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Candor and Truthfulness in Alternate Dispute Resolution

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An attorney's fundamental duty to tell the truth is mandated by the Rules of Professional Conduct (RPCs), but the line between impermissible falsehood and legitimate advocacy is often unclear. In the area of alternate dispute resolution, advocates are permitted to shape communications to varying degrees depending on whether the forum is an arbitration hearing or a mediation session with more limited communications required in adjudicatory proceedings. The following strives to more clearly explain the attorney's duty in each of these different contexts.

Candor toward the Tribunal

Under RPC 1.0(m), the arbitrator is defined as a "tribunal" for the purposes of attorney ethics rules. Even though an arbitrator conducts informal proceedings without the trappings of an austere courtroom and black robe, the same duties owed to a judge are also owed to the arbitrator.

This makes sense because judges and arbitrators — third-party neutrals called upon to decide a controversy — are susceptible to misguided appeals. Therefore, the RPCs proscribe making false or prejudicial assertions in an adjudicatory proceeding and unauthorized ex parte contact with the decision maker.

As set forth in RPC 3.3:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (4) offer evidence that the lawyer knows to be false.

Importantly, RPC 3.3(f) requires the advocate to inform the tribunal of all material facts during ex parte proceedings even if adverse to the client.

RPC 3.5 addresses additional ethical duties regarding "impartiality and decorum of the tribunal." It states:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; [or]
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order....

In re McGrath[1] demonstrates why these two rules exist. Attorney McGrath was engaged in an employment dispute with a former employee who was also a Canadian citizen. McGrath violated RPC 3.5(b) when he sent two letters to the judge ex parte.

The first was a typed letter bearing a handwritten message scrawled on the bottom of the last page: "Your decision is going to effect [sic] American's [sic] — How [sic] are you going to trust & believe — a [sic] alien or a U.S. citizen." The second was a single-page letter entirely handwritten:

> Dear Judge Rogers;
>
> How many jobs do we give to aliens like Dr. Ellison: She was schooled here in the U.S. and refuses to become a U.S. citizen. She needs to go back to Canada.
>
> In that regard, I am asking the Court to freeze all her assets pending the outcome of this case.[2]

In sharply admonishing McGrath, the court explained:

> Ex parte contact of the nature before us is very harmful to the public's view of the integrity of the bar. Unfortunately there are those, particularly those unfamiliar with the working of our judicial system, who are quick to believe that judges routinely have ex parte contacts with parties or their lawyers and are influenced by such contacts. Ex parte contacts intended to influence the judge diminish the integrity of the administration of justice.[3]

In another recent disciplinary decision, *In re Disciplinary Proceeding against Ferguson*,[4] an attorney was disciplined for ethics violations under RPCs 3.3 and 3.5. The genesis of the action was a failed real estate deal. Following several court hearings, the court ordered one party to retain possession of a residence and keep payments current pending trial.

Shortly after the hearing, a new attorney appeared before the judge ex parte arguing that the party who retained

possession of the house had lied at the prior hearing about making the required mortgage payments. At the ex parte hearing, the attorney failed to tell the court that bankruptcy proceedings would favor her clients if they had possessory rights. She also failed to state that prior payments may have been posted after the first hearing, and asserted that exigent circumstances existed because a "vagrant" now occupied the residence, not telling the judge that it was the other party's son.

Without notice, the judge signed the contempt order and writ of restitution. Once the attorney's clients obtained the right to possession, they filed bankruptcy, thereby interrupting state court jurisdiction and damaging the other party's ability to protect their possessory interests in the residence.

In both *McGrath* and *Ferguson*, ex parte communications with the tribunal provided the opportunity for each attorney to make false statements material to the decision. Had the opposition been present, the falsehood would have been brought to the court's attention, resulting in a proper and fair decision.

In fact, avoidance of an incorrect adjudication is the foundation for the rules:

> These rules [RPC 3.3(f) and RPC 3.5(b)] are designed to protect the integrity of the legal system and the ability of courts to function as courts. An attorney's duty of candor is at its highest when opposing counsel is not present to disclose contrary facts or expose deficiencies in legal argument. Such a high level of candor is necessary to prevent judges from making decisions that differ from those they would reach in an adversarial proceeding.[5]

Candor toward Third Persons

Lawyers have a duty of honesty toward third parties as well as a tribunal, but the extent of the duty is different. As we saw above, the RPCs do not lump mediators within the definition of a "tribunal."[6] Frankly, this makes sense because mediation does not result in a decision by a third-party neutral.

The mediator, unlike the judge or arbitrator, is a facilitator of settlement negotiations, not an adjudicator. Therefore, ethics rules governing statements to third parties, and not statements to a tribunal, apply to communications made to and through mediators.

As stated in RPC 4.1:

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

In re Disciplinary Proceeding against Carmick[7] includes a discussion of the extent of this rule in settlement negotiations. Carmick negotiated a settlement directly with a represented party, but without consent of that party's attorney, the prosecutor. And he presented the settlement to the court without divulging all the relevant facts.

In the course of negotiating a reduced amount for unpaid judgment interest on a child support order, the attorney failed to tell the judgment creditor that $11,000 had been deposited with the clerk toward accrued judgment interest. He also told her the prosecutor was unavailable, not knowing if that was true. Furthermore, he implied that she might have difficulty collecting the interest. As a result, the mother agreed to payment of only $5,000 in judgment interest, leaving $6,000 on the table.

Carmick was disciplined for his improper ex parte court appearance and for improperly communicating with a represented party. Surprisingly, however, the court concluded that Carmick had not violated the RPCs for his statements or omissions made in negotiation.

> Generally, an omission regarding the amount available for settlement does not violate either RPC 4.1(a) or RPC 8.4(c). "A lawyer ... has no affirmative duty to inform an opposing party of relevant facts." Model Rules R. 4.1 cmt. 1. While a misrepresentation can occur by a failure to act, under generally accepted conventions in negotiations "a party's intentions as to an acceptable settlement of a claim" are not taken as statements of material fact. Model Rules R. 4.1 cmt. 2.[8]

Comment 1 to RPC 4.1 helps explain the distinction between disclosure of relevant facts and disclosure of misleading statements. While a lawyer must be truthful, she has no affirmative duty to inform the other party about relevant facts. And misrepresentations "can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

But Comment 2 to RPC 4.1 distinguishes statements made in settlement negotiations:

> This Rule (4.1) refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. 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, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Although some negotiation statements to third persons are not taken as statements of material fact, some factual assertions during negotiation might still amount to bad faith. Can a party knowingly make a false or misleading statement to a mediator?

Obviously, any process will be contaminated by misrepresentations of fact, but the question remains whether and to what degree our ethics rules protect against the effect when false information is shared. This reflects the notion that "puffing" is permitted by negotiators in the settlement process while lying is not.

Candor and truthfulness are mandated by our ethics rules designed to preserve the integrity of the adjudication process. They also are necessary where parties negotiate a resolution to legal disputes.

However, the extent and quality of mandated disclosure are highest when one party approaches the court unaccompanied and they are lowest when parties are dealing with each other at arm's length. With the increased risk of harm comes the increased expectation of disclosure. ■

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[1] 174 Wn.2d 813, 280 P.3d 1091 (2012).
[2] *McGrath*, 174 Wn.2d at 827.
[3] *Id.* at 829–30.
[4] 170 Wn.2d 916, 246 P.3d 1236 (2011).
[5] Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: Handbook on the Model Rules of Professional Conduct*, § 29.2 at 29-3, 29-4 (3d ed. 2001). *In re Disciplinary Proceeding against Carmick*, 146 Wn.2d 582, 595, 48 P.3d 311 (2002).
[6] *See* RPC 1.0(m).
[7] *See* note 5.
[8] 146 Wn.2d at 599.
