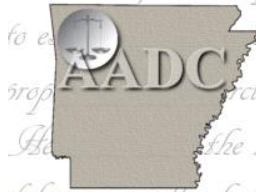

Arkansas Association of Defense Counsel

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Ethics in Mediation
By Baxter D. Drennon

The number of cases ending in trial is small and getting smaller.[1] Although there is criticism of claims that 95 percent of cases settle, practical experience teaches that the vast majority of cases defense lawyers handle will ultimately end in some fashion other than a jury verdict, with a substantial portion ending in mediation.[2] And many cases that do not ultimately settle will go through mediation as well. Conducting mediation is therefore an important part of defending cases. This article addresses some of the ethical considerations for an attorney when representing a client in mediation.

Agreement to Mediate

Before selecting a mediator, an attorney should request a copy of the mediator's standard agreement to mediate. The agreement to mediate is a document that is typically passed around at the beginning of the mediation and only perfunctorily reviewed. More attention is warranted. Many mediators now include a prospective liability waiver and indemnity language in their agreement to mediate. For example:

IV. Disqualification of Mediator and Exclusion of Liability.

Each party agrees to make no attempt to compel the mediator's or any JAMS employee's testimony, nor to compel the mediator or any JAMS employee to produce any document provided by the other party to the mediator or to JAMS. The parties agree to defend the mediator and JAMS from any subpoenas from outside parties arising out of this Agreement or mediation. The parties agree that neither the mediator nor JAMS is a necessary party in any arbitral or judicial proceeding relating to the mediation or to the subject matter of the mediation. Neither JAMS nor its employees or agents, including the mediator, shall be liable to any party for any act or omission in connection with any mediation conducted under this Agreement.

Although this language comes from an agreement to mediate used by a group that does not regularly practice in Arkansas, at least one local mediator uses similar language in his standard agreement to mediate. Attorneys in Arkansas are not allowed to require a client to sign a prospective liability waiver unless the client has independent counsel.[3] If in signing an agreement to mediate, an attorney is prospectively waiving his or her client's right to bring an action against the mediator, the attorney should affirmatively obtain the consent of the client after properly advising him or her.

[1] *See* Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 112-13 (2009). Cornell Law Faculty Publications, Paper 203. http://scholarship.law.cornell.edu/facpub/203.

Of interest, the same article indicates that less than five percent of cases end in a jury verdict in favor of a plaintiff. "[I]f a plaintiff is to recover something in a case seeking monetary relief, and therefore to succeed at least in part by an objective measure, recovery is far more likely to be via settlement than via trial." *Id.* at 113. Perhaps defense lawyers should consider trying more cases.

[2] *Id.*

[3] *See* Ark. R. Prof. Cond. 1.8(h)(1).

Good Faith

A typical court order for mediation includes a requirement that the parties participate in the mediation in good faith. This language raises the question of what good-faith participation requires. One court has described good faith as follows:

> "Good faith" is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of a design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone.[4]

In 2004, because of the difficulty in defining good faith, the ABA Section of Dispute Resolution issued a resolution on good-faith requirements in mediation.[5] It provides guidance on many questions that arise from the amorphous standard of good-faith participation in mediation. Specifically, the resolution makes clear that sanctions for failing to participate in good-faith in a mediation should only be issued based upon violations of rules specifying objectively-determinable conduct. The objective, sanctionable conduct identified in the resolution includes "failure of a party, attorney, or insurance representative to attend a court-mandated mediation for a limited and specified period or to provide written memoranda prior to the mediation." On the other hand, the resolution discouraged sanctions for subjective behaviors, including "a failure to engage sufficiently in substantive bargaining; failure to have a representative present at the court-mandated mediation with sufficient settlement authority; or failure to make a reasonable offer."

At least one court has attempted to follow the ABA's guidance and provide objective expectations for good-faith participation. In *In re A.T. Reynolds & Sons, Inc.*, the Bankruptcy Court for the Southern District of New York, determined that good-faith participation mandates compliance with an order to attend mediation, to provide a mediation statement, and to appear with the authority to settle.[6]

To provide additional guidance on what constitutes good faith, Kimberlee Kovach, a renowned author and lecturer on the topic of mediation,[7] proposed legislation with an itemized list of behaviors of good-faith conduct in mediation. Under Kovach's proposed statute, good faith includes the following:

> a. Compliance with the terms and provisions of [the state statute or other rule governing mediation];

[4] *Doyle v. Gordon*, 158 N.Y.S.D. 248, 259-60 (Sup. Ct. 1954).

[5] ABA Section of Dispute Resolution, *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs* (Approved, August 7, 2004).

[6] 424 B.R. 76, 95 (Bankr. S.D.N.Y. 2010).

[7] http://www.kimkovach.com/

b. Compliance with any specific court order referring the matter to mediation;

c. Compliance with the terms and provisions of all standing orders of the court and any local rules of the court;

d. Personal attendance at the mediation by all parties who are fully authorized to settle the dispute, which shall not be construed to include anyone present by telephone;

e. Preparation for the mediation by the parties and their representatives, which includes the exchange of any documents requested or as set forth in a rule, order, or request of the mediator;

f. Participation in meaningful discussions with the mediator and all other participants during the mediation;

g. Compliance with all contractual terms regarding mediation which the parties may have previously agreed to;

h. Following the rules set out by the mediator during the introductory phase of the process;

i. Remaining at the mediation until the mediator determines that the process is at an end or excuses the parties;

j. Engaging in direct communication and discussion between the parties to the dispute, as facilitated by the mediator;

k. Making no affirmative misrepresentations or misleading statements to the other parties or the mediator during the mediation; and

l. In pending lawsuits, refraining from filing any new motions until the conclusion of the mediation.[8]

In considering these elements of good-faith participation in mediation, a few questions arise:

Does the good-faith participation requirement mean that a defendant must settle a case?

No. Good faith does not require the parties to settle. Parties to mediation are not required to make or accept any particular offer.[9]

Does the good-faith participation requirement mean that a defendant must make a settlement offer?

No. At least one court has determined that a defendant is free to adopt a "no pay" position.[10] However, the same court warns

[8] *See* Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 591–96 (1997).

[9] *See G. Heileman Brewing Co. v. Joseph Oat Corp.,* 871 F.2d 648, 653 (7th Cir. 1989); *Hess v. New Jersey Transit Operations, Inc.*, 846 F.2d 114, 116 (2d Cir. 1988); *Kothe v. Smith,* 771 F.2d 667, 669-70 (2d Cir. 1985).

that a failure to bring a principal party to mediation is a violation of the good-faith participation requirement.

Properly Advising Client of Process

An additional ethical consideration is an attorney's obligation to advise his or her client on the mediation process. One court has found that an attorney must properly advise his or her client on the process for mediation, and ignorance of the process is no excuse for failure to participate in good faith.[11] There, the Court stated:

> From the outset, [the plaintiff] refuse to have his attorney negotiate or speak on his behalf in terms of settlement. Consistently, he refused to negotiate or speak on his behalf, though requested repeatedly. He had hamstrung his lawyer from even providing him with a basic understanding of the purpose and benefit of negotiations and, moreover, effectively curtailing the ability to craft option legal strategy. In essence, [the plaintiff] failed to listen to the basic explanation being provided by his attorney and, thus, went to this mediation substantially unprepared. Even if he was ignorant of the process, if he went to the mediation prepared to act in good faith, he would have been more receptive to the importunes of all of the participants, including his attorney and the mediator, and would have fairly and reasonably participated in the process.[12]

Based upon this finding, the Court held that the plaintiff failed to participate in the mediation in good faith and sanctioned him.[13]

Negotiation Tactics

A final ethical consideration for an attorney when mediating is the negotiation tactics. Under Ark. R. Prof. Cond. 4.1, a lawyer has a duty not to knowingly make a false statement of material fact to a third party. The American Bar Association, interpreting the same model rule, has found that this rule prohibits a lawyer from misstating a party's actual bottom line or the limits of settlement authority.[14] On the other hand, statements about goals for negotiating or willingness to compromise are not considered material facts and therefore are not governed by Rule 4.1.[15] In the same fashion, overstatements or understatements of the strengths or weaknesses of party's position are not considered material facts, either.[16] Although there has been a call for more stringent standards in mediation, these same guidelines have been found applicable to the mediation process.[17]

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[10] *Negron v. Woodhull Hosp*., No. 05-4147-CV, 2006 WL 759806 (2nd Cir. 2006).

[11] *See Outar v. Greno Industries Inc.*, No. 03-CV-0916, 2005 WL 2387840 (N.D.N.Y. Sep. 27, 2005).

[12] *Id.*

[13] *Id.*

[14] *Formal Opinion 93-970.*

[15] *See Formal Opinion 06-439.*

[16] *Id.*

[17] *Id.*

Conclusion

The mediation process presents a unique set of ethical considerations. Before agreeing to mediate, an attorney should consider whether the mediator's agreement is consistent with the client's needs and whether both the attorney and the client are prepared to participate in good faith. Once the parties have agreed to mediate, remember that an attorney's ethical obligation to make truthful statements of material fact applies during mediation.

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