Ethical Issues in Mediation

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A. Introduction

The conference room is uncomfortable. You’ve been in the room for hours, interrupted only by the arrival of a tray of sandwiches crafted by an unambitious deli, now quickly growing stale. You are stuck here. Any agreement between your side and the other side seems as far away as ever. In lengthy gaps between exchanges of offers that are only slowly approaching each other (if at all), the mediator tells stories of glorious battles fought in bygone days. You aren’t sure how this will end. You daydream, and wonder how amazing life would have been if you’d just stayed in Taos and taken that job as a rafting guide.

And then an interesting proposal floats into the room. The mediator proposes taking the lawyers out of the picture and putting the business representatives into a room together. You think, why not? Perhaps the business representatives can cut through the “noise” and legal issues and forge a practical solution. Of course, many other outcomes are possible. The clients may (inadvertently) agree to a resolution beyond one or more parties’ authority. The mediation may fall apart. Disclosures or statements may be made that may create a roadmap for new discovery requests or may facilitate one party’s litigation strategy after the mediation fails.

Below, we address some of the pitfalls and challenges inherent in mediation and the applicable ethical principles and rules.

B. Confidentiality

Confidentiality is central to the effectiveness of mediation. The exchange of legal arguments, damage theories, and personal stories play a central role in reaching resolution. In order to allow this type of free and open exchange, litigants find comfort in a number of evidentiary rules, statutes, and informal agreements. Federal Rule of Evidence 408, for example, drastically limits the admissibility of offers of compromise. Louisiana has a statute specifically protecting the confidentiality of all communications during mediation and further immunizing parties to the mediation from testimony on those communications by subpoena or otherwise. Other courts have issued local rule requirements setting the parameters of confidentiality in connection with mandatory or highly favored mediation programs. To fill in any gaps left by these rules, mediators often ask parties to sign mediation agreements committing the parties to maintain confidentiality. The goal of these protections is clear—full and open discussion tends to promote resolution.

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3 See, e.g., 4th Cir. Local Rule 33; D. Kan. Local Rule 16.3; see also 28 U.S.C. § 652(d) (encouraging district courts by local rule to adopt confidentiality rules for ADR procedures).
However, these rules run headlong into other obligations lawyers face related to protection of client information. Lawyers are required to maintain the confidentiality of client information, with very limited exceptions such as disclosing information to prevent substantial bodily harm.4 Moreover, lawyers must remain mindful concerning waiver of privilege and “offensive” use of privileged information. Disclosure of privileged information to third parties often results in a waiver of privilege.5

Moreover, the cautious lawyer will consider these obligations in the context of the express limitations to confidentiality in mediation discussions. Federal Rule of Evidence 408 provides for limited admissibility of settlement discussions for “another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”6 The same Louisiana statute protecting mediation communications clarifies that parties can disclose limited information to prove compliance or lack of compliance with a mediation order and acknowledges the widely-recognized fact that information and facts disclosed in mediation may still be the subject of further discovery.7

This dilemma of protecting confidentiality at the expense of disclosing or utilizing favorable information to advance negotiations, occurs throughout mediation processes. In mediations involving difficult, irate or indignant parties, mediators may cancel an opening session, pull the lawyers into the hallway, and endeavor to force a frank discussion. Under some circumstances, the mediator may resort to sideling the lawyers, and may put the focus on the business representatives, encouraging them to communicate directly with each other. In that situation, really anything may be disclosed, and the lawyers may only realize the scope of what has transpired after the session ends without an agreement and new discovery requests arise soon thereafter.

Fortunately, the ethical rules also provide some limitations and processes that allow lawyers to navigate this territory. Ethical rules generally allow disclosure of confidential information when “the client consents after consultation” or, said another way, through “informed consent.”8 While this dovetails with the issue of client authority discussed below, the client, as owner of the privilege and holder of the confidential information, has the ability to authorize disclosure after weighing the appropriate risks. Mediation allows plenty of time for these discussions to occur. A lawyer should advise the client regarding the risks of disclosing confidential information. If the mediation fails, disclosure of particularly helpful facts will trigger discovery requests probing those facts and searching for the rest of the story. Similarly, a refusal to disclose information, documents, and damages theories may result in arguments that a party has not participated in good faith in a mediation process, which can also be problematic. Ultimately lawyers must make practical judgments on these issues based on the circumstances in the case, the personalities in the room, and the specific client feedback.

4 See ABA Model Rule of Prof’l Conduct 1.6.
6 Fed. R. Evid. 408(b) (emphasis added).
7 La. Rev. Stat. § 9:4112(B)(1)(b), (C); but see In re A.T. Reynolds & Sons, Inc., 452 B.R. 374, 384 (S.D.N.Y. 2011) (refusing to lift confidentiality to evaluate whether a party participated in mediation in good faith when the party refused to make a settlement offer).
8 See, e.g., Tex. Disciplinary R. Prof’l Conduct 1.05(c)(2); La. R. Prof’l Conduct 1.6(a).
C. Authority

Every lawyer who has experience in mediating cases has grappled with the issue posed by an order or requirement such as the following: “Parties **MUST** send a client representative with **UNLIMITED AUTHORITY** to resolve the matter.” While such language may make sense in a family court matter where the highest authorities will inevitably be in the room, such a requirement poses difficulties in a business context where a favorite negotiating tactic is the reluctant “phone call” that will provide just enough to reach a settlement. Failing to show up at the mediation with sufficient authority can have bad consequences, including, in the worst case scenario, an ugly sanctions proceeding in which the otherwise confidential dirty laundry of mediation may suddenly be aired.9 However, it can be sometimes difficult to secure sufficient (let alone “unlimited”) authority for a corporate client where this may require participation by officers, directors, or even the principals or shareholders.10

 Courts weighing in on this issue have generally taken a practical approach—asking litigants to fairly apprise the relevant issues and range of damages and to provide representatives with sufficient authority to address the issues. Courts have recognized that representatives will need to be equipped with authority within the relevant amount in controversy and may not be able to send a representative aware of every issue in the case.11 As one court noted: “[W]here a mediation order requires the presence of a person with “settlement authority,” a party satisfied this requirement by sending a person with authority to settle for the anticipated amount in controversy and who is prepared to negotiate all issues that can reasonably be expected to arise.”12 Similarly, addressing pre-trial conference requirements related to settlement authority, the Seventh Circuit views authority as requiring the attendance of a person who has a position “allowing him to speak definitively and to commit the corporation to a particular position in the litigation.”13 Under that standard, the representative need not have authority to settle on anyone else’s terms but merely be prepared to consider settlement.14 Failure to send a representative with sufficient authority has been found to be sanctionable.15

 Much like addressing confidentiality, the issue of arriving with proper settlement authority requires an analysis of potential damages or the range of possible outcomes, consultation with the client, and laying the groundwork for corporate approval of settlement figures well in advance of mediation. While the presence of the client’s officers and directors will generally be unnecessary, parties should take a hard look at the potential liability or range of possible outcomes, the reasonable paths to resolution, and should ensure that a representative is prepared and equipped to advance settlement discussions in a meaningful manner.

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10 See G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 665 (7th Cir. 1989) (Easterbrook, J., dissenting) (noting that an order requiring “full authority to settle” would improperly require either a reallocation of corporate responsibility or sending a quorum of a company’s board to the settlement conference).
11 See A.T Reynolds & Sons, 452 B.R. at 384.
14 Id.
D. Preparing for Mediation

Navigating these issues requires planning and coordination between opposing parties, counsel, and their clients. Below is a short list of actions that may be taken to smooth the process and facilitate resolution without falling into these traps:

1. **Exchange information.** Even an informal exchange of key documents or settlement analyses in advance of mediation can help the parties understand the positions, facts, and issues before the mediation begins. The exchange of documents and information helps avoid situations where a lawyer and client fret anxiously over whether to share something that is otherwise confidential. If the parties have an understanding of the key facts and basic positions, the mediation is more likely to result in a discussion of respective settlement approaches instead of being bogged down in selective document production. Revealing the “smoking gun” document at mediation will only cause confusion and hinder matters.

2. **Exchange offers.** Parties showing up at mediation without a prior exchange of settlement figures will almost never have the “unlimited” (or sufficient) authority needed to negotiate in good faith. For significant disputes, the choice of representative should be made carefully to head off disputes regarding good faith participation.

3. **Select the right mediator.** Corporate clients often use a wide range of lawyers for different tasks—the title lawyer, the regulatory lawyer, the class action defense lawyer, the local fixer. Similarly, different mediators have wide range of experiences and levels of sophistication. If the mediation concerns the nuances of the Bankruptcy Code, selecting a mediator with no bankruptcy experience could result in wasted time. In another case, it may be more important to engage a mediator with experience with the local bench.

4. **Do your homework.** Mediations often end up focusing on a few significant facts and allegations. Lawyers should familiarize themselves with the relevant documents, the factual timeline, and otherwise be at the ready to address such important details. It is not uncommon for the mediation to be the occasion on which the lawyer spends the most amount of time with his or her client in the course of the entire case. It is awkward, to say the least, for the client to spend such time observing his or her attorney scrambling to locate relevant documents or analyze issues that the attorney was not prepared to address. Doing a bit of “homework” in advance can help move the mediation along and further assure the client that they have chosen the right person for the job. A complete failure to prepare for mediation, on the other hand, can form the basis for sanctions.

5. **Prepare a mediation statement.** Some mediation orders expressly require preparing a mediation statement, and at least one court has held preparation of a mediation statement is essential to good faith participation in mediation. Even if not expressly required, preparing a mediation statement containing an assessment of key facts, damages analysis,

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and potential settlement approaches will help a party organize thoughts and may guide the discussion as the mediation begins.

6. **Control the process.** Mediation generally occurs either by agreement between the parties or by court order. Parties may wish to “get ahead” of the process and consider proactively initiating a consensual mediation, instead of waiting for a court to order mediation when the dispute has become intractable. Additionally, a consensual mediation avoids the pitfalls that an order requiring “unlimited authority” may create. The parties can assess their positions, negotiate in good faith, and not worry about a sanctions or contempt proceeding. If mediation will be ordered, parties should discuss with the court the relative issues in the case, the potential range of damages, and define the sufficiency of authority required. Staying ahead of the process can help avoid unpleasantness down the road.

7. **Have a plan.** At the time of mediation, the parties should be aware of the key documents, legal risks, and likely range of damages or outcomes. In advance of the mediation, the lawyer and client should discuss how they want to open the mediation, a plan for countering and addressing the likely claims and assertions of the opposing party, and goals for where to end up at the end of the day. This preparation can speed the back-and-forth and facilitate resolution.

E. **Conclusion**

Alternative dispute resolution programs have become a critical part of litigation practice across industries and throughout state and federal court systems. When parties do not voluntarily mediate, they may be ordered to do so before trial and even during an appellate process. Parties should be mindful of the traps discussed above when approaching mediation. Parties should make sure they have adequate information and not spend mediation worrying over what information to disclose and whether the confidentiality of the process will truly remain protected. Parties should ensure they appear with sufficient authority to get the job done on reasonable terms based on a fair assessment of liability. With thorough planning, parties can be prepared for the pitfalls and difficulties they may experience and make the most of the opportunities for resolution afforded by mediation.

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18 An illustration of this concept appears in the case of *Turner v. Young*, 205 F.R.D. 592 (D. Kan. 2002). In that case the court notes that a voluntary mediation with disclosure of expected authority levels can be an alternative approach to court ordered mediation or mediation in which anticipated authority is not disclosed. Once the court orders mediation, the court suggested, the mediation must be attended by “‘the’ decisionmaker.” *Id.* at 595.