The Role of Ethics in ADR
Leading Lawyers on Understanding the Ethical Obligations of Attorneys Engaging in Alternative Dispute Resolution
Behaving Ethically During ADR

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Introduction

The ADR movement has undergone extraordinary growth since Chief Justice Warren Burger posed the question “Isn’t there a better way?” almost three decades ago. Warren E. Burger, Isn’t There a Better Way? 68 A.B.A. J. 274 (1982). More and more, parties are required to use various forms of ADR (e.g., negotiation, mediation, arbitration) instead of traditional adjudicative processes. Yet, the standards of professional conduct have failed to keep pace with this shifting professional paradigm. This chapter attempts to fill that void by clarifying some ethical uncertainties surrounding the practice of law in the ADR field and counseling practitioners on how to avoid common ethical pitfalls.

Common Ethical Issues Encountered in ADR Practice

Conflicts of Interest

The most common professional liability issue I encounter involves conflicts of interest. In particular, retired judges and senior attorneys, who have amassed substantial connections in the legal community, often serve as mediators and arbitrators. Likewise, I have developed similar connections with local attorneys in my law practice. As a result, I always divulge previous contacts (no matter how slight these contacts may seem) with a mediator or arbitrator prior to proceeding with a case.

Recently, for example, opposing counsel in a commercial matter suggested a mediator who is a casual friend of mine, a retired judge who I hired to serve as a consultant at one time. The retired judge and I also played golf on two occasions. I disclosed these contacts to opposing counsel before the mediation commenced. The other side accepted him as a mediator anyway, although I suspect they might have reacted differently if I failed to disclose this information and they later discovered these contacts.

I am not convinced that other attorneys would have volunteered this same information. Making such disclosures, however, can prevent a mediation decision or arbitration award from being vacated, as well as minimizing professional liability risk. At the same time, practitioners involved in ADR
should press opposing counsel to similarly reveal their relationships with a mediator or arbitrator.

*The Misuse of ADR Proceedings*

Many attorneys misuse the mediation process as a way to expedite or shortcut the discovery process. For example, attorneys who have no intention to settle a case often use the mediation process as a ruse to coerce the other side to reveal critical facts about their position. Exploiting the mediation process in this way is not only a waste of time and client money, but it is also unethical.

*Client Miscommunication*

Many attorneys fail to counsel their clients on both how the mediation process works and the benefits of exploring settlement opportunities through mediation. For example, I recently participated in a mediation in which the plaintiff refused to amend his initial demand, despite being urged to do so by the mediator. This unwillingness to compromise actually weakened the plaintiff’s bargaining position, as the mediator was forced to concede that the defendant’s settlement offer should be accepted. Unfortunately, I find this scenario to be increasingly common. I am unsure, however, whether it is a product of bad lawyering or clients demanding more money because of a shaky economy.

*Ex Parte Communications*

Practitioners need to be mindful of ethical violations when engaging in *ex parte* communications with a mediator or arbitrator. This is an issue not unique to ADR. For example, I recently served as counsel in a case where the judge contacted me *ex parte* to determine what needed to occur to resolve the matter. While this is a rare event, such contact is not unethical provided that the *ex parte* communication was initiated by the judge and not a party to the case. Similarly, it would not be unethical for a mediator or arbitrator to initiate an *ex parte* communication with a party.

I believe, however, that practitioners involved in ADR are more inclined to initiate *ex parte* communications with a mediator or arbitrator. Attorneys
engaging in such a practice should bear in mind that they are wading into treacherous ethical waters when doing so without a prior agreement that this practice is acceptable to all parties and the mediator.

**Recent Trends and Experiences in ADR**

In commercial cases, ADR is the preferred method of dispute resolution because it saves the client money. The cost-saving benefits of ADR, however, are curtailed when the conflict is “emotionally charged.” In those situations, only the specter of trial forces the parties into settlement. Such conflicts are common in the employment arena. For example, an employee who argues that he or she was unjustly terminated often feels that “having their day in court” will bring them vindication.

In tort cases in particular, I have found that mediation can be an invaluable tool in resolving disputes. While very few of these tort cases actually settle in mediation, the mediation process initiates a dialogue that is critical to reaching a final settlement without further intervention from the mediator or the court.

I recently had that experience in a tort case where compromise seemed unlikely prior to the mediation. At the mediation, a dialogue developed not only with the plaintiff, but also among the various co-defendants. Following the mediation, the defendants reached a consensus on a mutually agreeable settlement figure and appointed liaison counsel who ultimately settled the case on their behalf. Without the initial mediation session, it is likely that the case would have dragged on far longer.

**The Attorney’s Code of Ethics**

In the end, you are bound by your code of ethics as an attorney that applies to ADR as well as traditional adjudicative processes. An attorney must always be truthful with the mediator, arbitrator, or judge. With that being said, an attorney is not obligated to reveal the totality of their client’s position to comply with ethical mandates. To do so would inhibit an attorney’s ability to advocate for their clients.
Let us say a plaintiff is suing a defendant for $5 million. The plaintiff would ultimately be willing to take $1 million to settle the case. At mediation, the plaintiff’s attorney has no duty to reveal to the defendants that $1 million would suffice, because the attorney must secure the best possible result for their client under the circumstances. The defendant’s attorney has a countervailing obligation to secure the best possible deal for his or her client. Practitioners must be careful, however, that such advocacy does not shade into ethically murky territory, such as negotiating in bad faith or making misleading statements.

**Preventing Ethical Problems**

*Finding Neutral Mediators or Arbitrators*

Finding neutral mediators or arbitrators is the first step in avoiding ethical issues in ADR proceedings. As discussed above, this requires the practitioner to divulge any past contact with the mediator or arbitrator. By the same token, attorneys must be proactive in pressing opposing counsel to make similar disclosures.

*Preparing Your Client*

The second step is to educate your client about the ADR process. In mediation, the attorney must explain that the mediator’s role is to reach a settlement. In accomplishing this task, the mediator will likely not assess the merits of the case or the strength of the parties’ respective positions. An attorney must also convince his or her client that mediation is a helpful tool in evaluating the other side’s position. For that reason, I encourage my clients to be present at mediation, but not to participate in the proceedings, so that they will focus on listening to the other side’s position. Convincing the client to approach mediation with that mindset often facilitates a favorable settlement.

**Timing and Scheduling Issues**

Timing and scheduling can cause problems in ADR proceedings. In many cases, ADR takes place out of town for many of the individuals involved.
Negotiations lasting longer than anticipated can complicate matters when everyone is looking at their watches or anxious that they will miss the last flight out of the day. This situation can be positive if it brings people closer on a tough issue as time pressure mounts, but it often simply complicates matters. I always make every effort not to put myself in a time bind as I go into mediation.

The Makings of a Skilled ADR Attorney

A skilled ADR attorney is one who can create cohesiveness within a team of clients and attorneys so they can work effectively toward a compromise. This leader can then confer with the other side in a way that furthers his or her team’s interests. The key is for the lawyer to be able to gain the trust of the parties in multiple-party mediation.

Skilled ADR attorneys also recognize that mediation is not a zero-sum game. While all attorneys desire the best possible outcome for their client, a skilled ADR attorney understands that a well-reasoned compromise is unequivocally a win for both sides. Yet, a skilled ADR attorney must also realize when taking a bold stance is effective. In some cases, a plaintiff’s attorney knows he or she has the power to demand a large settlement. If a client does not act unreasonably, the defendant may agree to such a large amount to dispose of the case. Recognizing these opportunities is the result of experience.

Conclusion: The Future of ADR

As litigation is becoming cost-prohibitive for most businesses, ADR will continue to be the preferred method for resolving commercial disputes. I often advise clients that unless they have over $1 million at stake, they should not go to trial. The exorbitant costs associated with going to trial are a result of the high fees commanded by large law firms and the expenses incurred during discovery, such as searching for, evaluating, and producing electronic data.

Despite these costs, many young attorneys mistakenly believe they should not partake in ADR proceedings until discovery is complete. This can waste
the client’s money, as the case may have been resolved before undertaking such costly measures. For example, going through thirty boxes of e-mails may yield some useful information but is unlikely to change the course of a dispute and its final resolution. Senior attorneys often have a sense of where a dispute will likely resolve and thus are able to get through ADR quickly without protracted discovery. As such, young attorneys would be well served to shadow senior attorneys in ADR matters.

Key Takeaways

- Find neutral mediators and arbitrators to reduce the possibilities of conflicts of interest.
- Understand the value of early mediation and negotiation as a way to reduce the exorbitant costs of litigation and discovery.
- Educate your clients about the mediation process and the value of exploring settlement opportunities through ADR.
- Be a leader in ADR. Unite your side and build trust in the opposition.

Related Resources

- Lawrence J. Fox and Susan R. Martyn, Red Flags: A Lawyer’s Handbook on Legal Ethics (2005). Although focusing on traditional adjudication, this book addresses ethical issues such as communicating with clients and avoiding conflicts of interests, which apply equally to ADR.
- Roger Fisher and William Ury, Getting to Yes (second edition, 1991). This book is a step-by-step guide to resolving disputes through negotiation. In particular, this book stresses the need to avoid getting mired down in small details that can derail a potential resolution. Recognizing and being able to navigate such issues enables practitioners to maximize the benefit of the ADR process.
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