

CHAPTER 12
WASHINGTON MEDIATION ETHICS

Kathleen Wareham

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Kathleen Wareham, J.D., is a professional mediator. She mediates disputes utilizing her extensive legal background in negligence, personal injury, civil rights, wrongful death, and complex probate, guardianship, and trust matters. Before becoming a full-time neutral, Ms. Wareham was a shareholder and director in a Seattle law firm, MacDonald Hoague & Bayless. Since 2003 she has been a panel member of Washington Arbitration and Mediation Service (WAMS) and she is a Rule 39.1 mediator in federal cases. Ms. Wareham's law degree is from Columbia University (1986) and her B.A. is in philosophy, with honors, with a minor in economics, with honors, from the University of Washington (1983). She is a frequent speaker at continuing legal education seminars on dispute resolution methods and ethics and has served as a guest lecturer for the WSBA ethics school.

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§12.1 INTRODUCTION

Mediation, in the past referred to as a form of “alternative” dispute resolution, has become a common method for helping clients resolve their legal disputes. The Rules of Professional Conduct provide guidance and insight into the ethical duties of lawyers as they consider using mediation and as they then prepare for and participate in mediation. The rules provide a clear direction, guiding lawyers to consider moral, social, political, and economic consequences of litigation, and to consider alternatives to litigation, including mediation. In fact, the rules specifically direct lawyers that when the client’s legal matter “is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.” RPC 2.1 cmt. 5.

This chapter addresses how the Rules of Professional Conduct (RPCs) affect lawyers’ roles in mediation, including how the RPCs interface with the Uniform Mediation Act, Chapter 7.07 RCW. The perspective of this chapter is that of a lawyer representing a client in mediation, not a lawyer serving as a third-party neutral mediator.

Mediation is essentially a facilitated negotiation — a process in which a neutral third-party mediator facilitates communication and negotiation between parties to assist them in identifying issues, generating and evaluating options, and reaching a voluntary, mutually acceptable agreement. The rules most applicable to mediation and addressed in this chapter are RPC 1.1 — Competence; RPC 1.2 — Scope of Representation and Allocation of Authority; RPC 1.4 — Communication; RPC 1.6 — Confidentiality of Information; RPCs 1.7 and 1.8 — Conflicts of Interest; RPC 2.1 — Advisor; RPC 4.1 — Truthfulness in Statements to Others; and RPC 5.5(c)(3) — Multijurisdictional Practice of Law.

Note:	Ethical guidance for lawyers negotiating settlements, both in mediation and in direct negotiation, is also provided by the A.B.A. Section of Litigation, <i>Ethical Guidelines for Settlement Negotiations</i> (2002), available at http://www.abanet.org/litigation/ethics/settlement.html . Although these guidelines have not been approved by the House of Delegates of the Board of Governors of the ABA, the ABA recommends them as a resource designed to facilitate and promote ethical conduct in settlement negotiations.
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§12.2 ROLE OF LAWYERS IN MEDIATION

This section discusses the lawyer's multiple roles in mediation and the lawyer's specific duties in each of those roles.

(1) Multiple roles

The Preamble to the Rules of Professional Conduct describes multiple roles for a lawyer representing a client: advisor, advocate, negotiator, and evaluator. As an "advisor," the lawyer "provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." RPC Preamble [2]. As an "advocate," the lawyer "conscientiously and ardently asserts the client's position under the rules of the adversary system." *Id.* As a "negotiator," the lawyer "seeks a result advantageous to the client but consistent with the requirements of honest dealings with others." *Id.*

Lawyers need to understand these different roles when preparing for mediation and representing clients in mediation. In mediation as well as in litigation, the lawyer is helping the client by advocating and asserting the client's position. In mediation and in unassisted settlement negotiations, the lawyer takes on the role, as negotiator, to seek a result advantageous to the client, and as an advisor, to explain practical implications of a client's legal rights and obligations. The lawyer should explain to the client the lawyer's ethical obligations to fulfill these various roles in representing the client.

(2) Role of lawyers regarding advice to client

The Rules of Professional Conduct specify the duties expected of lawyers in their role as advisors. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." RPC 2.1. These nonlegal factors are part of the lawyer's assessment and advice because pure legal advice, in a vacuum, fails to fully meet the client's needs. As described in one of the comments to RPC 2.1:

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge

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upon most legal questions and may decisively influence how the law will be applied.

RPC 2.1 cmt. 2. The rules encourage client-need-centered guidance and “candid” advice. RPC 2.1. Comment 1 to RPC 2.1 reminds lawyers of the standards they are expected to meet and of the importance of honest, straightforward advice, even when it is difficult to give:

A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

The lawyer’s advice must be candid and based on an honest assessment. The comments acknowledge that this is not always easy. The duty to advocate and assert the client’s interests complicates the advisory role even more. By providing broad advice, including moral, economic, social, and political factors, lawyers can strike the appropriate balance and fulfill the duties to clients expected under the rules: both to assert the client’s interests through advocacy and also to give honest and candid advice.

(3) Duty to abide by clients’ decisions

While endeavoring to both advocate and advise the client toward a resolution of a legal dispute, the lawyer must be mindful of the fact that decisions concerning the objectives of the representation, and the ultimate decision regarding settlement of a legal dispute, are client decisions. The lawyer must also consult with the client about how to pursue the legal objectives. RPC 1.2(a) provides:

[A] lawyer shall abide by a client’s decisions [A] concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter.

The lawyer’s role is to advise the client regarding the possible objectives of representation, the potential means to pursue the objectives, and the pros and cons of particular settlement options. Fulfilling these duties to the client is a complex task. The lawyer must remember that the client is the decision maker under RPC 1.2(a), but also remember

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to give the client complete, broad advice pursuant to RPC 2.1, as discussed in §12.2(2).

Mediation is an ideal forum for the lawyer to both advise and advocate. Advising the client about mediation as a means of pursuing the client's legal objectives not only is encouraged by the rules, it is an example of how a lawyer can strike the balance between giving advice and advocating for the client, and between giving advice and listening to the client. Mediation supports these complex communication tasks for the lawyer.

Abiding by RPC 1.2(a) in a mediation context requires, as a baseline determination: Who is the client? And, who speaks for the client? When representing a competent individual as a client, these questions are easily answered. But if the client does not have capacity to participate in litigation, or when the client is an entity, questions arise: Who will speak for the client? Who will attend the mediation? Will a client representative's participation by phone or availability by phone be sufficient? For the lawyer to follow the requirements of RPC 1.2, these questions need to be addressed when setting up the mediation.

Courts have found the failure to bring clients with decision-making authority to mediation raises questions of good faith. In *Nick v. Morgan's Food's Inc.*, 99 F. Supp. 2d 1056 (E.D. Mo. 2000), *aff'd.*, 270 F.3d 590 (2001), the court ordered mediation. The defendant's failure to bring to the mediation a claims representative with settlement authority and failure to give the mediator a written submission resulted in sanctions. *See also Francis v. Women's Obstetrics & Gynecology Group, P.C.*, 144 F.R.D. 646 (W.D.N.Y. 1992); *In Re Stone*, 986 F.2d 898 (5th Cir. 1993).

The lawyer who is mindful of the requirements of RPC 1.2 will identify the client or client representative with settlement authority and will ensure adequate ongoing communication with the client so that the lawyer can give the client appropriate advice and abide by the client's decisions regarding the objectives and means of the representation, and the client's ultimate decision regarding settlement.

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***Practice
Tip:***

Case intake procedures used by mediators and mediation companies can help assure participation of a client with settlement authority. Case administrators and mediators often ask: “Who is the person with authority to settle? Will she or he participate in person, and if this person is not planning to participate in person, will she or he be available by phone?” Policies and procedures for failure to bring a client or client representative with authority to settle vary with mediators and mediation companies and should be determined in advance.

***Practice
Tip:***

If you are concerned the opposing party or parties may not bring a client representative with settlement authority, work out a specific plan regarding the mediation participants, or obtain a court order authorizing and directing particular participants to attend.

§12.3 COMMUNICATION BETWEEN LAWYER AND CLIENT

Miscommunication is at the heart of many conflicts between lawyers and their clients. The Rules of Professional Conduct set standards for minimum expectations in lawyer-client communications. Understanding and remembering these expectations helps avoid many of the ethical challenges imbedded in the lawyer-client relationship and guides communication between lawyer and client and with the mediator during mediation.

RPC 1.4(a)(1)-(4) provides:

A lawyer shall[:]

- (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information[.]

“Informed consent” is specifically defined in RPC 1.0 (e) as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the

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material risks of and reasonably available alternatives to the proposed course of conduct.”

RPC 1.4(b) further provides: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

The parameters set by these rules should guide lawyers in discussing with clients the material risks of litigation and other options. These communication rules, combined with the RPC 2.1 requirements regarding advice to clients, require full consultation with clients about the means to accomplish the client’s objectives, including mediation. In fact, in the comments to the Rules of Professional Conduct, lawyers are specifically directed that when the client’s legal matter “is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.” RPC 2.1 cmt. 5. The RPC 1.4(b) requirements of consultation with the client about means to reach an objective and of reasonable explanations by the lawyer to allow the client’s “informed decisions regarding the representation” means the lawyer needs to communicate with the client regarding the lawyer’s analysis of litigation strategy decisions, including whether to mediate, when to mediate, who to select as a mediator, and who will participate in the mediation. The level of detail required concerning means of reaching an objective is a question of perception: What is a reasonable amount of information given the circumstances of the case? The frequency and level of communication that is necessary will vary with the circumstances.

Any client decision requires informed consent. RPC 1.4 cmt. 2. A settlement decision is a client decision pursuant to RPC 1.2, and must therefore meet the informed consent communication requirements of RPC 1.4; and, in addition, the lawyer must follow the advice requirements of RPC 2.1 while representing a client in a mediation or settlement discussion.

Because the lawyer must promptly consult with and secure the client’s informed consent regarding settlement, the lawyer who receives a settlement offer from an opposing party or its counsel must promptly inform the client of the substance of the offer, 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.” RPC 1.4 cmt. 2.

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**Practice
Tip:**

Always consult with the client regarding a settlement offer or demand, whether in mediation or in direct negotiations. Do not rely on a client's prior representations regarding settlement authority, as settlement negotiations are dynamic. A client's decision regarding settlement, as well as the lawyer's advice regarding settlement, must take into consideration many factors: legal, moral, social, economic, and political, as discussed in §12.2(2) above. Even in the best lawyer-client relationships, miscommunications happen, and clients sometimes, intentionally or unintentionally, negotiate both with their own lawyers and with the mediator. It is always better to discuss a settlement position thoroughly each time it changes. If the client's previous position has not changed, the only harm done is risking the client's impatience at what may seem to be a repeat conversation. If the client's previous position has changed, failing to discuss the offer or demand again imposes a far greater risk of harm by not meeting the client's ultimate objective of resolution or giving up on a chance to move the negotiations closer to resolution.

Inadequacy of communication, whether real or perceived, can lead to conflict between lawyers and clients. Numerous bar complaints are rooted in client perceptions of inadequate communication. In *In Re Disciplinary Proceeding Against Heard*, 136 Wn.2d 405, 963 P.2d 818 (1998), the Washington Supreme Court found a lawyer had violated the RPCs by negotiating a settlement agreement with worthless interests included for the client, but with cash benefits to the lawyer, without a final accounting to the client and without explaining the implications to the client. This violated both RPC 1.4 requiring adequate communication and RPC 1.1 requiring competence. (See further discussion of the *Heard* court's reasoning on competence in Chapter 8).

The amount and frequency of adequate communications about settlement and the risks of litigation will vary with the circumstances. "Reasonable client expectations" is the guiding principle, described in RPC 1.4 cmt. 5:

[W]hen there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client

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expectations for information, consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation.

***Practice
Tip:***

The amount and type of communication will vary from case to case and client to client. The best practice is to form an intentional plan with the client about communication extent and frequency, and if ever in doubt, to risk erring on the side of more, not less, communication.

Adequate communication with the client leading up to the mediation will minimize the risks of difficult or inadequate communications during the mediation and the risk of client dissatisfaction. As described in the comments to RPC 1.4, “[a] lawyer’s regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation.” RPC 1.4 cmt. 4. Communications about both the strengths and weaknesses of the legal case, and about factual developments during discovery that affect the strength or weakness of a case, will help the client come to mediation with realistic expectations and able to participate in mediation in good faith, increasing the likelihood of reaching settlement.

§12.4 COMPETENT REPRESENTATION IN MEDIATION IS AN ETHICAL DUTY

The Rules of Professional Conduct require a lawyer to be competent in representing a client. RPC 1.1 defines this basic ethical duty. It provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

The ethical duty of competence in general is discussed in Chapter 8 of this deskbook. As applied to mediation, the legal knowledge needed for the mediation of a particular case is the same as that needed for the other aspects of representation in discovery, hearings, and trial. The skills, thoroughness, and preparation needed for mediation are, however, quite different from the skills, thoroughness, and preparation needed for the other litigation aspects of legal representation.

Competent legal representation in mediation requires an understanding of the mediation process; selecting an effective mediator; preparing a succinct yet thorough submission for the mediator; preparing the client for a participatory role; preparing the lawyer and support

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staff for a participatory, problem-solving role; analyzing the legal and underlying issues, including emotional, social, psychological, moral, political, and economic issues; and evaluating the best and worst alternatives to a negotiated agreement. A competent mediation lawyer understands and uses negotiation theory and technique. A competent mediation lawyer considers and evaluates potential mediators for the particular case. The mediator's experience, skills, training, and reputation are some indicators of effectiveness. Subject matter expertise may be helpful in a complex case. Experience with multiparty cases may be helpful when there are multiple stakeholders. Attentive listening skills, patience, and an ability to keep parties on track and moving forward may be particularly important in a case with complex emotional dynamics. Tenacity, persistence, and high energy may be especially important when barriers to settlement seem insurmountable.

A lawyer's training and education in mediation theory and practical skills and experience in representing clients in mediation are factors indicative of the lawyer's skills.

A lawyer's thoroughness in preparing for mediation will vary with the particular case. Timely providing a thorough mediation submission, and conferring with the client and if possible with the mediator in advance of the mediation are good indicators of thorough preparation.

Practice Tip:

Providing the mediator copies of pleadings and briefs is not "thoroughness and preparation reasonably necessary for the representation." A submission should be tailored for the mediator and should summarize the facts and law, identify underlying issues and concerns, describe the procedural posture of the case, discuss the history of any prior settlement negotiations, and identify perceived barriers to settlement. Take advantage of the opportunity to educate the other side about your case by sharing your submission with them. Any confidential information can be included in an addendum for the mediator.

**Practice
Tip:**

Consider having separate litigation counsel and settlement counsel representing the client's interests. If this is not practical, consciously shift perspective from litigation to mediation preparation. Preparing yourself to mediate includes identifying underlying issues, avoiding being positional, remembering the different lawyer roles from the Rules of Professional Conduct (advisor, negotiator, advocate), and remembering negotiation is a dynamic and creative process in which new, different solutions acceptable to your client may emerge.

**Practice
Tip:**

When considering selecting a mediator, talk with potential mediators or their staff about the mediator's experience, approach, and skills. Not all mediators are well suited for all cases.

§12.5 CONFIDENTIALITY AND PRIVILEGE

A cornerstone of the lawyer-client relationship is the lawyer's duty to preserve client confidentiality. This duty continues during mediation.

(1) RPC 1.6 — Confidentiality of Information

RPC 1.6 provides: "(a) A lawyer shall not reveal *information* relating to representation of a client unless the client *gives informed consent, the disclosure is impliedly authorized* in order to carry out representation or the disclosure is permitted by paragraph (b)" (emphasis added).

Without the client's informed consent, the lawyer must not reveal information related to the representation.

RPC 1.6 cmt. 2 explains the underlying purpose of the duty to preserve client confidentiality:

This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.

In a mediation and settlement context, the lawyer needs the client's full and frank communication so that the lawyer can give the full,

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candid advice required by RPC 2.1 and can competently represent the client's interests as required by RPC 1.1.

The Washington State Bar Association Disciplinary Board has had occasion to consider a client's complaint in which the client's lawyer revealed to the mediator, a federal judge in a settlement conference, the client's position on settlement, without the client's permission. The board concluded this was a violation of RPC 1.6. *See In re Disciplinary Matter of Utevsky*, WASH. STATE BAR NEWS, May 1999, at 53.

In the course of settlement negotiations during mediation, the lawyer can easily find the dynamic process of negotiation and the efforts by the mediator to understand barriers to settlement compel frank communications with the mediator. The honest assessment of a client's case with the client and with the mediator is one of the keys to settlement. The lawyer must be mindful nonetheless of the overriding duty to the client to keep the client engaged in the process and to acknowledge that the client is the decision maker regarding settlement pursuant to RPC 1.2. The lawyer must not disclose the client's position to the mediator unless the disclosure requirements of RPC 1.6 have been met.

The disclosure requirements of RPC 1.6 are satisfied by either explicit client permission to disclose or by implied authorization. RPC 1.6 allows disclosure if "disclosure is impliedly authorized in order to carry out the representation." RPC 1.6(a). Whether the information disclosed without explicit client permission is "impliedly authorized in order to carry out the representation" is determined case by case after the fact, because the question of implied authorization arises only if the lawyer has disclosed information without explicit client permission or without proof of such permission, and therefore arises only after the client has complained that there has been an unauthorized disclosure. As aptly described by Barry Althoff, former WSBA disciplinary counsel, "A lawyer's misplaced reliance on implied authorization in effect guarantees satisfaction to the client." Barrie Althoff, *Ethics and the Law: Confidentiality in the ADR Process*, WASH. STATE BAR NEWS, Aug. 2001 at 41.

**Practice
Tip:**

Do not rely on "implied authorization" to disclose something to a mediator. Always consult with the client privately and engage with the client in a full discussion of the risks and benefits of disclosure and then document your consultation.

(2) Additional privilege and confidentiality requirements

A mediation agreement and the Uniform Mediation Act, Chapter 7.07 RCW, may impose additional disclosure restrictions beyond RPC 1.6. Confidentiality provisions in an agreement to mediate do not obviate the requirements of RPC 1.6 as to the lawyer's own client and may in fact add to the lawyer's responsibilities regarding disclosure of information learned in mediation. A mediation agreement may bind a lawyer not to disclose information from another party disclosed to the mediation participants during mediation. A confidentiality agreement, as part of an agreement to mediate or as a settlement term, may have broad applicability, prohibiting disclosure of settlement terms to the press, government agencies, family members, or others.

The Uniform Mediation Act (UMA), codified at Chapter 7.07 RCW, protects against the use of mediation communications in judicial proceedings, arbitrations, or legislative hearings. This privilege is triggered if a court or an arbitrator orders mediation, if the mediator and parties agree in a writing "demonstrating an expectation" that they intend mediation communications to be privileged, or if the mediation is conducted by someone who holds him- or herself out as a mediator or who mediates through an organization that provides mediation services. RCW 7.07.020.

The privilege under the UMA begins with the first contact with a mediator or mediation organization. It applies to any communication made for the purpose of "considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." RCW 7.07.010(2). The communications covered are any oral or written statements made or nonverbal conduct, such as a head nod, that takes place at any point in the mediation process. RCW 7.07.010(2).

The UMA privilege allows parties to the mediation, nonparty mediation participants, and mediators to refuse to disclose or to prevent others from disclosing mediation communications. The strength, extent, and limits of the disclosure barrier depend upon who is claiming the privilege. A mediation party, defined as a "person that participates in a mediation and whose agreement is necessary to resolve the dispute," RCW 7.07.010(5), may refuse disclosure of any mediation communication and prevent anyone else from disclosing. A nonparty participant, defined as a "person, other than a party or mediator, that participates in a mediation" (such as an accountant, neighbor, caregiver, relative or support person), RCW 7.07.010(4), may only refuse or prevent disclosure of his or her own mediation communications. A mediator may refuse

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disclosure of any mediation communication and may prevent disclosure of only the mediator's communications. RCW 7.07.030.

Note: There are multiple exceptions to these disclosure restrictions.
See RCW 7.07.050.

§12.6 TRUTHFULNESS DURING MEDIATION

Honesty is a basic ethical expectation in our society. The Rules of Professional Conduct specify and codify a lawyer's duty to be honest and truthful. RPC 4.1 provides:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person, or
- (b) 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, unless disclosure is prohibited by Rule 1.6.

Mediation provides a confidential opportunity for communications with a neutral and an opportunity to benefit from the mediator's facilitative and evaluative skills. Confidentiality, neutrality, and the facilitation process encourage and support honesty in the process of assessing the strengths and weaknesses of a client's legal position. The potentially evaluative aspects of mediation and the dynamic nature of settlement negotiation may, on the other hand, discourage transparency and honesty. Because a mediator is not a "tribunal," the candor toward the tribunal requirements of RPC 3.3 do not apply. RPC 1.0(m). But does the RPC 4.1 requirement of honesty apply to statements made to a mediator?

RPC 4.1 requires lawyers, in all contexts, including mediation, not to make false statements of material fact or law. The purpose and nature of a statement to the mediator, or to another party in the mediation, determines whether it must be truthful. While any statement of material fact or law must be truthful, representations of settlement position or value are generally considered opinion, not statements of material fact or law. As described in the comments to RPC 4.1: "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." RPC 4.1 cmt 2.

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The Washington State Supreme Court held in *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 599, 48 P. 3d 311 (2002), that under “generally accepted conventions in negotiations” statements regarding settlement amounts and valuation of a claim are not taken as “statements of material fact.” The court described material facts as “generally those facts upon which the outcome of the litigation depends in whole or in part.” *Id.* at 600.

The ethical requirement of honesty in a mediation context was thoroughly discussed in ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 439 (2006). In the opinion, the Committee states:

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client 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, as well as statements that can fairly be characterized as negotiation “puffing,” are ordinarily not considered “false statements of material fact” within the meaning of the Model Rules.

In contrast, if the purpose of a statement in mediation is to provide material facts, such as the applicable limits of an insurance policy, or to reference what the lawyer believes is applicable legal precedent, the statement must be truthful.

§12.7 CONFLICTS BETWEEN CLIENTS

The conflict rules apply with equal measure to mediation and other settlement negotiations. The conflict rules include general provisions governing current and former client conflicts under RPCs 1.7 and 1.9, and a settlement-specific conflict rule, the treatment of aggregate settlements under RPC 1.8(g). Chapter 11 of this deskbook provides a comprehensive discussion of these conflict rules, including a description of joint representation and specifically what is required for permissible concurrent representation under RPC 1.7. When preparing for mediation, a lawyer who has previously satisfied these RPC 1.7 requirements for joint representation may need to review the conclusion that the multiple clients’ interests can be ethically represented in mediation. The clients’ common interests in litigation may be outweighed by antagonistic interests in settlement negotiation, or their potentially adverse interests in settlement may be outweighed by the benefit of negotiating settlement jointly. Comment 28 to RPC 1.7, concerning non-litigation conflicts, provides:

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“A lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them.”

Individual clients may find it beneficial to be part of a group when negotiating settlement. In spite of this benefit, there may be a potential for conflict among the clients in perceptions of value or settlement positions, raising RPC 1.7 issues.

As part of the process of satisfying RPC 1.7 requirements during the mediation or settlement process, lawyers should consider the advice described in detail in Chapter 11 of this deskbook, including having a joint representation agreement, and should discuss with the joint clients the potential differences in settlement valuation or settlement position. Comment 13 to RPC 1.8(g) provides: “Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of obtaining the clients’ informed consent.” And, if negotiation between joint clients is contemplated, Comment 29 to RPC 1.7 provides:

“A lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated.”

***Practice
Tip:***

In preparation for mediation and during mediation, a lawyer representing multiple clients should evaluate and discuss with the clients the implications for a group settlement and the potential advantages and disadvantages of negotiating the individual claims together. The opportunity to seek separate counsel before concluding a settlement on behalf of multiple clients is advised by the ABA Litigation Section Ethical Guidelines for Settlement Negotiations, Section 3.5 “Multiple Clients Represented by the Same Counsel” <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf>

**Practice
Tip:**

A joint representation agreement can anticipate the potential differences between clients' settlement positions and the material information regarding settlement that must be exchanged among multiple clients. See Chapter 11 in this deskbook regarding joint representation agreements and consider including language recommended by the ABA Litigation Section Ethical Guidelines for Settlement Negotiations, Section 3.5 "Multiple Clients Represented by the Same Counsel," regarding what must be disclosed to obtain each client's informed consent during concurrent representation. <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf>. See also Comment 13 to RPC 1.8(g), the rule that limits the lawyer's role with aggregate settlements, which advises that "before any settlement offer... is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement ...offer is accepted."

**Practice
Tip:**

If a single lawyer or law firm is representing multiple plaintiffs and one or more of the plaintiffs is a minor or lacks capacity, have a settlement guardian ad litem appointed prior to settlement discussions and prior to mediation, and obtain court permission for the settlement guardian ad litem to participate in mediation.

§12.8 MULTIJURISDICTIONAL PRACTICE

The Rules of Professional Conduct permit a lawyer admitted in another jurisdiction to provide temporary legal services in a jurisdiction where the lawyer is not admitted if those services are "reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution" and if the services "arise out of or are reasonably related to the lawyer's practice" in the jurisdiction where the lawyer is admitted. RPC 5.5(c)(3). However, the lawyer must still determine if the forum requires pro hac vice admission for the services provided and must obtain admission pro hac vice for court-annexed arbitration or mediation. RPC 5.5(c) cmt. 12.

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§12.9 CONCLUSION

The Rules of Professional Conduct provide lawyers needed ethical guidance for fulfilling the complex roles of both advocating for a client and advising a client. More than just establishing ethical duties, the rules help promote resolution of clients' legal disputes, the ultimate purpose of litigation, by defining the lawyer's role as both advisor and advocate and by establishing communication, confidentiality, and competence requirements that must be followed during the complex process of litigation. Perhaps mediation has become the paramount method of dispute resolution not just due to economic pressures and crowded court dockets but in part because it best supports the tensions in the litigation process between lawyers' dual roles as advocates and as advisors. Following the ethical guidance of the RPCs when considering, preparing for, and participating in mediation helps lawyers fulfill their duties to their clients and resolve their clients' legal disputes effectively.

§12.10 ADDITIONAL SOURCES

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