

ETHICS ISSUES IN ADR PRACTICE

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A new cable television series, “Fairly Legal,” reportedly depicts the world of mediation as remarkably glamorous and profitable. By way of disclaimer, I’ve never seen an entire episode of this show, only promos and snippets while channel surfing, so my take may be skewed. But I have to wonder whether many (any?) lawyers engaged in a mediation practice will find this show even remotely realistic.

What the show may at least do is highlight the ever-growing use of alternative dispute resolution (ADR), which includes mediation as well as various forms of arbitration. Not only are ADR methods increasingly becoming the principal means of resolving contested civil disputes that otherwise would take significantly longer to wind through crowded court calendars, but they have spawned a new area for application of many ethical standards. This includes a separate code of ethics for alternative dispute resolution^{Ftn 1} and a separate disciplinary agency to deal with complaints against a neutral in ADR proceedings arising under Rule 114 of the General Rules of Practice for the District Courts.^{Ftn 2} Obviously, lawyers engaging in a mediation or arbitration practice must be aware of and abide by these requirements.

Rule 114

Rule 114’s Code of Ethics states several general principles for neutrals, both lawyers and nonlawyers. Many of these reflect a common-sense approach to what the ADR process is meant to be.^{Ftn 3} Neutrals shall conduct dispute resolutions in an impartial manner and, if unable to be or remain impartial, the neutral shall withdraw; the neutral shall disclose all actual and potential conflicts of interest reasonably known to the neutral; the neutral shall have the necessary qualifications to satisfy the participants; the neutral shall maintain confidentiality to the extent required by Rule 114 generally; and the neutral shall work to ensure a quality process (including procedural fairness, not knowingly making false statements and reasonably expediting the process). Mediators have one additional requirement: to recognize that mediation is based upon the principle of self-determination by the parties; that is, it should result

in a voluntary and uncoerced agreement.Ftn 4 This last point is one that, from what I've seen of the show, our fictional television mediator does not strictly follow—she needs to seek out the parties' true feelings and motivations even if putting a mediated agreement at risk. I suppose it makes for better drama.

From a disciplinary perspective, our office does not routinely involve itself in complaints made against a neutral who happens to be a lawyer. Such complaints usually are referred to the ADR Review Board in the first instance if applicable, although allegations that directly implicate the rules set out below can be investigated by the lawyer disciplinary system too.

Applicable Lawyer Rules

There are several Minnesota Rules of Professional Conduct (MRPC) that apply to lawyers engaged in ADR; some of these vary in their application depending upon the type of ADR procedure being used and the lawyer's role in the matter. First, there are rules that apply to lawyers acting as arbitrators or mediators. Some of these overlap with the Rule 114 obligations, but those rules apply to lawyer and nonlawyer neutrals alike. The two rules that specifically deal with lawyers who have served or are serving in the ADR process as adjudicators or mediators are Rule 1.12, MRPC, and Rule 2.4, MRPC.

Rule 1.12(a) states that (with one exception noted below) a lawyer shall not represent anyone in connection with a matter in which the lawyer acted as an arbitrator, mediator, or other third-party neutral unless all parties to the prior proceeding give informed consent, confirmed in writing.Ftn 5 The one exception contained in Rule 1.12(d) is that a partisan member of a multimember arbitration panel is not prohibited from subsequently representing that party. In addition, Rule 1.12(c) imputes such a conflict to all members of a lawyer's firm unless the disqualified lawyer is screenedFtn 6 and written notice is provided to all parties and the tribunal.

While Rule 1.12 thus addresses circumstances subsequent to a lawyer's service as a third-party neutral, Rule 2.4 sets guidelines for the lawyer's service as a neutral. It defines "third-party neutral" as one assisting two or more persons who are not clients to resolve a dispute between them and includes service as an arbitrator or mediator. More importantly, the rule requires a lawyer acting in such a capacity to inform any unrepresented parties that the lawyer is not representing any of them; if the lawyer knows or reasonably should know that a party does not understand the lawyer's role, the lawyer must explain the difference.Ftn 7

A second category is rules applicable to lawyers acting as advocates in the ADR process. A lawyer acting as an advocate in an ADR proceeding generally has all the same obligations as lawyers do in any form of contested litigation or transactional work. A lawyer's duty as to competence, diligence, communication, confidentiality, conflicts of interest, fees, withdrawal from representation, etc. is not diminished by the fact that the representation is taking place in an arbitration proceeding rather than a district court trial; nor is any duty diminished that arises during the investigation or discovery stages of such proceedings.

Applying a lawyer's ethical duty to a tribunal may give some lawyers pause. As officers of the court, lawyers have a duty of candor to the tribunal (Rule 3.3, MRPC). The term "tribunal" appears in several rules. The term is defined in Rule 1.0(n), MRPC, which states that a tribunal includes not only courts, but also an arbitrator in binding arbitration or any other body acting in an adjudicative capacity (any entity rendering a binding legal judgment directly affecting a party's interests).

Mediation Not a Tribunal

A noteworthy omission from the MRPC's definition of "tribunal" is any reference to mediation. This should not be construed to indicate that an obligation such as candor is somehow not required of an advocate in mediation. Lawyers remain subject to prohibitions on knowingly making a false statement of fact or law while representing a client (Rule 4.1) and the general proscription on acts of dishonesty (Rule 8.4(c)).Ftn 8

The ABA, in Formal Opinion 06-439 (2006),Ftn 9 opined that a lawyer's obligation of truthfulness when representing a client in a caucused mediation is the same as the duty in any sort of negotiation; that is, that the lawyer may not make a false statement of material fact to a third person. However, "statements regarding a party's negotiating goals or its willingness to compromise" ordinarily are not considered false statements of material fact within the meaning of Rule 4.1.

Lawyers in future will no doubt continue to expand their practices in the areas of arbitration and even more so mediation. There exist several layers of ethical standards and disciplinary enforcement that apply to the practice of ADR. Before entering into the area, lawyers should be fully aware of their ethical duties.

Notes

1 Rule 114 (Alternative Dispute Resolution), General Rules of Practice for the District Courts, Appendix – Code of Ethics. *See also*, Chalmers, "'Danger Ahead': Ethics Guidelines for Lawyer-Mediators," *Bench & Bar of Minnesota* (March 2006).

2 The ADR Review Board. *See* Rule 114 Appendix – Code of Ethics Enforcement Procedure.

3 The statements that follow track with Rule 114’s Code of Ethics Rules I-VII.

4 Rule 114 Code of Ethics Mediation Rule I.

5 These terms are defined in Rule 1.0(b) and (f), MRPC.

6 Screened is defined in Rule 1.0(l), MRPC.

7 Compare Rule 4.3, MRPC, as to a lawyer’s duty to unrepresented persons when acting in a representational capacity.

8 *See also* Comment to Rule 3.9 (Advocate in Nonadjudicative Proceedings).

9 ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 06-439 (April 12, 2006).