5.9 ETHICAL CONSIDERATIONS

To represent your client effectively in mediation you need to be familiar with two types of ethical standards—those that guide mediators in performing their function and those that govern the conduct of lawyers engaged in negotiation. You need to understand the ethics of the mediator function so that you will know when a mediator is exceeding his ethical bounds and thus when it may be appropriate to advise your client of the necessity to conclude participation in a particular mediation. You need to understand the ethics of the lawyer's function in negotiation so that you will know the constraints on your own conduct as an advocate and on the conduct of opposing counsel. This section discusses these two types of ethical standards.

5.9.1 Standards of ethical conduct for mediators

Mediator ethical standards are defined in relation to the mediator's duties to the parties, to the process, to nonparties, and to other professionals. Several professional dispute resolution organizations currently publish mediator standards. The American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution have jointly published Model Standards of Conduct for Mediators, a set of ethical standards for mediators. In the discussion that follows, references to numbered standards reflect the Model Standards. A complete set of these standards is reproduced in appendix I.

- **Duties to the Parties.**

Mediators must recognize that the mediation process is based on the principle of self-determination by the parties (Standard I). The purpose of the process is to allow the parties to reach a voluntary, uncoerced agreement. The role of the mediator is to facilitate a voluntary resolution of a dispute. A mediator can educate the parties about the mediation process and help them make informed decisions but may not advise them on the law. And she must have the necessary qualifications to satisfy the reasonable expectations of the parties (Standard IV).

A mediator must conduct the mediation in an impartial manner (Standard II). A mediator may mediate only those matters in which he can remain impartial and evenhanded with respect to the subject matter of the dispute and the participants' personal characteristics, background, or performance at the mediation. A mediator is further required to disclose all actual and potential conflicts of interest reasonably known to the mediator and afterwards decline to mediate unless all parties choose to retain the mediator (Standard III). The need to protect

against actual or apparent conflicts of interest also governs the conduct of mediators both during and after the mediation.

A mediator must maintain the reasonable expectations of the parties with regard to confidentiality and may not disclose any confidential matter to the opposing party or to anyone outside the mediation unless given permission by the pertinent party or parties or unless required by law or other public policy (Standard V). The mediator's duty of confidentiality arises from at least four types of laws: specific statutes or court rules related to mediator confidentiality or mediator privileges, rules related to evidentiary exclusion of settlement discussions, discovery limitations, and laws regarding the enforcement of agreements not to disclose.

A mediator must conduct the mediation fairly, diligently, and in a manner consistent with the principle of the parties' self-determination (Standard VI). A mediator must withdraw from a mediation when incapable of serving, when unable to remain impartial, when the mediation is being used to further illegal conduct, or when a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.

A mediator must to be truthful in advertising and solicitations for mediation (Standard VII) and must fully disclose and explain the basis of compensation, fees, and charges to the parties (Standard VIII).

Included in the mediator's duties under Standards I and VI is the responsibility to see that checks are performed to guarantee that the settlement is fair and equitable within the perceptions of the parties. Under those standards, a mediator is also expected to deal appropriately with power imbalances causing advantages to one or more parties resulting from wealth, social position, access to legal expertise, access to facts, negotiating ability, physical intimidation, or an opponent's avoidance of conflict. Methods by which mediators deal with power imbalances include (1) enlisting the aid of the parties' counsel, (2) convincing parties to stop the intimidating tactics or other abusive behavior, (3) encouraging parties to obtain legal representation if they are unrepresented, (4) educating the parties in effective negotiation techniques, and (5) advising the parties of the mediator's obligation to withdraw if the adverse effects of the imbalance cannot be resolved.

- **Duties to the Process.**

Mediators have a duty to improve the practice of mediation (Standard IX). They also have the duty of nonownership of the problem, of the process for solving it, and of the solution. They have a duty to protect

the integrity of the mediation process and the duty to withdraw when appropriate.

- **Duties to Nonparties.**

Mediators may, in some circumstances, owe duties to identifiable nonparties who do or may have an interest in, or who will or may be affected by the outcome. Before they commence mediations, mediators often ask whether there are other individuals or organizations that should be invited to participate. If all the necessary individuals or organizations do not participate, the mediated agreement may risk being challenged in court. Mediators may also in certain circumstances owe duties of protection or notice to the general public. This occurs in situations involving a risk to public safety, for example, where the mediation concerns the environmental risks associated with toxic waste storage or removal.

- **Duties to other professionals.**

A mediator owes a duty not to interfere with professional relationships between the parties and other professionals —lawyers, physicians, psychotherapists, and the like—and also a duty to appointing judges and to the judicial process generally.

5.9.2 Standards of ethical conduct for lawyers in negotiation

Codes of professional conduct for lawyers vary from state to state, and although a few still follow variations of the American Bar Association's Model Code of Professional Responsibility, many have adopted the more recent ABA Model Rules of Professional Conduct (Model Rules). The discussion that follows addresses the lawyer's ethical duties in negotiation under the ABA Model Rules (MR) and includes references to the relevant rule numbers. The duties covered include advising the client, advocacy, truthfulness, confidentiality, and drafting agreements.[21]

- **Advising the Client.**

Under the Model Rules a lawyer must keep a client reasonably informed about the status of a matter and must promptly comply with reasonable requests for information from the client (MR 1.4(a)). Furthermore, a lawyer must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation (MR 1.4(b)). Initial discussions with the client should normally include (1) the extent to which the lawyer's professional

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21. See generally Donner and Crowe, *Attorney's Practice Guide to Negotiations*, chap. 14, pp. 1-15. Provisions of the Hawaii Rules of Professional Conduct corresponding to pertinent ABA Model Rules of Professional Conduct appear in Appendix J.

background is either necessary or superfluous to the negotiation, (2) when and to what degree the client can expect to be consulted regarding how the negotiation is progressing, and (3) whether the subject matter of the negotiation is one in which the attorney is qualified to be involved. If a lawyer becomes aware that the client intends to engage in criminal or fraudulent conduct, many jurisdictions allow the lawyer to discuss the legal consequences of any proposed course of conduct with a client and to advise the client to make a good faith effort to determine the validity, scope, meaning, or application of the law. But of course the lawyer may not do anything that can be construed as aiding or abetting the client in committing a criminal or fraudulent act.

- **Advocacy.**

The lawyer is expected to exercise independent professional judgment on behalf of her client and to advocate the client's interests and positions, so long as the positions can be argued in good faith and are supported by existing law. The lawyer not only has an ethical duty of advocacy on behalf of the client, but she also is an officer of the legal system and a public citizen having special responsibility for the quality of justice (MR, preamble). Thus the lawyer's duty of advocacy for the client is defined, in part, by the expectations of the community and the court in which the lawyer practices.

Limitations on the extent to which a lawyer may vigorously advocate her client's interests or positions in negotiation include the following: (1) a lawyer may not contact the other side directly, or advise the client to do so, if that party is represented by a lawyer (MR 1.16); (2) a lawyer may not request that persons other than the client (or his relatives or agents) refrain from voluntarily giving relevant information to another party (MR 3.4(f)); and (3) a lawyer must make reasonable efforts to expedite litigation consistent with the interests of the client (MR 3.2).

- **Truthfulness.**

In the course of representing a client, a lawyer may not knowingly make a false statement of material fact or law to a third person or 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 (MR 4.2). Under generally accepted conventions in negotiation, certain types of statements normally are not taken as material facts. They include estimates of price or value, a party's intention regarding an acceptable settlement of a claim, and the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. The Comments to the Model Rules suggest that puffing in negotiations is permissible. Nevertheless, the line between impermissible lying and permissible puffing is not bright. Regardless of the precise contours of

the concept of puffing, there is wide agreement that the Model Rules prohibit a lawyer from knowingly falsifying facts, evidence, or legal precedent.

- **Confidentiality.**

A lawyer may not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation (MR 1.6). As to impliedly authorized disclosures, in litigation for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation a lawyer may make a disclosure that facilitates a satisfactory conclusion. The mediation process stretches the application of this rule. For example, lawyers routinely share confidences of clients with a mediator—with or without the client's explicit authorization. This convention is widely accepted because the mediator has an ethical duty to keep such information confidential if instructed to do so. Even though the mediator cannot disclose such information to the other side, the mediator can use confidential information to suggest solutions to the parties that the parties would not discover through direct communication. Of course a lawyer must honor his client's requests not to disclose particular information to a mediator.

- **Drafting Agreements.**

A lawyer may not prepare a settlement agreement giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, except where the client is related to the donee (MR 1.8(c)). Furthermore, a lawyer may not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation (MR 1.8(d)). Finally, a lawyer may not participate in the making of a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship (except an agreement concerning benefits upon retirement) or in the making of an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a controversy between private parties (MR 5.6).