

Ethical Considerations for Advocates in Mediation*

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I. Introduction

As litigation counsel, have you at some point bluffed your opponent, protected sensitive information, overstated your case, or been less than candid? If so, would you have considered it part of the zealous representation you owe your clients in preparing for trial?

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 mediation¹, 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.²

This essay examines some of the common litigation tactics and client-management practices used in mediation and explores whether they are ethical and/or effective in that process.

II. "Bluffing or Puffing"

A. About the value of the case

¹ 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).

² See, Introduction, *Ethical Guidelines for Settlement Negotiations*" (ABA 2002).

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,³ 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. . .”⁴

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. . .”⁵

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.⁶

B. About settlement authority

Case example: 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?

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”,⁷ bluffing about settlement authority is a tactic

³ 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).

⁴ Model Rule Section 4.1, Comment 2 (MRPC, ABA 2003).

⁵ Section 4.1.1, Committee Notes, Ethical Guidelines for Settlement Negotiations (ABA 2002).

⁶ 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).

⁷ Section 2.3, Ethical Guidelines for Settlement Negotiations (ABA 2002).

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.⁸

C. About the applicable law

Bluffing about the applicable law is more risky. If counsel can make a good faith argument about the applicable law, it might be tolerated.⁹ If not, it could be viewed as a misrepresentation of the law, which is unethical conduct under both the Guidelines¹⁰ and the Model Rules.¹¹

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.¹²

D. About the state of the evidence

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.

Case example: the 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?

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

⁸ See, footnote 3 above.

⁹ See, United States v. Cavin, 39 F.3d 1299 (5th Cir. 1994) (duties of client loyalty and zealous representation include advocacy of positions that lawyer, in good faith, believes have arguable basis, despite contrary authority).

¹⁰ "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).

¹¹ "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) (lawyer's misplaced reliance upon U.S. Supreme court case would have become apparent had lawyer researched and read cases distinguishing it).

¹² See, footnote 6 above.

would not be ethical to proceed with the mediation process.¹³ 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 to share the email with the plaintiff, who, with her lawyer's input, reduced her demand from one year's salary to \$500.

III. Misrepresentations and Omissions

A. About material facts

Case example #1: In mediation, the lawyer for the plaintiff in a sexual harassment case demands out-of-pocket damages for the cost of the visits to her psychologist for emotional distress, even though the visits were paid for by her health insurance. Is this ethical?

As in judicial proceedings, misrepresentations of material fact are not acceptable in mediation: "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."¹⁴ A misrepresentation of damages would qualify as a false statement of material fact under Model Rule 4.1.¹⁵

Case example #2: In mediation, the lawyer representing a terminated employee alleges gender discrimination, but fails to mention that immediately before being terminated, his client punched her supervisor and was removed from the premises by police. Is this a misrepresentation of material fact?

Under Model Rule 4.1, counsel is not required to disclose this fact.¹⁶ Similarly, the Guidelines provide, "A lawyer generally has no ethical duty to make affirmative disclosures of fact when dealing with a non-client. . . ."¹⁷ Regardless of whether the lawyer for the

¹³ See, Section "V" below.

¹⁴ See, Section 4.1.1, Ethical Guidelines for Settlement Negotiations" (ABA 2002). This rule is based upon Model Rule, 4.1 which states, "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...(b) fail to disclose a material fact which disclosure is necessary to avoid assisting a... fraudulent act by a client... Comments: [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements..." (MRPC, ABA 2003).

¹⁵ See, Spaulding v. Zimmerman (116 N.W.2d 704 (Minn. 1962) (vacated settlement where defendant knew and failed to disclose true damages caused by accident); Ausherman v. Bank of Am. Corp., 212 F.Supp.2d 435 (D.Md.2002) (lawyer referred to disciplinary committee for untruths in letter to defendant's counsel proposing settlement terms); Watson v. White, 408 S.E.2d 66 (W.Va 1991) (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).

¹⁶ See, Footnote 14 above.

¹⁷ Section 4.1.2, Committee notes (citing MRPC 4.1(b) and MRPC 4.1, comment 3), Ethical Guidelines for

plaintiff is required to disclose, the issue would be moot as the defendant's lawyer most likely would raise this fact at the first opportunity. To establish credibility, it is best advised to raise and discuss candidly facts that weaken the case.

B. About insurance coverage

In mediation, defendants often are reluctant to disclose the limits or even the existence of insurance coverage. If asked directly, counsel usually will ask the mediator not to share information about coverage with the plaintiff. The fear is the plaintiff will insist on negotiating in a higher range if he or she knows that deeper pockets are involved.

Courts are split on whether misrepresentations about insurance coverage are actionable, and there is not a clear mandate in non-coverage cases. Until recently, the failure to disclose insurance in litigation or in settlement negotiations was considered to be a failure to disclose a material fact.¹⁸ In 2002, however, the California Court of Appeals held that the absolute litigation privilege protects misrepresentations regarding limits of coverage.¹⁹

III. Disclosure of Confidential Information Obtained in Mediation

Under the Guidelines, lawyers are free to disclose to a third party information relating to settlement negotiations, unless the disclosure is prohibited by the law, rules, or an agreement.²⁰ However, since in most jurisdictions, mediations are confidential by agreement and the applicable laws, lawyers generally are not at liberty to discuss with others what transpired during the mediation.²¹

IV. Conflicts of Interest

A. Fees

The tension between the interests of the plaintiff and his or her lawyer are manifest in cases where the plaintiff is asked to forego attorney's fees in exchange for other favorable settlement terms.²² The Supreme Court resolved that tension by holding that attorney's fees

Settlement Negotiations" (ABA 2002).

¹⁸ See, Nebraska State Bar Ass'n v. Addison (226 Neb. 585, 412 N.W.2d 855 (Neb. 1987) (failure to disclose insurance was failure to disclose material fact); Slotkin v. Citizens Cas. Co. of New York, 614 F.2d 301, (2d. Cir. 1979) (court overturned settlement and allowed fraud claim against defendant's lawyers for failure to disclose availability of excess coverage).

¹⁹ Home Ins. Co. v. Zurich Ins. Co., 116 Cal. Rptr.2d 583 (Cal. Ct. App. 2002).

²⁰ See, Section 2.4, Ethical Guidelines for Settlement Negotiations" (ABA 2002). However, under Model Rule 1.6, information learned during settlement discussions may be confidential as "information relating to representation of the client, therefore requiring client consent to disclose" (MRPC, ABA 2003). Even with client consent, if disclosure has "substantial likelihood of materially prejudicing the proceeding", disclosure may be prohibited under Model Rule 3.6.

²¹ See, Roth, et. al., The Alternative Dispute Resolution Practice Guide at Chapter 27 "Confidentiality Issues and the Mediated Settlement Agreement (West Group 2004). Note also, that while statements made in the mediation and the mediator's work product are protected under statute in Mass, the law defines "mediator" as well as the required "mediation agreement" so narrowly that protection under the statute is limited. See, White v. Holton, 1 Mass. L. Rptr. 213, 1993 WL 818800 (Mass. Super. Ct. 1993).

²² Section 4.2.2, Committee Notes, Ethical Guidelines for Settlement Negotiations (ABA 2002).

recovered belong to the plaintiff, not the plaintiff's attorney.²³

Case example: An employee claimed that his supervisor discriminated against him on religious grounds and sued for equitable relief (a transfer to another department). During mediation, the defendant agreed to the transfer and to pay the plaintiff's "reasonable attorney's fees", which the plaintiff's lawyer was unable to calculate during the mediation. After the mediation, the plaintiff's attorney submitted his final bill, which was three times what the defendant expected, based on its own lawyer's bill. When the defendant refused to pay the plaintiff's bill in full, the plaintiff's attorney discouraged his client from accepting the other settlement terms until the fee issue was resolved. Is this ethical?

According to the Guidelines, it would be unethical for the plaintiff's lawyer to interfere with the settlement: "When an attorney's fee is a subject of settlement negotiations, a lawyer may not subordinate the client's interest in a favorable settlement to the lawyer's interest in the fee".²⁴ As a general rule, should take any available procedural steps to reduce the possibility that the lawyer's professional judgment, in negotiating other settlement terms, will be adversely influenced by the lawyer's interest in the fee.²⁵

B. Representing parties "for the purposes of mediation only"

1. Multiple parties

Lawyers often represent both individual and corporate defendants, even though their interests may not be aligned, "for the purposes of mediation only". The Model Rules generally do not preclude the multiple representation of adverse parties in mediation unless the lawyer will not be able to provide competent and diligent representation to each affected client²⁶ or if the parties' interests are directly adverse.²⁷ The standard for potential conflicts appears to be more relaxed in mediation than in litigation; according to Model Rules 1.8 and 1.0(m), mediation is not considered "a tribunal" for the purposes of representing adverse parties.²⁸

2. Former relationship with a party

Case example: 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?

²³ On that basis, the Court upheld a settlement that required waiver of claim for attorney's fees. See, Evans v. Jeff, 101 S. Ct 1531 (1986).

²⁴ See, Section 4.2.2, Ethical Guidelines for Settlement Negotiations" (ABA 2002).

²⁵ Section 4.2.2, Committee Notes, Ethical Guidelines for Settlement Negotiations (ABA 2002).

²⁶ Model Rule 1.7(b)(1) (MRPC, ABA 2003).

²⁷ Model Rule 1.7(a)(1) (MRPC, ABA 2003).

²⁸ See, Model Rules 1.8 and 1.0(m) (MRPC, ABA 2003).

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.

V. Misuse of Mediation Process

A. Lack of good faith

Occasionally in mediation, a lawyer shows no interest in reaching settlement. He or she may initially resist advancing a settlement proposal (or one that seems reasonable), and indicates instead an interest in learning more about the case. Is this ethical?

Under the Guidelines, “An attorney may not employ the settlement process in bad faith”,²⁹ such as “using the settlement process solely to delay the litigation or to embarrass, delay, or burden the opposing party or other third person” or “representing that the client is genuinely interested in pursuing a settlement, when the client actually has no interest in settling the case and is interested in employing settlement discussions or alternative dispute resolution processes solely as a means of delaying proceedings or securing discovery.”³⁰

However, it is “not bad faith for a party to refuse to engage in settlement discussions or refuse to settle. . . .”³¹

Thus, the Guidelines seem to distinguish between refusing to pursue settlement and deceiving the other side into settlement negotiations.³²

Despite a possible negative outcome, it would be unwise to require a higher level of good faith participation for many reasons, including enforceability³³ and the fact that once in mediation, the lawyer and his or her client might decide to participate in the process. A good mediator will work with the reluctant party to facilitate the exchange of information as long as the process is fruitful.

However, if it is clear that a party is abusing the mediation process, the mediator will terminate the session and refuse further participation.

B. Threats

²⁹ Section 4.3.1, Ethical Guidelines for Settlement Negotiations (ABA 2002).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See, Comment, Laissez-“Fair”: An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators, 13 Ohio St. J. on Disp. Resol. 611 (1998) (imposing further good-faith and fair-dealing requirements for negotiations would be unworkable and create more problems than it would solve).

Case example #1: In mediation, the lawyer for a terminated teacher in a race discrimination case states that if the case does not settle, he will contact the press and let them know how the school system treats its educators. Case example #2: In mediation, the plaintiff in a sexual harassment case threatens to file a criminal complaint for sexual assault if the matter is not resolved. Are these threats ethical?

The Guidelines prohibit lawyers from making extortionate or otherwise unlawful threats to attempt to obtain settlement.³⁴ However, not all threats are impermissible, including the threat to file a civil lawsuit if there is a good faith basis in the claim,³⁵ and the threat to file a criminal lawsuit in certain circumstances.³⁶ A threat for negative publicity is even more complex. While it is ethical to point out that a private resolution could avoid public embarrassment, specific threats to contact the press generally are not favored.³⁷

Threats are not recommended in mediation in any event. More often than not, the opponent will become defensive and look for ways to fight back. Escalating a conflict with threats will make it more difficult to reach resolution in mediation and create more issues between the parties.

VI. Interference with Settlement

Perhaps the most unfortunate mistake lawyers make is not recognizing their client's interests. As an extreme case, during mediation the defendant's lawyer refused to acknowledge his client's desire to pay the modest sum demanded by an ex-employee, because he believed his client could ultimately prevail at trial. His client was an elderly, infirmed owner of a hairdressing salon, who had a strong defense but wanted the litigation to end. In other common examples, the lawyer confirms for the defendant client that "paying to settle is the same as admitting wrongdoing", or advises the plaintiff client that "the final settlement offer doesn't fully compensate [his or her] losses, so it should be rejected."

These are examples not only of poor counseling, but questionable ethics. Model Rule 1.2 requires the lawyer to abide by a client's decision concerning the objectives of representation, and consult with the client as to the means by which they are to be pursued.³⁸ Since it the client, not the lawyer, who decides the objectives of the representation,³⁹ the lawyer is obligated to explore the client's interests in mediation. The most effective lawyers separate out their own views from their client's needs and desires, and counsel their clients

³⁴ See, Section 4.3.2, Ethical Guidelines for Settlement Negotiations (ABA 2002).

³⁵ *Id.*, at Committee Notes.

³⁶ See, ABA Formal Op. 92-363 (1992) (if the matters are related, the report would be warranted by the law and the lawyer does not try to influence the criminal process).

³⁷ See, e.g., *In re Finkelstein*, 901 F.2d 1560 (11th Cir. 1990)(reversing order suspending plaintiff's lawyer from practice where lawyer threatened, among other things, to report the case to the NAACP and the SCLC; to send the story to ABC News; and a widespread boycott of defendant's products).

³⁸ See, Model Rule 1.2 (a): "... a lawyer shall abide by a client's decision whether to settle a matter...." "Comment [1]: The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See, Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. 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." (MRPC, ABA 2003).

³⁹ See, footnote 6.

accordingly.

VII. The Lawyer's Obligation to Consult with the Client in Mediation

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

This question illustrates the tension between the ability of the lawyer to conduct negotiations for the client,⁴⁰ and his or her obligation to consult with the client on the means in which the client's objectives are to be pursued.⁴¹ Model Rule 1.2 permits a lawyer to act on behalf of the client "as impliedly authorized to carry out the representation".⁴² This provision was added in 2002 specifically to avoid any implication that a lawyer must always consult to obtain authority to act.⁴³ Therefore, the Model Rules support the lawyer having discretion to decide how to present information to the client to help move it toward settlement.

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,⁴⁴ 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. 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.⁴⁵

VIII. Power Imbalances

⁴⁰ See, *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990) (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).

⁴¹ 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."

⁴² See, Model Rule 1.2 (MRPC, ABA 2002).

⁴³ ABA Report to the House of Delegates, No. 401 (Aug. 2001), Model Rule 1.2, Reporter's Explanation of Changes.

⁴⁴ 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).

⁴⁵ 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) and (3) (ABA 2003)).

The most successful mediations often involve a balance of power between the parties, i.e., each side is represented by competent counsel. Occasionally, however, the sides are not adequately represented – either a corporation is represented by a director, or the plaintiff appears pro-se or with a lawyer unsophisticated in the law. Under these scenarios, the mediator will face many challenges to try to “level the field” without providing legal advice to either side.⁴⁶

The question for lawyers is whether they have a duty to help create a “fair process,” or are they responsible only for the success of their client?

The Model Rules make clear that the lawyer owes a duty of loyalty to the client,⁴⁷ although the Guidelines recommend that, “A lawyer who negotiates a settlement with an unrepresented person must (a) clarify whom the lawyer represents and that the lawyer is not disinterested, (b) make reasonable efforts to correct any misunderstanding about the lawyer’s role in the matter, (c) avoid giving advice to an unrepresented person whose interests are in conflict with those of the lawyer’s client, other than advise to obtain counsel, and (d) avoid making inaccurate or misleading statements of law or material fact.”⁴⁸

IX. The Value of Collaboration

Parties and lawyers unfamiliar with the mediation process initially may be wary of the frequent ex-parte communications with the mediator, or the professional relationship the mediator may have with the other side. As they gain experience with the process, they will appreciate the benefits of a strong working relationship with the mediator and the opponent. Relationships of trust and collaboration enable lawyers to better address the challenges to their case and help move their clients toward settlement. For this reason, it is advised to work with mediators proposed by the other side and negotiate collaboratively to reach resolution.

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⁴⁶ See, Nance, Cynthia, “Unrepresented Parties in Mediation”, 15 No. 3 Pract. Litigator 47 (2004).

⁴⁷ See, Model Rules 1.2, 1.3, 1.7, 1.8 (MRPC, ABA 2002).

⁴⁸ Section 4.3.4, Ethical Guidelines for Settlement Negotiations (ABA 2002).

