# PROFESSIONALISM IN MEDIATION

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## Part I: The Statutory Framework

In trying to discuss professionalism in mediation you are confronted with the disconnect of the concept with the requirements for training. In Louisiana there are no imposed standards for mediation training. The only statutory requirement is found in the Louisiana Mediation Act which imposes a minimum of 40 classroom hours to qualify for appointment by a Louisiana court. La.R.S.9:4116

This rather minimal requirement is in sharp contrast with what we normally associate with professions such as medicine and law which both require a lengthy formal academic training.

The Model Standards of Conduct for Mediators adopted by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution is made applicable to all mediations conducted under the Louisiana Mediation Act. La.R.S.9:4107A.(Attachment "A")

The Model Standards make it clear that the process is specifically designed to promote voluntary decision making by the parties to the dispute.

The first standard makes the same point. A mediator is to 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."

Rule 2.4 of the Louisiana Rules of Professional Conduct requires a lawyer acting as a third party neutral to inform unrepresented clients that the lawyer is not representing them in the process.

Although Louisiana has not adopted the comments to the model rules, Comment 5 of Model Rule 2.4 says that lawyers representing clients in an alternative dispute resolution proceeding are governed by the Rules of Professional Conduct. The Assumption is the same would apply in Louisiana.

With this statutory framework in mind let's examine some of the issues as they might arise in a mediation.

## Part II: The Lawyer Representatives

### A. 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.

A good starting point, or frame of reference, for these discussions would be the Louisiana Rules of Professional Conduct. The Louisiana State Bar Association adopted none of the official comments of the ABA Model Rules.[1]

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 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.

[1] 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)

(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. If there is to be a standard of truthfulness, is the lawyer

mediator to be held to a different standard than the lawyer advocate in mediation? Should the standard for truthfulness and honesty for lawyer advocates be different if the mediation is a court ordered mediation?

Another rule appears to have application for attorney conduct:

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 demonstrates the problem. 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 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)

## B. The Points of View

A little over a quarter of century 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 and our law-oriented society would not expect too much if it required its members to adhere to two simple principals 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 mislead." 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)

**Part III: The Mediators**

Most of us think of professions as those occupations which require substantial educational training and practice to qualify. Such occupations as medicine, architecture and law come to mind. Mediation on the other hand has no such extensive requirement. Here in Louisiana, the only requirement deals with mediators that want to be eligible for court appointment and that requirement is very minimal, only 40 hours of training. La. R.S. 9:4106. However, there is absolutely no requirement for an individual to hold herself out as a mediator.

And so we are left with scant guidance on appropriate mediator behavior.

The overriding principle of the Model Standards of Conduct for Mediators is found in Standard 1.

> "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 the process and outcome."

How is that standard observed in today's mediation practice?

Let's look at several examples:

*Ex.A*: The mediation has reached impasse over amount. Can the mediator ask the claimant's counsel to consider reducing her fee in order to reach settlement?

Though the lawyer is not a party she is certainly a participant and has an interest in the outcome of the process. So does this suggestion violate the principle of voluntary decision making? Probably not, but the mediator must be sensitive not to use a tactic with the lawyer that would be prohibited with one of the parties. Since the lawyer retains the option to reduce or not reduce her fee, the principle of party self-determination is maintained.

*Ex.B*: Many mediators engage in what is commonly referred to as "evaluative" mediation. In practice, this means that the mediator, generally in private caucus will tell the parties her opinion of the merits of the case. Lots of times it comes up with one of the lawyer representatives asking the mediator, "what do you think this case is worth?"

Should the mediator answer that question? If she does is that conduct in accordance with the standards? Evaluation by the mediator is really the mediator deciding the merits. It is vastly different from giving the parties information to allow them to evaluate, assess and decide for themselves.

Yet this practice is widespread and frequently justified on the grounds that one side or the other's evaluation of the case is such an outlier that without the direct intervention by the mediator of her opinion on the merits the case cannot be resolved. That may be true, but are such actions really mediation at all?

*Ex.C*: The mediation gets off on the wrong foot. One of the parties is grounded at a number which is clearly outside the range where a settlement can be achieved.

The party won't budge. The mediator approaches one of the parties and poses this proposition.

*What if I approach the other side and say you will go to "x" if they will go to "y"?*

*If the other side agrees, we can continue to attempt to close the gap. If not, then you can decide to make another proposal.*

Of course the same problem exists in this scenario. The bracket is decided by the mediator. She is the one suggesting the bargaining range, not the parties.

This technique is used by many mediators and is effective in breaking the impasse, but it still reduces the self-determination of the party participants.

*Ex.D*: A case is on the trial docket with a scheduled trial date and is sent by the court to a court appointed mediator, three days before trial. Right before the mediation is to begin the judge informs the mediator the case will not go as scheduled but there will be a two month delay and the parties are not aware of this as the arrive for the mediation.

The mediator thinks to himself, "If I tell the lawyers the trial is off the pressure to settle will be substantially reduced." One of the lawyers makes a reference in opening statement, "Our trial is set to begin three days from now". The mediator remains silent. Is this action of the mediator proper?

*Ex.E*: In a serious back injury case as a result of an automobile accident, in the first caucus the plaintiff's attorney has told you that he will do all the talking for the client and anything the client wants to convey he will obtain from the client to convey to the mediator. After a number of hours the parties are within $100,000 of each other. The mediator has picked up that the plaintiff seriously wants to avoid going to trial. Counsel for the insurance company is frustrated with the lack of movement and tells the mediator "this is my last and best effort to settle the case. If the plaintiff doesn't accept tell them the offer will be withdrawn and we will go to trial." The offer is presented exactly as conveyed and as he is presenting it the plaintiff opens his mouth as if to accept and the lawyer places his hand on the shoulder of his client and

says, “tell them this is our answer, we are going to trial.” You are the mediator, what would you do?

(a) It looked as if you were about to say something as claimant, but your attorney stopped you, what were you about to say?

(b)“I have a sense that you would like to accept as claimant but you are worried about disappointing your lawyer.”

(c)“With your permission counsel before terminating the mediation, I would like to have a short caucus with your client.”

(d)Noting the client has selected his attorney, and has a relationship with him, it is not your role to interfere.

*Ex.F:* A related practice deals with what is referred to as “mediator proposals”.

This tactic comes up in this setting. After a full day of work the parties are still at impasse. At this point the mediator might suggest a “mediator proposal” and explain it like this:

*There is one last thing we can try to see if we can’t get past impasse and reach settlement, that is a mediator’s proposal. What will happen is, I will come up with a number that has what I think has a best chance of both sides saying yes to. This number may or may not be reflective of my own evaluation of the case but is rather a number that I believe you both could live with.*

*The way it will work is this. I will come up with the number and send it to each of you tomorrow. You will have three days to think about it and then you can tell me in confidence whether that is a number you can accept. The other side will not know your answer unless both sides say yes. If there is no agreement then I will simply advise that we could not reach agreement and the mediation will be closed.*

This tactic is obviously hard to reconcile with the standards as it not only has the mediator evaluating the case but deciding the settlement amount. While it is true the parties can accept or reject the amount, it is nonetheless decided by the mediator.

In practice, many mediators report using the "mediator proposal" and claim it is effective in reaching resolution of the dispute. But the question, remains, is it true to the principle of party self-determination?

**Other Mediator Actions**

Food

Everyone in this room has had this happen. You attend a mediation that begins at 9:00 a.m. and the mediator does not make arrangements for lunch and the day goes on and it is past 4:00 p.m. and you and your client have had nothing but candy bars and chips all day and show no sign of breaking for food.

Or the mediator comes back into the private session and just sits there and says nothing knowing that parties are made uncomfortable with silence to get more options out of the parties.

Or the mediator gets an offer from one side to present to the other party and when he presents it to the other side it is presented as a mediator generated idea.

All of these interventions are manipulations by the mediator to get the parties to react to moves or actions controlled by the mediator.

As a guide to help mediators, several points should be considered before a specific move is implemented.

First, any move should be in keeping with the Model Standards of Conduct for Mediators.

Second, the move should not manipulate, so that one side is disadvantaged or the integrity of the mediator or the process itself is compromised.

Or simply, does the intervention support party self-determination and is it consistent with process integrity?

If the answer is no, then you should rethink whether the move is appropriate or not.

## IV. CONCLUSION

As you can see from the examples, the practice is somewhat at odds with the aspirational Model Standards of Conduct for Mediators. My view is, that the practice is much more results oriented than the standards which are more aspirational. It is probably time for experienced practitioners to revisit the standards and to homogenize what is going on in the real world with the standards. Ultimately, in virtually all lawyer assisted mediations, the lawyers as the party representatives, are much more interested in results and less interested in process.

It is time to start the discussion of bringing the standards and the practice into a set of rules, that are more reflective of actual practice.