

KENTUCKY LAW UPDATE



2024

ADVANCING THE PROFESSION THROUGH EDUCATION

**Mediation Ethics:
What You Don't Know CAN Hurt You!**

1 Ethics Credit

Sponsor: KBA Alternative Dispute Resolution Section

**Compiled and Edited by:
The Kentucky Bar Association
Office of Continuing Legal Education
for
Kentucky Bar Association
2024 Kentucky Law Update**

**©2024 All Rights Reserved
Published and Printed by:
Kentucky Bar Association, August 2024**

Editor's Note: The materials included in the following Kentucky Bar Association Continuing Legal Education handbook are intended to provide current and accurate information about the subject matter covered as of the original publication date. No representation or warranty is made concerning the application of legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how a particular judge or jury will interpret or apply such principles. The proper interpretation of the principles discussed in a matter for the considered judgment of the individual legal practitioner. The faculty and staff of this Kentucky Bar Association CLE program disclaim liability therefor. Attorneys using these materials, or information otherwise conveyed during these programs, in dealing with a specific legal matter have a duty to research the original and current sources of authority. In addition, opinions expressed by the authors and program presenters in these materials do not reflect the opinions of the Kentucky Bar Association, its Board of Governors, Sections, or Committees.

MEDIATION ETHICS: WHAT YOU DON'T KNOW CAN HURT YOU!

Henry L. Stephens, Jr.

THE FOLLOWING HYPOTHETICALS WILL ILLUSTRATE THE DILEMMAS.

I. HYPOTHETICAL #1

During the mediation of a suit for wrongful death by a grandson of the deceased, the plaintiff informs his attorney about facts about the decedent's habits which the attorney feels may indicate contributory negligence and minimize any award of damages. The defendant has offered \$25,000, but the plaintiff's last offer was \$200,000. Apparently, the defendant, the defendant's attorney and the mediator are not aware of these facts. What if the plaintiff's attorney, with knowledge of this revelation from the plaintiff, remains steadfast in representing the earlier assertion that the decedent in no way could have contributed to his own death and keeps pushing for the \$200,000 demand?

[Model Rule 4.1](#) applies to lawyers' statements to others, and it prohibits attorneys from knowingly making false statements of material fact or law to third parties when representing clients. This Rule prohibits lawyers from lying about material facts when negotiating inside and outside of mediation. Although [Model Rule 8.4](#) generally prohibits lawyers from engaging in dishonest, deceitful, and fraudulent conduct, many scholars and commentators conclude that the more specific provisions of [Model Rule 4.1](#) govern lawyer truthfulness when negotiating.¹

Further, a misrepresentation of damages would qualify as a false statement of material fact under [Model Rule 4.1](#).²

The prohibition of [Model Rule 4.1](#) against lying about material facts largely replicates substantive doctrines of fraud which can make agreements vulnerable to invalidation. American fraud law touches many negotiation behavioral decisions and seems to be expanding its reach. Reflecting these substantive trends, the Ethics 2000 Commission amended the Comments to [Model Rule 4.1](#) to announce that material fact lies can occur if lawyers "incorporate or affirm" statements of others they know are false. Material fact lies also occur when lawyers use "partially true but misleading" assertions in contexts that make them the "equivalent of affirmative false" communications. Courts are likely to find this equivalence when other facts

¹ Peters, Don, "When Lawyers Move Their Lips: Attorney Truthfulness In Mediation and a Modest Proposal", 2007 *J. Disp. Res.* 119, 121-122 (2007), available at <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1023&context=facultypub> [internal citations omitted].

² See *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962) (where court vacated settlement where defendant knew and failed to disclose true damages caused by accident); *Ausherman v. Bank of America Corp.*, 212 F.Supp.2d 435 (D. Md. 2002) (where lawyer referred to disciplinary committee for untruths in letter to defendant's counsel proposing settlement terms); *State ex rel. Watson v. White*, 408 S.E.2d 66 (W. Va 1991) (where lawyer admonished for seeking damages in suit when remedy not available in underlying deed of trust). See also [Model Rule 8.4\(c\)](#): It is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." (MRPC, ABA 2003.)

are vital and not easily accessible to the persons who receive selective, partial communications.

Lawyers who lie about material facts when negotiating inside or outside of mediation risk ethical discipline by the legal profession for violating [Rule 4.1](#), and for assisting their clients in committing fraud. They also risk civil liability for fraud, deceit, and legal malpractice. Although instances where lawyers are disciplined for lying about material facts and assisting client frauds seem to be increasing, most actual regulation of lawyer honesty regarding this information category occurs when parties later seek to challenge agreements they negotiated inside or outside of mediation. While aggrieved participants have the ability to challenge agreements based on lies about other negotiation topics, they typically have greater motivation to discover that important external facts, independent of lawyers' negotiation strategies, were not as represented.

Despite these prohibitions and risks, and despite concerns about reputation in repeat encounters, empirical research suggests that lawyers lie about material facts when negotiating. A survey of a national sample of lawyers showed that fifty-one percent believe that "unfair and inadequate disclosure of material information during pretrial negotiation is a regular or frequent problem." Another survey of civil litigators in Illinois, Indiana, and Michigan showed that twenty percent believed that opposing lawyers routinely lied about material facts during non-mediated negotiations. Mirroring that research, the average of estimates from respondents answering the questionnaire regarding lying about material facts was that such lying occurred in twenty-three percent of the non-mediated negotiations in which they participated.

Many facets of mediation constrain opportunities to lie about material facts successfully. Concerns for reputation and effectiveness in future encounters with mediators encourage truth-telling. The presence of clients typically required for court-connected mediations often means that material fact lies require party complicity. Caucuses give mediators opportunities to converse directly about and indirectly around suspected misrepresentations. With capable attorney representation, effective use of broad civil discovery provisions also limits opportunities to lie about material facts.

Nevertheless, reported decisions and anecdotal evidence suggest that lawyers lie about material facts when negotiating during mediations. One mediation scholar reported that "some attorneys, operating under the assumption that ... [mediations are] entirely confidential, have bragged about resolving the case by misrepresentation." Another noted the reports of several Texas mediators that lawyers regularly lie during mediations. Survey respondents were asked to indicate how often they believed they observed lies about material facts in joint sessions versus caucuses. The average of survey respondents' estimates was that lies occurred in twenty-five percent of the joint sessions in which they participated. The average of respondents' estimates of lies about material facts in caucuses was that

they occurred in seventeen percent of the mediations in which they participated.

Respondents' estimates that more material fact lying occurred in joint sessions than in caucuses probably reflect the questionnaires' option only to self-disclose when lawyers evaluate caucus behaviors. This difference may suggest that lawyers occasionally choose to communicate deception directly in joint sessions to avoid how mediators translate, embellish, diminish, reframe, and ignore lawyer statements when carrying messages between caucuses. In addition, predictions that lawyers will exploit the confidentiality that attaches to caucuses to lie about material facts more than in private sessions may not be accurate.

On the other hand, some lawyers might choose to lie about material facts in caucuses to take advantage of opportunities to influence mediations within these confidential sessions. They also may hope that mediators will communicate these falsehoods in ways that participants deem more legitimate and persuasive.

Mediators may not know when lawyers lie about material facts during mediations, particularly when misrepresentations relate to information that is not readily available to and beyond the reach of other participants. Studies show most humans are not particularly adept at detecting lies. If the limited research and respondents' estimates accurately predict that lawyers lie about material facts in seventeen to twenty-three percent of all mediations, it follows that undetected lies occasionally influence mediated outcomes and resulting agreements.

Sometimes contexts, prior communications, caucus conversations with clients, or earlier experiences with attorneys raise legitimate concerns about the truthfulness of important fact representations made in joint sessions or caucuses. When this happens, mediators may use the common advocacy technique of asking questions to which they already know the answers as a way to check attorney truthfulness. Mediators also may pursue several options if they suspect the truthfulness of material fact statements.

One option includes encouraging parties to include representation or warranty provisions in mediated agreements for fact statements that are essential to inducing acceptance of proposals. Representations are detailed statements about important facts, and warranties are promises that these assertions are true. Both of these provisions lessen the need to base agreements solely on trust. Both supply standard tools transactional lawyers use to deal with the strategic opportunism presented by the ability to deceive about material components of deals. This option can be raised by parties or mediators and, because agreements are usually readily admissible in evidence, these provisions can avoid many later controversies about the content of key representations and can focus disputes directly on the truth of these statements.

Lawyers who reject using representations and warranties naturally increase mediators' concerns about the truthfulness of the material fact statements they make. Mediators confronting this challenge may privately discuss the risks of discovery through pretrial procedures and subsequent challenges to encourage lawyers and their clients to reframe these situations and reconsider their refusals to change or warrant their representations. Mediators also may encourage negotiators to make suspected misstatements confidential communications to avoid confronting dilemmas regarding whether and how to share them. Finally, mediators can choose not to transmit material information that they suspect is false.

Assuming that none of these approaches resolves concerns, mediators may need to terminate mediations to avoid helping create agreements that involve fraud. Discussing their ethical obligation to avoid fraudulent agreements at appropriate moments in caucuses may generate modifications of earlier statements and decisions not to use or make additional false representations.

Current legal trends exempt challenges to mediated agreements based on claims of material fact misrepresentations from the confidentiality rules that ordinarily apply to mediation proceedings. Mediators also may be compelled to testify regarding the existence of subsequently challenged material fact statements during the mediation.³

II. HYPOTHETICAL #2

What if the plaintiff's attorney does not lie about the facts concerning the decedent's conduct, but he does fail to disclose the facts the plaintiff has just disclosed?

Explanation:

Analysis of truthful negotiating in and out of mediation typically focuses on affirmative misstatements, which generally must exist before fraud or ethical scrutiny occurs. Circumstances, however, may make the failure to disclose facts or other information fraudulent and unethical. Explicitly linking ethical regulation to the American law of fraud, [Model Rule 4.1\(b\)](#) prohibits lawyers from knowingly failing to disclose a material fact when disclosure is necessary to avoid "assisting" fraudulent acts by clients unless disclosure is barred by the confidentiality rule. Comment 1 to [Model Rule 4.1](#) notes that although American lawyers generally have "no affirmative duty to inform" opposing parties of relevant facts, omitting facts or other information may be "the equivalent of affirmative false statements." Section 98(3) of the Restatement (Third) of the Law Governing Lawyers also provides that attorneys negotiating may not fail to make disclosures required by law.

American fraud law generally recognizes disclosure duties when making partial statements that are or become misleading in light of all facts, parties

³ The excerpt above is reprinted from Peters, *supra* note 1 at p. 122-126.

stand in a fiduciary relationship to each other, non-disclosing parties have vital information not accessible to others, or special statutory obligations apply. Negotiated agreements have been set aside for attorneys' failures to disclose the death of the plaintiff, a life-threatening injury about which the plaintiff was ignorant, major procedural developments affecting a case, existence of insurance coverage, an autopsy, and changed testimony.

This author's research found that no empirical studies regarding the frequency with which attorneys' failures to disclose material facts in these situations occur in negotiations inside or outside of mediation.... The broad reach of civil discovery and the presence of skilled lawyers lessen risks of this happening in high stakes, court-connected mediations. This seems particularly likely when duties exist to correct representations that lawyers learn were false when made or have become false because of changed circumstances. Although the ABA's House of Delegates deleted a draft recommendation generally establishing this duty when enacting the Model Rules in 1983, such obligations are created by discovery provisions or common law. Mediators traveling between private sessions with participants also may discern what material facts really matter to them and thereby identify when significant failures to disclose occur.

Mediators encounter challenges if lawyers confidentially disclose material facts that create serious fraud concerns and then instruct mediators not to reveal them. This disclosure puts in conflict mediators' duties to maintain the confidentiality of caucus disclosures and to not produce fraudulent agreements. When this situation happens, mediators typically explore the risks run by going forward without disclosure in terms of successful challenges to resulting agreements and personal exposure to fraud, intentional or negligent misrepresentation, and malpractice claims. They also may mention their ethical duties to terminate rather than go forward with deals they believe may be later determined to be fraudulent. Oregon has decided that mediators must terminate mediations in this situation. Mediators who go forward after discovering lawyers or participants are fraudulently withholding material information from others participate in the perpetration of fraud.⁴

III. HYPOTHETICAL #3

Counsel for the employer in an age discrimination case tells the mediator that she and her client value the case below \$30,000, which is the limit of her settlement authority. Because of the complexity of her client's corporate structure, she would not be able to reach the individuals needed to obtain any additional authority that day. In reality, she is authorized to settle at \$40,000 and could reach the individuals for more authority at any time. Is this conduct ethical?⁵

⁴ *Id.* at p. 126-128.

⁵ Roth, Bette J., "Ethical Considerations for Advocates in Mediation," Boston Bar Association, p. 2 (November 2004), available at <https://rothadr.com/wp-content/uploads/2021/12/ethics-reprint.pdf>.

Explanation:

As mediation counsel, your role is very different. Rather than “winning” through adjudication, in mediation, you help your clients work toward resolution by recognizing their interests, addressing case weaknesses, and exploring solutions.

In transitioning from litigation to mediation advocacy, lawyers often struggle with how – or whether – to use adversarial litigation tactics in the settlement process. The first question is whether such tactics are ethical in mediation, but there are no easy answers. The Model Rules of Professional Conduct provide little guidance for lawyers in mediation,⁶ and while the Ethical Guidelines for Settlement Negotiations (ABA 2002) (“Ethical Guidelines”) address ethical behavior in mediation, they have not yet been approved to represent the policy of the ABA or any state.

* * * *

Mediators often explore with each party its best alternative to a negotiated agreement (“BATNA”). In so doing, the mediator will challenge the lawyers to discuss candidly their case weaknesses and any key concerns. Lawyers often respond by shrugging the negative evidence, overstating the supporting evidence, or both. The tactic is clear – to bluff the mediator to pressure the other side to make greater concessions. Is this ethical?

The Model Rules recognize the need for zealous advocacy in representing a client,⁷ and specifically allow a lawyer to bluff about the value of his or her case in mediation:

“... Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category. . . .”⁸

⁶ The Model Rules address behavior within the litigation system, in which discovery, trial, and the appellate processes are defined by three critical components: procedural rules, an impartial arbiter, and partisan advocates. This framework is not present in mediation. See, Haussmann, Brian, “The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic,” 89 *Cornell L. Rev.* 1218 (2004).

⁷ [Model Rule 1.3\(1\)](#) states, “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” (MRPC, ABA 2003). *Editor’s note: [Model Rule 1.3](#) has been revised to state the following: “A lawyer shall act with reasonable diligence and promptness in representing a client.”*

⁸ [Model Rule Section 4.1](#), Comment 2 (MRPC, ABA 2003).

The Guidelines concur:

“The prohibition against making false statements of material fact or law is intended to cover only representations of fact, and not statements of opinion or those that merely reflect the speaker’s state of mind. . . .”⁹

Bluffing that is more extreme would likely impact negatively the negotiation process and is never recommended. It could offend the opponent or the mediator, and in particularly egregious cases, jeopardize the client’s ability to settle. In this circumstance, the conduct could be grounds for legal malpractice claims or discipline under the Model Rules.

* * * *

The Model Rules do not address bluffing about settlement authority. Although the Guidelines specify that “a lawyer’s conduct in negotiating a settlement should be characterized by honor and fair-dealing,”¹⁰ bluffing about settlement authority is a tactic commonly used to test the opponent and establish a negotiating range, and it often yields effective results. In addition, settlement authority is not something a party would otherwise be compelled to disclose. Therefore, the conduct most likely would be permitted under [Section 1.3](#) of the Model Rules.¹¹

* * * *

Bluffing about the applicable law is more risky. If counsel can make a good faith argument about the applicable law, it might be tolerated.¹² If not, it could be viewed as a misrepresentation of the law, which is unethical conduct under both the Guidelines¹³ and the Model Rules.¹⁴

⁹ Section 4.1.1, Committee Notes, Ethical Guidelines for Settlement Negotiations (ABA 2002).

¹⁰ Section 2.3, Ethical Guidelines for Settlement Negotiations (ABA 2002).

¹¹ [Model Rule 1.3\(1\)](#) states, “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” (MRPC, ABA 2003.) *Editor’s note: [Model Rule 1.3](#) has been revised to state the following: “A lawyer shall act with reasonable diligence and promptness in representing a client.”*

¹² See *United States v. Cavin*, 39 F.3d 1299 (5th Cir. 1994) (noting that duties of client loyalty and zealous representation include advocacy of positions that lawyer, in good faith, believes have arguable basis, despite contrary authority).

¹³ “In the course of negotiating or concluding a settlement, a lawyer must not knowingly make a false statement of material fact (or law) to a third person.” Section 4.1.1, Ethical Guidelines for Settlement Negotiations (ABA 2002).

¹⁴ “A lawyer is required to be truthful when dealing with others on a client’s behalf.” Comment 1, [Model Rule 4.1](#) (MRPC, ABA 2003); see also *In re Richards*, 986 P.2d 1117 (N.M. 1999) (recognizing that lawyer’s

Bluffing about the applicable law is not recommended in any event for tactical reasons. Mediators often are lawyers or retired judges who tend to be experienced in the industry and knowledgeable about the law. Misstating the law could make the lawyer look unprepared, not credible, or both. The consequence will be an erosion of trust with the mediator, which could make settlement less likely, and potentially harm the client.^{15,16}

IV. HYPOTHETICAL #4

[T]he plaintiff claims she was terminated in retaliation for complaining about sexual harassment. She denies having had any “performance issues” until after the initial discriminatory incident. During the private caucus session, the owner of company tells the mediator that the plaintiff had been warned repeatedly for poor performance, and that several days before the alleged harassment, he sent an email her supervisor, instructing her to terminate the plaintiff. Initially, the company’s lawyer is unwilling to share the email with the plaintiff, thinking that it would be powerful evidence to save for trial. Is this advisable?¹⁷

Explanation:

Occasionally, a lawyer knows of evidence that would harm the opponent’s case, but rather than share it in mediation, he or she prefers to save it as “ammunition” for trial if the mediation fails.”

.....

Lawyers often struggle with the question of whether to “lay all of their cards on the table” at mediation or save some of them for trial. The real questions are (a) what is the goal of the process, and (b) how is the client better served? If the goal is to prepare the case for trial, it would not be ethical to proceed with the mediation process. In addition, if the email would be produced eventually in discovery, protecting it during mediation wouldn’t further that goal in any event.

If the goal is settlement, the lawyer should maximize the value of the evidence in mediation – as negotiating leverage – to help the opponent re-value its case. In this example, the defendant’s lawyer eventually agreed

misplaced reliance upon U.S. Supreme court case would have become apparent had lawyer researched and read cases distinguishing it).

¹⁵ It is the client who decides the objectives of the representation and the lawyer is required to pursue them. If the lawyer fails to carry out these objectives, through, for example, a lack of diligence or competence, this will, *a fortiori*, constitute a violation of [Rule 1.2](#). See, e.g., *People v. McCaffrey*, 925 P.2d 269 (Colo. 1996); *In re Hagedorn*, 725 N.E.2d 397 (Ind. 2000); see also [Model Rule 1.1](#) (MRCP, ABA 2003).

¹⁶ The excerpt and citations above are reprinted from Roth, *supra* note 5, at p. 1-3.

¹⁷ Roth, *supra* note 5, at p. 3.

to share the email with the plaintiff, who, with her lawyer's input, reduced her demand from one year's salary to \$500.¹⁸

V. HYPOTHETICAL #5

At a mediation for a sexual harassment case, the lawyer representing the plaintiff had met his client several months earlier when he was hired by the company to train its employees in discrimination prevention. Since he had not formerly represented or advised the company, and had not obtained confidential information in connection with the training, he did not feel compelled to disclose to the company his intent to represent the plaintiff "for the purposes of mediation only." The company believed his lack of loyalty and opportunism was actionable. Could he ethically represent the plaintiff in mediation against her employer?¹⁹

Explanation:

Neither the Guidelines nor the Model Rules define what it means to represent a party "for the purposes of mediation only," nor do they address how the limited representation affects the ethical duties of the lawyer. Under [Model Rule 1.9](#), despite his duty of loyalty to the former client, since he did not represent the company in a specific "matter" or "transaction," and therefore did not have access to the defendant's confidential information, it is unlikely that his conduct would be actionable.²⁰

As with all potential conflicts of interest, the legal question is what should be absolutely prohibited to protect some important interest (like loyalty, confidentiality or integrity of the process) and what conflicts can comfortably and permissibly be waived by full disclosure and consent? Some commentators have suggested simple solutions to these problems by providing for strong and broad disclosure requirements with specific waiver and consent provisions. Others simply suggest an arbitrary time period for ADR conflicts to "lapse."

In the ADR context, these possible solutions may have other complications – what is to be disclosed? The judicial conflict rules focus on personal relationships and financial interests. But, might an ADR provider have to disclose other factors as well, such as the quality and amount of prior work for the parties (as advocated by opponents of pre-dispute contract allocation of arbitration or mediation services to particular providers), or potential or "perceived" biases or prejudices such as personal, demographic and social affiliations.

¹⁸ *Id.* at p.3-4 [internal citations omitted].

¹⁹ *Id.* at p. 6.

²⁰ *Id.* at p. 7.

Several of the few recent cases which have had to address these issues illustrate some of the difficulties. In *Poly Software International, Inc. v. Su*,²¹ a federal court disqualified an attorney from representing a party against another party who had been a co-participant in a previous mediation involving a similar issue. In the first case, the two parties (together) were accused of appropriating software from another company and the attorney involved in the second case was the mediator. During the mediation the mediator clearly had access to information from all parties, including in all likelihood, some information about who had actually been responsible for the “theft” of the software codes. In the second case, the former partners in the prior mediation were engaged in a similar dispute, this time one of them accusing the other of appropriating the software documentation. The court based its disqualification ruling by reasoning, by analogy, from [Model Rule 1.9](#), that like an attorney “who has formerly represented a client in a matter [and who should therefore] not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client,” a mediator should not represent someone who had previously been a party in a mediation. Note that the court treated the prior mediation as being analogous to a prior representation, when what occurred functionally, was the learning of confidential information during the mediation which could have been used adversely against one of the parties (who had, at least during the mediation, trusted that the mediator would not only keep the information confidential but not use it against him).

This case is instructive for many reasons. First, it is not clear from the confidentiality “oaths” and contracts that mediators make, that they are offering the same protections as representative lawyers. The mediator in this case could have represented the party in the second matter without disclosing any information – all he had to do was “use” what he had learned against the prior party in some way, such as a tough cross-examination question during a deposition, a subtle “threat” through a settlement offer or any number of devices which would have communicated to the adverse party that he would be held liable “when the real facts came out.” There is no need for disclosure to a third party here. Thus, the court, in a sense, imposed a requirement of integrity for the “long-term” trust of the mediation process by suggesting that the mediator was no freer to use information than a prior representative who owes a “continuing loyalty” to the previous client.²²

VI. HYPOTHETICAL #6

During mediation, the mediator may request private caucuses with the lawyer, in order to bypass the attorney-client dynamic and communicate

²¹ *Editor's note: 880 F. Supp. 1487 (D. Utah. 1995).*

²² The excerpt above is reprinted from Menkel-Meadow, Carrie, “Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities,” 38 *S. Tex. L. Rev.* 407 (May 1997) [internal citations omitted].

more efficiently. Similarly, if the lawyer believes that the client's emotion is a potential barrier to settlement, he or she might also request private caucuses with the mediator. After sharing and receiving information from the mediator, can the lawyer edit the information he or she relays to the client, or is he or she obligated to report everything back to the client?²³

Explanation:

This question illustrates the tension between the ability of the lawyer to conduct negotiations for the client,²⁴ and his or her obligation to consult with the client on the means in which the client's objectives are to be pursued.²⁵ [Model Rule 1.2](#) permits a lawyer to act on behalf of the client "as impliedly authorized to carry out the representation."²⁶ This provision was added in 2002 specifically to avoid any implication that a lawyer must always consult to obtain authority to act.²⁷ Therefore, the Model Rules support the lawyer having discretion to decide how to present information to the client to help move it toward settlement.²⁸

VII. HYPOTHETICAL #7

If the lawyer is insulted by an offer, can he or she reject it without discussing it with the client?

The Model Rules permit this, as long as the lawyer and client made the decision in advance,²⁹ although it is never advised in mediation. Since mediation is a process that requires full participation throughout the entire process and often transforms the parties' perceptions, it is impossible for a party to decide its firm bottom line before the conclusion of the mediation.

²³ Roth, *supra* note 5, at p. 9.

²⁴ See *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990) (stating that [Rule 4.2](#) of MRPC prevents lawyers from eliciting "unwise statements" from opponents, protects privileged information, and facilitates settlements by allowing lawyers to conduct negotiations).

²⁵ See Section 3.1.3, Ethical Guidelines for Settlement Negotiations (ABA 2002): "With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by [Rule 1.4\(a\)\(2\)](#) and may take such action as is impliedly authorized to carry out the representation."

²⁶ See [Model Rule 1.2](#) (MRPC, ABA 2002).

²⁷ ABA Report to the House of Delegates, No. 401 (Aug. 2001), [Model Rule 1.2](#), Reporter's Explanation of Changes.

²⁸ Roth, *supra* note 5, at p. 9.

²⁹ See Comment 2, [Model Rule 1.4](#) (MRPC, ABA 2003): "Lawyer who receives from opposing counsel an offer of settlement... must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer." The lawyer may not make a settlement decision without the client's authorization. See *In re Friesen*, 991 P.2d 400 (Kan. 1999).

If the client is unable to participate in the mediation process in person, the lawyer should communicate each offer along with the information conveyed by the mediator in presenting it. Similarly, if the mediation fails, the lawyer should inform the client and consult with the client on how to proceed.^{30,31}

VIII. HYPOTHETICAL # 8

The night after a successful mediation resulted in the settlement of a personal injury case, the plaintiff's lawyer listens to her friends discuss their jobs while they gather at a cocktail party. Wanting to get in on the conversation, the lawyer boasts about her recent settlement of a case that had dragged on for years. Is she subject to discipline for disclosing information from the mediation?

Explanation:

Like concerns about conflicts of interest, confidentiality in mediation has become increasingly complex and controversial over the years. In seeking to draft ethics rules or guidelines of appropriate protection in this area, one must be mindful once again, of where alternative dispute resolution (ADR) practice may diverge from representation practice. As the Model Rules ([Rule 1.6](#)) seek to protect both client and attorney interests, in ADR there are party interests, as well as third-party neutral and process interests. Thus, as with representational confidentiality, there are multiple sources of law in the confidentiality area, including party contracts and agreements, specific statutory codes and sections, court rules, case law and ethics rules. What is particularly tricky in the ADR area is ascertaining exactly what is protected. Under representational confidentiality rules, by definition, anything said in a mediation would not be confidential because (at least in joint sessions), adverse parties are revealing information to each other and in the presence of a third party (the neutral) and are thus, outside the protected zone of lawyer-client confidentiality. Thus, ADR has had to forge its own confidentiality protections so that parties may share "settlement" and other potentially compromising facts with each other without fear that such information will be used outside of the mediation. Interestingly, issues have already developed about the subsequent use of information disclosed in an unsuccessful mediation, where at least one party seeks admission of such information in formal court proceedings. Though some have argued that all information disclosed in ADR proceedings should be covered by evidentiary rules that protect against admission of disclosures in furtherance of settlement, this is considered by others a risky business as many other disclosure statutes "trump" confidentiality provisions and

³⁰ The "lawyer must notify a client of a decision to be made by the client ... and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." [MRPC 1.4\(a\)\(1\), \(3\)](#) (ABA 2003). *Editor's note: The revised language of Model Rule 1.4 is available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/.*

³¹ Roth, *supra* note 5, at p. 9.

require disclosure of facts of child or domestic abuse or other intentions to commit crimes.

Ethics rules and guidelines, as well as private contracts and agreements for confidentiality, are still subject to “other law,” raising significant issues about what *Miranda* warnings parties may need in a mediation in determining whether to be totally candid, as requested by the “norms” of good mediation practice.

Third-party neutrals have their own (and sometimes different from the parties') concerns about confidentiality, once again appealing to the integrity of the process and their own role-based ethics. Mediators and arbitrators promise confidentiality (in their contracts, retainer agreements and through private ethics codes) and may go so far as to risk contempt proceedings in refusing to disclose information revealed in a mediation or arbitration, even when under subpoena. This is because, whatever the conflicting interests in particular cases (including allegations of fraud of either the parties or the third party neutral), third-party neutrals have their personal integrity and reputation for confidentiality at stake. Thus, while ethics standards attempt to deal broadly with confidentiality issues, the reality is that case law and common law development will be required to deal with the myriad of factually specific conflicts that exist between competing policies.

Confidentiality is one of several of such basic issues to the integrity of the ADR process that it is not easily assimilated to confidentiality in adversary practice. As confidentiality attaches to lawyer-client interactions which meet certain basic requirements, confidentiality, at least in the mediation context, is far more complex. With a wide range of practices concerning when to hold private caucuses and separate sessions with the parties, attempts to clarify party expectations of confidentiality will be difficult at best, especially with such variations in third-party neutral practice. Some mediators reserve the right to share information between caucuses where it is “their” judgment that such disclosure will serve the settlement well; others promise never to disclose unless authorized to do so by the parties. Most problematic in practice, is the unwitting revelation of some underlying factual detail or party preference that can be discerned by a wise party when a neutral “proposes” a possible settlement option that implicitly contains messages about the preferences or facts of the other party. (Is this a violation of confidentiality? How should it be enforced or policed?) Such issues cannot be resolved easily either by broad protections of confidentiality or by reference to the lawyers’ (and even other professionals’ duties of confidentiality.³²

³² The excerpt above is reprinted from Menkel-Meadow, *supra* note 21, at p. 441-443.

FOR YOUR INFORMATION ...

The Kentucky Law Update: Continuing Legal Education for All Kentucky Lawyers

The Supreme Court of Kentucky established the Kentucky Law Update Program as an element of the minimum continuing legal education system adopted by Kentucky attorneys in 1984. The KLU program is now offered in a hybrid format. The 2024 Kentucky Law Update is offered as a one-day, in-person program at nine different locations across the state. The 2024 On-Demand Kentucky Law Update is offered virtually on the Kentucky Bar Association website from September 1st until December 31st. These two programs offer every Kentucky attorney the opportunity to meet the 12 credit CLE requirement, including the 2 ethics credit requirement, **close to home and at no cost!** Judges can also earn continuing judicial education credits at the Kentucky Law Update.

This program was designed as a service to all Kentucky attorneys regardless of level of experience. This service is supported by membership dues and is, therefore, each member's program. The program is a survey of current issues, court decisions, ethical opinions, legislative and rule changes, and other legal topics of general interest that are faced by the Kentucky practitioner on a daily basis. As such, the program serves both the general practitioner and the practitioner who limits his or her practice to a particular field of the law. The Kentucky Law Update program is not intended, nor designed, to be an in-depth analysis of a particular topic. It is designed to alert the lawyers of Kentucky to changes in the law and rules of practice that impact the daily practice of law.

About the Handbooks and Presentations

Handbook materials are the result of the combined efforts of numerous dedicated professionals from around Kentucky and elsewhere. The KBA gratefully acknowledges the following individuals who graciously contributed to this publication:

Nicole S. Bearse	Stephen Embry	Bruce Simpson
Robbie O. Clements	Yvette Hourigan	Rebecca Adams Simpson
Don H. Combs, III	James K. Murphy	Jordyn Smith
Larry C. Deener	Mary Ellis Patton	Henry L. Stephens, Jr.
Laura Day DelCotto	Damon Preston	Robert P. Stith
Haley Dennis	Shari Polur	Eleanore Stoess
Sean Dennis	Lou Anna Red Corn	Judge Thomas Lee Travis
Laurel S. Doheny	Lori J. Reed	B. Scott West
Angela Logan Edwards	Jeffery L. Sallee	

Special Acknowledgments

Special thanks to the following KBA Sections, Committees, and other organizations whose participation and assistance with the 2024 Kentucky Law Update programs have been invaluable:

KBA AI Task Force	KBA Office of Bar Counsel
KBA Alternative Dispute Resolution Section	KBA Well Being Committee
KBA Criminal Law Section	Kentucky Court of Appeals
KBA Elder Law Section	Kentucky Lawyer Assistance Program
KBA Ethics Committee	Lawyers Mutual of Kentucky
KBA Family Law Section	Legislative Research Commission
KBA Law Practice Committee	NAELA – Kentucky Chapter
KBA Military Law Committee	Supreme Court of Kentucky

Presentations are also made on a voluntary basis. To the individuals who volunteer in this capacity, special gratitude is owed. Individuals contributing to this program are contributing to the professional development of all members of the Kentucky Bar Association. We wish to express our gratitude in advance to these individuals.

A special thank you to all of the organizations, authors, presenters, moderators, and other 2024 Kentucky Law Update program volunteers will appear in the January 2025 issue of the *Bench & Bar*.

CLE and Ethics Credit

The one-day, in-person 2024 Kentucky Law Update Program is accredited for 7 CLE credits, including 2 ethics credits. The 2024 On-Demand Kentucky Law Update is accredited for 7.75 CLE credits, including 3 ethics credits. One credit is awarded for each 60 minutes of actual instruction as noted on the agendas provided on the KBA website.

The Kentucky Bar Association 2024 Kentucky Law Update programs are accredited CLE activities in numerous other jurisdictions. Credit categories and credit calculations vary from state-to-state. CLE reporting information for other states will be provided at the registration desk at the in-person programs. The out of state information for the on-demand sessions will be available on the program website.

Kentucky Judges, don't forget you can claim CJE credit for attending this program.

REMEMBER! Reporting attendance credits is now online. Reporting information and activity numbers will be available at each respective in-person event. The on-demand reporting information and activity number will be located on the program website.

Evaluations

The 2024 Kentucky Law Update is *your* program and your input *is* valued and needed. Links to the program evaluations for the live, in-person programs and the on-demand program will be provided to all registrants via email. PLEASE take a few minutes to complete the evaluation questionnaire upon receipt. We appreciate your assistance in improving this service.

Kentucky Bar Association 2024-2025 Board of Governors

Rhonda Jennings Blackburn President Pikeville	Todd V. McMurtry President-Elect Ft. Mitchell	Matthew P. Cook Vice President Bowling Green
W. Fletcher McMurtry Schrock Immediate Past President Paducah		Don H. Combs III Chair, Young Lawyers Division Pikeville
Amelia M. Adams Lexington	Douglas G. Bengé London	Miranda D. Click Pikeville
LaToi D. Mayo Lexington	Ryan C. Reed Bowling Green	Jennifer M. Gatherwright Crescent Springs
William M. "Mitch" Hall, Jr. Ashland	Stephanie McGehee-Shacklette Bowling Green	Susan Montalvo-Gesser Owensboro
Susan D. Phillips Louisville	James M. Ridings London	James A. Sigler Paducah
Catherine D. Stavros Ft. Mitchell		J. Tanner Watkins Louisville

2024-2025 Continuing Legal Education Commission

Jennifer S. Nelson First Supreme Court District	Colton W. Givens Second Supreme Court District	Kelly K. Ridings Third Supreme Court District
Eric M. Weihe, Chair Fourth Supreme Court District	Nealy R. Williams Fifth Supreme Court District	Frank K. Tremper Sixth Supreme Court District
Robert Stephen McGinnis Seventh Supreme Court District	Justice Robert B. Conley Supreme Court Liaison	Cassie H. Cooper Director for CLE

Kentucky Bar Association CLE Staff

John D. Meyers Executive Director	Cassie H. Cooper Director for CLE	Lori J. Reed CLE Attorney Editor & Section/Division Program Coordinator
Caroline J. Carter CLE Lead Program Coordinator – Annual Convention & Virtual Education	Laura Cole CLE Program Coordinator – Kentucky Law Update & New Lawyer Program	Coleen Kilgore CLE Compliance Coordinator
Terri Marksbury CLE Regulatory Coordinator		Clifford D. Timberlake CLE Accreditation Coordinator