

Navigating Attorney Ethical Obligations When Representing Clients in Negotiations, Mediations, and Arbitrations

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Considering that more than 90% of all cases are settled without a trial, surprisingly little attention has been given to lawyers' professional obligations when representing clients during negotiations, mediations, and arbitrations (collectively, ADR). Tension frequently arises between lawyers' obligations concerning client confidentiality and zealous representation, on the one hand, and candor, truthfulness, and disclosure obligations, on the other hand.

Lawyers' ethical obligations as set forth in the Rules of Professional Conduct apply to their ADR work. The most relevant of these are:

- RPC 1.2-Scope of Representation and Allocation of Authority Between Client and Lawyer
- 6-Confidentiality of Information
- RPC 3.3-Candor Toward the Tribunal
- RPC 3.4-Fairness to Opposing Party and Counsel
- RPC 4.1-Truthfulness in Statements to Others

Lawyers owe clients a duty of zealous representation, rooted in RPCs 1.2 and 1.3. *LoBiondo v. Schwartz*, 199 N.J. 62, 100 (2009). The court has recognized that fidelity to that duty may create tension with other potential duties.

The Uniform Mediation Act, N.J.S.A. 2A:23C-1 to -13, and Court Rule 1:40 also inform a lawyer's obligations with respect to privilege and confidentiality.

A common challenge for attorneys negotiating and mediating on behalf of clients is determining and complying with disclosure obligations. It is generally understood that the "candor to the tribunal" obligation under RPC 3.3 applies to adjudicative proceedings, but not to mediation or negotiation. Arbitration is an adjudicative proceeding. RPC 1.0(n); *In Re Forrest*, 158 N.J. 428, 435 (1999). Rule 1:40-2(a)(2) includes "settlement proceedings" in the definition of adjudicative processes, but mediation is a "facilitative process" included in the definition of "evaluative processes" in Rule 1:40-2(b)(c).

Our Supreme Court adopted a more stringent version of RPC 3.3 than the ABA Model Rule. New Jersey's RPC 3.3 includes this section (a)(5):

(a) A lawyer shall not knowingly:

...

(5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

This obligation to disclose to the tribunal applies "even if compliance requires disclosure of information otherwise protected by RPC 1.6 [(Confidentiality)]." RPC 3.3(b).

RPC 3.4 (Fairness to Opposing Party and Counsel) and RPC 4.1 (Truthfulness in Statements to Others) apply to all ADR proceedings. New Jersey prioritized the disclosure obligation in RPC 4.1 when it adopted a more restrictive version than the proposed ABA Model Rule. The model rule requires disclosure when "necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." ABA Model RPC 4.1(b) (emphasis added). New Jersey's Rule states:

(a) In representing a client a lawyer shall not knowingly:

(1) make a false statement of material fact or law to a third person

(2) 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

(b) The duties stated in this rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

N.J. RPC 4.1 (emphasis added).

“‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” RPC 1.0(f). “‘Fraud’ or ‘fraudulent’ denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” RPC 1.0(d).

Common-law fraud consists of: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 172-73 (2005) (citations omitted). “Misrepresentation and reliance are the hallmarks of any fraud claim...” Every fraud in its most general and fundamental conception consists of obtaining an undue advantage by means of some act or omission that is unconscientious or a violation of good faith. *Jewish Center of Sussex County v. Whale*, 86 N.J. 619, 624 (1981).

Even an omission or misrepresentation that is not criminal or civilly actionable may be sufficient to void a deal made in mediation, or at least to invite post-settlement litigation. Skirting too close to the border of acceptable non-disclosure, when discovered, may also harm an attorney’s reputation, leading to a diminished ability to represent clients effectively.

To avoid further litigation, attorneys should also ensure that mediated settlements are signed, (*Willingboro Mall v. 240-242 Franklin Ave.*, 215 N.J. 242 (2013)), and any agreement to switch the mediator to an arbitrator (frequently a helpful way to obtain a fair and less costly resolution) should be in writing signed by the parties (*Minkowitz v. Israel*, 433 N.J. Super. 111 (App. Div. 2013); *Pami Realty v. Locations* XIX 468 N.J. Super. 546, 558 (App. Div. 2021)).

Not telling the court that your client has died, even though it is a misstatement that inevitably will be revealed, has come up more than once as an example of a material fact that must be disclosed to the tribunal and opposing counsel. In *In re Forrest*, to collect a settlement, a lawyer did not inform the tribunal or his adversary of the death of his client. Negotiating a settlement after a misrepresentation before the tribunal does not wipe away the ethical violation of the misrepresentation. *Forrest*. Because of the confidential nature of mediations, and the unwritten customs that prevail, more latitude is afforded counsel in a mediation context than in either an arbitration or court proceeding. The informality of mediation is one strong reason lawyers select mediation. The attorneys also may disclose confidential information to the mediator, with the permission of the client, that enhances the mediator’s ability to settle the case. Disciplinary cases in New Jersey involving truthfulness to third parties typically do not involve mediation. (*Brundage v. Estate of Carambio*, 195 N.J. 575, 594 (2007), involved settlement of a case at the trial court level.) But given that a lawyer also must not “make a false statement of material fact to a third person” (RPC 4.1(a)(2)), and may not “engage in conduct involving dishonesty, fraud, deceit or representation” (8.4), can the puffery, bluffing, and hard bargaining that frequently occur in family and civil negotiations stray into unethical territory? Courses taught in law school promote principled

negotiations, with parties focusing on their best alternative to a negotiated agreement (BATNA), and producing the best possible results for all parties after approaching opposing parties with honest, good-faith arguments. “Getting to Yes,” Fisher, Ury and Patton, 3rd edition 2011. In real-life litigations, mediation negotiating tactics frequently stray from these principled negotiation teachings.

In civil cases, most frequently the dispute involves settling one issue, the amount of damages, if any, to be paid by defendant(s) to plaintiff(s). The parties might be court-mandated to attend mediation or be completely voluntarily seeking a resolution. Either way, the more paper discovery, at least, that has been completed, the more the parties are kept to strictly accurate factual arguments. Exaggeration, non-factual statements of opinion, which would be known by the recipient to be less than the unvarnished truth, otherwise known as puffery, is frequently practiced by all counsel, and even the mediator at times. If one side is self-represented, however, the need to adhere strictly to the facts without such puffery is reasonable.

In family mediation, where usually many more issues must be resolved than in civil cases, frequently the need for discovery arises during the mediation process. Depending on the resources of the parties and the potential value and history of the assets, income and debts in contention, the parties may not be able to develop the discovery thoroughly. In these matters, the parties frequently have deep distrust and limited financial information. Their animosity may well overpower reason. To accomplish the goal of a fair settlement, attorneys’ efforts should be aimed at representing their client vigorously while also refraining from adopting their nonfactual emotion-driven positions. The neutral mediator can be extremely helpful in talking to the client in the presence of counsel to reinforce the hard realities of the court system, including the cost of litigation, the risk of an adverse ruling, and the delay in obtaining relief. In this family negotiation process, it is important not to misrepresent material facts.

In one published Appellate Division opinion involving family lawyers, after the parties reached a settlement, but before putting the divorce through in court, the husband’s attorney did not divulge to the court or opposing counsel that her client had died. *Kingsdorf v. Kingsdorf*, 351 N.J. Super. 144, 147, (App. Div. 2002). The death of the husband under the statute in effect at the time would have advantaged the wife regarding ownership of the home through inheritance rather than the divorce agreement. That omission, which was predictably revealed after the divorce, resulted in the undoing of the divorce agreement and discipline for counsel. *In re Vella*, DRB 03-425, family matters, due to the tremendous emotional weight of the issues and wide discretion afforded judges, without juries to distance the judge from the decisions, disproportionately result in complaints against lawyers and judges. Thus, even in the confidential world of negotiations, attorneys should be especially careful to avoid misrepresentations, whether affirmatively or by omission, particularly where a child’s well-being may be at stake.

With these ideas in mind, ADR succeeds as a cost-effective, relatively quick way to resolve legal disputes.

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