Ethical and Practical Issues in Negotiation and Mediation

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Candor in Negotiations – Competing Obligations

• Zealous advocacy on behalf of client
  • “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” [Preamble]
  • “[W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and, at the same time, assume that justice is being done.” [Preamble]

• Honesty in dealings with other parties
  • “As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.” [Preamble]
  • “In the course of representing a client a lawyer shall not knowingly make a false statement of material of fact or law to a third person.” [Rule 4.1]
  • It is professional misconduct for a lawyer to: … engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or to] engage in conduct that is prejudicial to the administration of justice.’ [Rule 8.4]
Prohibited Conduct

• Affirmative misrepresentations of fact or law by counsel
  • Also “partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” [Rule 4.1, cmt.]

• Adopting or affirming statements by others that are known to be false
  • Shall not assist a client in conduct the lawyer knows is fraudulent
  • May not draft or deliver documents the lawyer knows to be fraudulent
Obligations on Discovery of Material Misrepresentation

- When lawyer's client has made a prohibited misrepresentation:
  - Withdraw if client persists in prohibited conduct
  - “Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like.” [Rule 1.2, cmt; Rule 4.1, cmt.]
  - “In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud.” [Rule 1.2, cmt; Rule 4.1, cmt.]

- When mediator discovers material misrepresentation by a party:
  - Engage the offending participant in private conversation
  - If party persists in prohibited conduct, terminate the session and withdraw
  - Must preserve confidentiality, even in withdrawal
Permissible Negotiating Tactics

• Estimates of price or value and a party’s intentions as to acceptable settlement are not considered “statements of material fact” [Rule 4.1, cmt.]

• No affirmative duty for lawyer to inform an opposing party of relevant fact
  • Extra care required in dealing with unrepresented persons, including refraining from offering legal advice and making sure the party understands the lawyer’s adverse role [Rule 4.3]
Interplay Between Civil Claims and Criminal Charges

- Old rule prohibited a lawyer from “present[ing], participat[ing] in presenting, or threaten[ing] to present criminal charges primarily to obtain an advantage in a civil matter”
  - Rule changed in 1997 revisions to Rules of Professional Conduct

- May now discuss actual or potential criminal charges in context of settlement of related civil claims, subject to certain guidelines
  - See 2008 FEO 15 (permissible to include provision in civil settlement agreement that plaintiff will not report defendant’s conduct to law enforcement authorities)

- Non-reporting provision improper if (i) it would constitute the crime of compounding a felony, (ii) there is any suggestion that the plaintiff would testify falsely or otherwise refuse to cooperate if contacted by law enforcement or (iii) there is an independent legal requirement to report the defendant’s conduct to the authorities
State Bar Guidance Re: Threat of Criminal Charges

• 98 FEO 19:

[A] lawyer representing a client with a civil claim that also constitutes a crime should adhere to the following guidelines: (1) a threat to present criminal charges or the presentation of criminal charges may only be made if the lawyer reasonably believes that both the civil claim and the criminal charges are well-grounded in fact and warranted by law and the client’s objective is not wrongful; (2) the proposed settlement of the civil claim may not exceed the amount to which the victim may be entitled under applicable law; (3) the lawyer may not imply an ability to influence the district attorney, the judge, or the criminal justice system improperly; and (4) the lawyer may not imply that the lawyer has the ability to interfere with the due administration of justice and the criminal proceedings or that the client will enter into any agreement to falsify evidence.
But Tread Lightly When Raising Potential Criminal Charges …


- “Plaintiffs have alleged that as part of the settlement negotiations, Defendants threatened Plaintiffs with criminal prosecution and possible jail time. If Plaintiffs are able to support this allegation with legally sufficient facts, they may be able to state a claim for retaliation based on Defendants' alleged threats. Therefore, Plaintiffs are permitted to amend their Complaint to add a claim for retaliation based on Defendants' threats of criminal prosecution and possible jail time, should the facts and law support such a claim.” *Id.* at *7.*

- “It is also noted that if Defendants did threaten Plaintiffs and/or their counsel with criminal prosecution and possible jail time, this conduct would likely be considered misconduct under the North Carolina Rules of Professional Conduct.” *Id.* at *8.*
Direct Communications with Opposing Party

• “During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” [Rule 4.2(a)]

• Not a violation of Rule 4.2 to encourage a client to discuss directly with the adverse party in an effort to resolve the matter or to advise the client about that communication

• But lawyer must be mindful to avoid “mak[ing] a communication prohibited by this Rule through the acts of another”
Aggregate Settlements

“A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.” [Rule 1.8(g)]

“Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement …. [B]efore any settlement offer … is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement … is accepted.” [Rule 1.8, cmt.]

Waiver of conflicts [RPC 251 (1997)]
- Possible claims between and among the clients – NO
- Multiple claims to a limited fund – YES

Strict compliance with notice and other procedural protections in class action lawsuits
Limiting Future Engagements by Plaintiff’s Counsel

• “A lawyer shall not participate in offering or making … an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.” [Rule 5.6(b)]

• Specifically prohibits lawyer “from agreeing not to represent other persons in connection with settling a claim on behalf of a client” [Rule 5.6, cmt.]

• But settlement can limit disclosure of information obtained during the representation, even if the practical effect of that provision will be to limit plaintiff’s counsel’s ability to represent future claimants. [2003 FEO 9]
Mediation Confidentiality

• What is protected:
  • Mediator has obligation to maintain the confidentiality of all information obtained during mediation process [Standard III]
  • No recording of proceedings
  • Generally no later testimony from mediator about what was said
  • Statements inadmissible under Rule 408

• What is not protected:
  • Parties and counsel generally free to disclose what is said at mediation
  • Information revealed is subject to post-mediation discovery
Mediator’s Role in Reaching Agreement

• Self-determination of parties is critical
  • “A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.” [Standard V]
  • Mediator should not offer legal or other professional advice to the parties
  • Mediator should generally not offer opinions about the dispute, even when asked

• What mediator can and should do:
  • Mediator may assist the parties “in making informed and thoughtful decisions”
  • Proper for mediator to raise questions for consideration
  • Proper for mediator to suggest options for settlement beyond those raised by the parties
Mediator’s Role in Protecting the Integrity of the Process

• Mediator should not allow the mediation to proceed when the integrity of the process has been compromised
  • Examples include “inability or unwillingness of a party to participate meaningfully, inequality of bargaining power or ability, unfairness resulting from non-disclosure or fraud by a participant or other circumstance likely to lead to a grossly unjust result.” [Standard V]
  • Required to make “reasonable efforts” to “prevent manipulation or intimidation by either party.” [Standard VIII(A)]

• What the mediator can do:
  • Inform the parties of his or her concern, without violating confidentiality
  • Attempt to persuade offending party (or counsel) to cease and remediate conduct
  • Postpone, withdraw from or terminate the mediation
Mediator Impartiality

- A mediator “shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.” [Standard VII]
  - No contingent or other outcome-based fees
  - No consideration in exchange for referrals
  - Generally no future representation in connection with a matter in which lawyer-mediator “participated personally and substantially” as a mediator [Rule 1.12(a)]

- Mediator should not agree to serve as a fiduciary in a matter that he or she has previously mediated. See A.O. No. 15 (2008).

- Mediator can transition from role of mediator to that of arbitrator, at the request of the parties. See A.O. No. 17 (2010).

- *Ex parte* conferences with the mediator in advance of mediation are helpful and common, but should be disclosed to other participants. See Rule 6(A)(2).
Mediation Participation Obligations

• Attendance required under NC rules

• But a party is not required “to make a settlement offer or demand which it deems is contrary to its best interests.” N.C. Gen. Stat. § 7A-38.1(f)

• Mediator should not impasse before conference even if one party says from the outset that it has no intention of increasing its last pre-mediation settlement offer [A.O. No. 01 (1999)]
Questions?

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