] "Ethics for Lawyers Representing Clients in Mediations," supra, p. 29.

differences between the ethical obligations of attorneys representing clients in mediations and those of attorneys in litigation. [19] However, when it comes to truthfulness, this author suggests that advocates may have an even higher duty when dealing with mediators since a crucial part of the process involves providing the mediator with accurate information so that the mediator can be effective in helping the parties to reach a workable solution to their dispute.[20] Failing this, a lawyer may not find himself in violation of the Rules regarding truthfulness, but may violate Rule 1.1, which addresses the duty to provide competent representation.[21]

From a practical standpoint, mediator Alida Camp describes the problem with truthfulness, or a lack thereof, this way:

> "Part of what is necessary for a successful mediation is information because it can persuade parties that they should be flexible in their proposals. Yet it can be difficult for counsel to impart information that they would rather keep in their back pockets for litigation or other reasons. Counsel's reluctance to provide facts or confirmation of impending actions that would have an impact on settlement conversations may be considered an impediment to continued talks, the cause of delay in productive talks, or leading the opposing party down the so-called primrose path. None of these outcomes furthers the mediation, leading to objections of bad faith or a disheartening reluctance to continue talking with accusations of being lied to once the truth emerges."[22]

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[19] *Id.* at p. 38.

[20] *Id.* at p. 34.

[21] *Id.* See Rule 1.1: COMPETENCE
(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[22] Alida Camp, ADR Offices of Alida Camp, alicampny@gmail.com

Other than the mistrust that a lack of truthfulness can generate, misrepresentations that rise to the level of fraud[23] could actually impose a duty on opposing counsel to take affirmative steps to report such conduct, which would certainly muddy the waters for a possible settlement of the underlying dispute, to say the least.[24]

In conclusion, advocates in mediations need to be familiar with the same obligations that an advocate at an adversarial proceeding must know, with the added proviso that in a mediation advocates must be sure to keep their clients' goals and interests as a first priority while abiding by the ethical rules that apply to more adversarial proceedings.

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[23] Rule 8.4: MISCONDUCT
A lawyer or law firm shall not:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;…

[24] RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT
(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.