By Sylvia Mayer

Ethics and the Art of Mediation

Attorneys owe a duty of candor to the tribunal and competency to their clients,[1] but what obligations does an attorney bear in mediation? This article offers practical ethical guidance to assist attorneys representing parties in bankruptcy mediation.

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Starting with the Basics

Rule 1.1 of the Model Rules of Professional Conduct (Model Rules) provides that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In the context of mediation, at a bare minimum, competency includes (1) informing your client of the date, time and place of the mediation; (2) preparing for the mediation; and (3) attending the mediation. In addition, in a bankruptcy mediation, preparation may require an understanding of factors beyond the basic facts and law specific to your dispute.

Practice Tips

As a bankruptcy mediator, preparation by counsel, parties and the mediator are often the keys to a successful mediation. As you prepare to represent clients in mediation, consider the information needed beyond the basic elements of your claims or defenses. For example, if you represent a creditor defendant in a preference action who seeks a reduced settlement amount due to its own financial distress, then be prepared to demonstrate your client's financial distress, and consider sharing that information with the plaintiff before the mediation. Another example is if the mediation is to liquate a pre-petition claim, then explore when, if and how such a claim will be paid.

Turning to the Negotiations

The critical ethical distinction for negotiations is the difference between puffing and lying. Puffing is allowed and to some degree expected, whereas lying is neither allowed, nor should it be expected. Model Rule 4.1 provides that:

> 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 to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Under Model Rule 4.1, the crux of the issue is what constitutes a "material fact" in negotiations. The comments to Model Rule 4.1 recognize that it is generally accepted that, in a negotiation, estimates regarding value or price, or statements about willingness to settle, are not to be taken as statements of material fact.[2] Instead, these types of statements fall into the puffing category. The comments also acknowledge that while an attorney has a duty to be truthful, he/she does not generally have an affirmative duty to inform an opposing party of relevant facts.[3]

Further guidance regarding an attorney's ethical obligations in negotiation is offered in formal ethics opinions issued by the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility.[4] Notably, Formal Opinion 06-439 clarifies that Model Rule 4.1 applies to negotiations in the context of mediation. In addition to the ethics opinions, in 2002 the ABA's Section of Litigation issued nonbinding ethical guidelines for settlement negotiations to serve as a resource for attorneys.[5]

Model Rule 4.1, the comments, and the ABA's ethics opinions and guidelines establish basic parameters regarding ethics in negotiation, whether in mediation or between the parties. These parameters are summarized in the exhibit. To be clear, as explained in Formal Opinion 06-439: "Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law."

Practice Tips

While the examples in the exhibit offer helpful guidance, there may be times when it is difficult to assess the distinction between puffery and deception. It is best to err on the side of honesty. Although

1 *See* Model Rules Prof'l Conduct 1.1 and 3.3. While this article discusses the Model Rules, consideration should also be given to ethical guidelines and rules for professional conduct in the applicable jurisdiction.

2 *See* Comments to Model Rule 4.1 (section on Statements of Facts).

3 *See* Comments to Model Rule 4.1 (section on Misrepresentation).

4 *See, e.g.*, Am. Bar Ass'n Standing Committee on Ethics and Professional Responsibility Formal Opinions 93-370, 94-387, 95-397 and 06-439.

5 *See* "Ethical Guidelines for Settlement Negotiations," Am. Bar Ass'n Section of Litigation (August 2002), *available at* americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/settlementnegotiations.pdf (last visited March 9, 2022).

national in scope, the bankruptcy bar is a comparatively small community, and your reputation for integrity matters.

It is equally important to remember that Model Rule 4.1 must be read in conjunction with Model Rule 3.4[6] regarding fairness to opposing party and counsel, and Model Rule 8.4 regarding attorney misconduct.[7] To state the obvious, in a mediation attorneys should not falsify a document, threaten or extort the other party, or lie about a material fact to achieve a settlement.

Considering Settlement Offers

Several of the Model Rules blend together to provide guidance on consideration of settlement offers. Model Rule 1.2(a) provides, in relevant part, that attorneys shall abide by their client's decisions "concerning the objectives of representation" and "whether to settle a matter." The comments to Rule 1.2 refer to Model Rule 1.4(a).

Model Rule 1.4(a) governs an attorney's duty to communicate with their client, including the duty to promptly inform a client of any decisions for which their informed consent is required. The comments to Rule 1.4 provide that this duty includes the duty to promptly inform clients of settlement offers unless the client has previously provided guidance on whether such an offer is acceptable, and authorizes the attorney to act in accordance with that guidance. However, Model Rule 1.0(e) defines "informed consent" as agreement after communication of "adequate information and explanation about the materials risks of and reasonably available alternatives to the proposed course of conduct."

> **[W]hat you most need to know about ethics in settlement negotiations and mediation you probably learned in kindergarten.**

These rules apply to the evaluation of any settlement proposals in mediation. Essentially, while the client decides whether or not to settle and on what terms, it is incumbent on the attorney to educate the client about their options, risks and alternatives. In addition, if you have a client with diminished capacity, then refer to Model Rule 1.14 for guidance. You should explore options to address capacity before starting the mediation to ensure that your client's interests can be served in the mediation.

Practice Tips

When exploring options, risks and alternatives with your client, stay attuned to your own cognitive bias. For example, confirmation bias occurs when you reject information that does not confirm your position, whereas anchoring bias occurs when you fixate on one data point (anchoring it in your mind) to the exclusion of other data. Both biases reduce objectivity, which impacts your ability to weigh options, risks, benefits and alternatives for your client.

Takeaways

In the end, what you most need to know about ethics in settlement negotiations and mediation you probably learned in kindergarten: listen, tell the truth, follow the rules and respect others. abi

6 Model Rule 3.4 provides, in relevant part, that:
A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
(b) falsify evidence, counsel or assist a witness to testify falsely or offer an inducement to a witness that is prohibited by law.

7 Model Rule 8.4(c) provides that it is professional misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Exhibit

Statement or Omission by Counsel	Guidance	Source
Claimant does not disclose that the statute of limitations has run on its claims.	No duty to disclose.	Formal Opinion 94-387.
Claimant falsely states that the statute of limitations on its claims has not run.	False statement of a material fact.	Formal Opinion 94-387.
Party understates its willingness to make concessions.	Puffing.	Comment to Rule 4.1; Formal Opinion 06-439.
Party states unwillingness to pay $X to settle.	Puffing.	Comment to Rule 4.1; Formal Opinion 06-439.
Party falsely states they lack authority to pay $X to settle.	Failure to disclose a material fact.	Formal Opinion 06-439.
Failure to disclose the death of claimant.	Failure to disclose a material fact.	Formal Opinion 95-397.
Party falsely asserts that documentary evidence exists proving its position.	False statement of a material fact.	Formal Opinion 06-439.
Party exaggerates the strengths of their factual or legal position.	Puffing.	Formal Opinion 06-439.
Party fails to disclose the weaknesses in their factual or legal position.	So long as no misrepresentations, then no duty to disclose.	Formal Opinion 94-387.
In a labor negotiation, employer falsely represents that adding a specific employee benefit would cost $X per employee when the employer knows it would cost substantially less.	False statement of a material fact.	Formal Opinion 06-439.
Buyer of a product overstates its ability to obtain the product from other sources.	Puffing.	Formal Opinion 06-439.