Ethics and Professionalism in Mediation
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Introductions & Overview

- The Panelists
- Program Format
- Administrative Details
This Program Will Address:

• Mediation Ethics - Fallacy, Folly or Foundation of best practices?
• Does the success of a settlement justify the means?
• Are the ethical obligations of advocates different in mediation than litigation and arbitration?
• Are all parties to a mediation required to negotiate in good faith?
• Do ADR providers have discernable ethical considerations when administering mediations?
Discussion Perspectives

The three panel members will discuss the basic ethical issues and the obligations of participants in mediation from the perspectives of:

- The Mediator
- The Lawyer Representative / Advocate
- The ADR Provider
What are the ethical rules and standards potentially applicable to mediation participants?

- State statutes and superior court rules
- General Rules of Professional Conduct
- Local rules of state and federal court systems
- The parties’ mediation agreement
- Uniform Mediation Act
- Model Standards of Conduct for Mediators
Considerations for the Mediator

• To identify ethical obligations for mediators the role of the mediator must be examined:

• Creation of a fair process

• Neutral facilitator (not a fact finder or decision maker)

• Assist in communications and negotiations to reach a voluntary settlement

• Guiding Principle - All parties must have the ability to freely and willingly enter into an informed settlement agreement so that self-determination occurs.
Model Standards of Conduct for Mediators

• Joint effort of the American Bar Association, American Arbitration Association, and the Association for Conflict Resolution.

• Although largely aspirational and not enforceable, they are designed and generally accepted in the mediation community to serve as fundamental (although general) ethical guidelines for persons mediating in all practice contexts.
The Preamble to the Model Standards states that:

“These model standards serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.”
The Model Standards address the ethical obligations of the mediator under each of the fundamentals of the mediation process.

**Standard I. Self Determination**

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.
Standards, con’t.

Standard II. Impartiality

• A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

Standard III. Conflicts of Interest

• A mediator shall avoid a conflict of interest of the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator’s impartiality.
Standards, con’t.

Standard IV. Competence

• A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

Standard V. Confidentiality

• A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
Standard VI. Quality of the Process

A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
**General Provisions of standards of conduct for mediators**

- Impartiality / Neutrality
- Avoid Conflicts of Interest
- Mediator’s Role
- Party Self-Determination
- Providing Professional Advice
- Quality of Process
- Mediator Qualifications
- Confidentiality
- Advertising / Fees
- Duties to the Profession
- Honesty, Truthfulness, Candor
ETHICS: FALLACY, FOLLY, OR FOUNDATION OF BEST PRACTICES

What do Ethics for Lawyers Really Mean
Overview of the Development of Rules of Professional Responsibility

- Role of the ABA
- A time when ADR was not heard of, not common
- Adversarial approach to lawyering dominant paradigm

As a result, lawyer conducted negotiation and settlement were viewed as nearly exclusively adversarial and competitive
Concerns: The Playing Field Changed

- Understanding the Evolution of Law Practice
- Different Approaches, even in Litigation
- No Longer, One Size, Color, Shape Fits All Situations
- Need to Examine the Changes in the Lawyer’s Role in Negotiation, Mediation and Settlement
- Understanding that Effectiveness in the Courtroom Differs Considerably from Effectiveness in Mediation and / or at the Negotiation Table
Issues in Lawyer Representation in Mediation

• Realization / Understanding of Real Paradigm Change
• Overlapping Use of Tactics & Strategies
• Real Need for Change in Rules
• Knowledge / Understanding of Negotiation
• Role of Mediator – Educator ? Enforcer ? Other ?
• Business Considerations
Attempts at Change

• Why need Rules?
  • Current conduct
  • Lawyers look to rules
  • Educational Function of Rules / standards
  • Other

• Testimony on Behalf of the DR Section – May 1998

• Litigation Section Draft of Ethical Guidelines for Settlement Negotiations
Proposed Rules in 1998

- PROPOSAL ONE*:

- A LAWYER HAS A DUTY TO INFORM HIS CLIENT ABOUT THE EXISTENCE AND AVAILABILITY OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES.

- *APPROVED BY THE SECTION OF DISPUTE RESOLUTION AT COUNCIL MEETING, DENVER, COLORADO, MAY 2, 1998
Second Proposal:
• Addresses Lawyer Conduct in a Mediation
  • Not as clear in terms of what might be useful or effective
  • No consensus reached

PROPOSAL TWO**:

Model Rule for Lawyers Requiring Good Faith Participation in the Mediation Process
Rule 1.7 Good Faith in Mediation
A lawyer representing a client in mediation shall participate in good faith.
(a) Prior to the mediation, the lawyer shall prepare by familiarizing herself with the matter, and discussing it with her client.
(b) At the mediation, the lawyer shall comply with all rules of court or statute governing the mediation process, and counsel her client to do likewise.
(c) During the mediation, the lawyer shall not convey information that is intentionally misleading or false to the mediator or other participants.

**PARTIAL DRAFT INCLUDED HERE.CURRENTLY UNDER STUDY BY THE ETHICS COMMITTEE OF THE SECTION OF DISPUTE RESOLUTION.
Current Result or Status:

- VERY small change in terms of a lawyers duty to inform clients about ADR
- No Change to Rule 4.1
- ABA actually took a step back with its Formal Opinion 06-439 from the Standing Committee on Ethics and Professional Responsibility
Issues of Enforcement

Numerous Obstacles to Enforcement of Ethical Standards Exist

Yet, Benefits of Standards are Many
Looking at Alternatives…

- Role of Courts
- Role of Bar Associations
- Scope of Applicability of Enforcement Entities
  - Private Justice?
- Contractual Ethics

  Contractual Ethics
  ◆ Options
  ◆ Concerns
  ◆ Ability to Craft or Design
  ◆ Means to Enforce
  ◆ Other Considerations
A Provider of ADR Services may have ethical obligations for a number of aspects of the administration and conduct of the mediation session.
KEY PROVIDER CONSIDERATIONS

• Training, Quality Control & Competency
• Panelist Feedback and Ongoing Need for Training
• Mediator Choice and Diversity
• Confidentiality
TRAINING AND CONTINUING ASSESSMENT OF COMPETENCY

Assessment during the Training

Post Training Follow up

Definitions of Competency and Success in Mediation

Any Requirements of Continuing Education
An important role for the Provider is the effective handling of participant complaints and feedback:

- Methods for soliciting mediation participants’ feedback
- Considerations in determination of valid complaints
- Distinguishing between process vs. outcome complaints
POTENTIAL CHOICE OF NEUTRAL ISSUES

Provider’s ethical obligations for effective mediator choice and selection, including diversity:

- Sufficient Information Provided
- Role of Support Staff in Process
- Role of the Lawyers
- Encourage Parties’ own Research and Input in the Selection Process
- Possible Discussion of Process Design / Choice Matters
CONFIDENTIALITY

Importance of the Provider’s Role in maintaining a Confidential Mediation Process

◆ Regardless of Jurisdiction, importance of ensuring staff and mediators respect and understand mediation confidentiality

◆ Role of the Provider in Maintaining a level of Confidentiality

◆ Importance of Confidentiality
  ◆ Overall – all aspects of the process
  ◆ The mediation Itself
  ◆ Post Mediation issues
  ◆ Additional Concerns
A SCENARIO TO CONSIDER
As the Mediator:

- Do you reveal what you have just heard?
- To no one
- To everyone
- To just the party x
AND ANOTHER SITUATION
As the lawyer, when the wine is delivered, do you?

- Inform the mediator, and request that the mediation end?

Yes, definitely.
No, but will make sure consent to settlement is postponed.
Not sure. Wait and see what the settlement terms are.
ADDITIONAL CONSIDERATIONS

- Mediator’s Role in the Outcome
Questions, Wrap Up.....