Alternative Dispute Resolution and Ethics

By Patricia M. Weaver

I. Is there a Duty to Discuss ADR with Clients ?

So, a new client is sitting in your office and outlining the contours of an ongoing dispute with her business partner. The client is well-heeled and, at the moment at least, pretty ticked off about her partner's recent actions. She has raised her concerns with her partner, and he has denied or dismissed them.

Based on the client's account of events, you advise her that the facts give rise to several causes of action and you can file a multi-count Complaint. Certainly, you are likely to discuss that option with the client. But, do you have an ethical obligation to discuss any other options with your client, that is, to advise your client about the availability of alternative processes for resolving the dispute?

No Maryland Rule of Professional Conduct expressly answers that question. A former Comment to Rule 2.1 stated: "It *may* be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." In response to an effort to amend the Comment by changing the "may" to "shall," the Comment was changed to read:

> "when a matter is likely to involve litigation and, in the opinion of the lawyer, one or more forms of ADR are reasonable alternatives to litigation, the lawyer should advise the client about those reasonable alternatives."

Now, the Comment instructs that the lawyer "should" advise the client about the existence of ADR when, in the opinion of the lawyer, ADR is a reasonable alternative to litigation, a curious development in response to an effort to strengthen the lawyer's obligation to advise clients about ADR.

Beyond the Comment to Rule 2.1, other Rules speak generally in response to the question. Rule 1.4 governs attorneys' communications with their clients and provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Similarly, Rule 1.2 (a) requires that "a lawyer shall abide by a client's decisions concerning the objectives of the representation and, when appropriate, shall consult with the client as to the means by which they are to be pursued." Here, the duty to consult with and advise a client about the various means available to pursue the client's objectives is framed as a mandate, albeit again, qualified by "when appropriate."

When assessing whether ADR is a "reasonable" or "appropriate" alternative to litigation, the lawyer obviously must make that assessment considering only the client's interests, given the constraints on lawyers elevating their own self interests over clients' interests. Comment 7 to Rule 1.4 warns that a "lawyer may not withhold information to serve the lawyer's own interest or convenience..." Absent domestic violence or some other unique factors, it is hard to imagine when it would not be reasonable or appropriate to at least advise a client about the availability of ADR and discuss it as an option. It may well be that the client's objectives are better served by litigation, but it would seem prudent to reach that conclusion after a discussion with the client.

II. Is Mediation the Practice of Law and Does it Matter ?

The answer to that question may depend on what "mediation" means to you, as mediation often means different things to different people. And, though a simple question, the answer is not so simple. Ultimately, the matter is for the legislature or the courts to determine. Neither has addressed the question directly, but the Court of Appeals has provided some principles that may guide the analysis.

Purists in the ADR community may view "mediation" as defined under Rule 17-102(d) for court-ordered mediation to be a "process in which the parties work with one or more impartial mediators who, ***without providing legal advice***, assist the parties in reaching their own voluntary agreement for the resolution of the disputes or issues in the dispute." In that process, the mediator facilitates the communication between the parties and seeks to identify issues and options and help the parties explore the needs underlying their respective positions. The Rule specifically provides: "While acting as a mediator, the mediator does not engage in arbitration, neutral case evaluation, neutral fact-finding, or alternative dispute resolution processes and does not recommend the terms of an agreement." This view of mediation is aimed at facilitating the parties' communication, can be done by non-lawyers, and is not the practice of law. Opinion No. 2003-02.

The term "mediation," however, is colloquially and frequently used to refer to processes that go beyond this notion of mediation and may include neutral case evaluation or other methods as well. Per 17-102(f), "neutral case evaluation" involves an impartial person evaluating the party's legal positions after hearing a summary of the issues and arguments and sometimes also opining as to the likely outcome of the dispute if the matter is tried. If such process involves "the application of legal principles to problems of any complexity," then, under *Attorney Grievance Commission v. Hallman*, 343 Md. 390, 681 A.2d 510 (1996), it would fit within the traditional views of the practice of law.

The Court in *Attorney Grievance Commission v. Shaw*, 354 Md. 636, 732 A.2d 876 (1999), later instructed that "when determining whether an activity constitutes the practice of law," the "focus of the inquiry is, in fact, whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent." Here, it would seem that much of the neutral case evaluation method (i.e. assessing and evaluating legal issues and arguments) often used in "mediation" would constitute the practice of law as it has been traditionally defined.

When the Court of Appeals made changes to the Rules of Professional Conduct as part of the "Ethics 2000" amendments, it adopted Rule 2.4, titled "Lawyers Acting as Third-Party Neutrals." Though significant that the Court of Appeals directly addressed ADR in this Rule, the content of the Rule itself is somewhat limited. Notably, however, Rule 2.4 recognizes the lawyer in a role beyond the traditional one as client representative and envisions the lawyer-neutral acting in a ***non-representational*** capacity by stating that the lawyer "assists two or more persons who are ***not clients***."

Since the traditional notion of practicing law typically involved applying legal principles to advise clients (and here mediating parties are expressly not clients), it could be suggested that Rule 2.4 is intended to insulate attorney-neutrals from conflict of interest violations, which otherwise could be rampant ***if*** the attorney-neutral was considered to be providing legal advice to ***unrepresented*** parties in mediation.

Many lawyer-mediators provide neutral case evaluation to parties in mediation, and surely no one would suggest that lawyer-mediators should face any ethical proscription against providing legal analysis and opinions to mediating parties who were represented by counsel. Mediating parties and their counsel often want to hear feedback on their legal positions, as well as a neutral assessment of their chances of prevailing at trial. The lawyer-mediator serves a hugely important – and much needed – function.

While the lawyer-mediator may apply legal principles and precedents and thus fit within the traditional "practice of law" paradigm, the medi-

ating party is presumed to be receiving "legal advice" from their own counsel, and not the third-party neutral. In this context, it is easy to distinguish the "practice of law" from the giving of "legal advice"

Is the analysis any different if the parties are unrepresented? If the lawyer-mediator provides legal analysis and opinions to the pro se parties, particularly in separate caucuses as is popular in shuttle diplomacy, does the legal analysis begin to approach "legal advice?"

In a thoughtful article titled *The New Maryland Rules of Professional Conduct and Mediation: Perplexing Questions Answered and Perplexing Questions that Remain*, 36 U. Balt. L.F. 1, 8 (2005), Robert Rubinson explores a number of ethical issues in the mediation arena, posits that "[e]ngaging in the practice of law while mediating generates almost certain ethical problems for attorneys as mediators," and concludes that "[p]erhaps the greatest risk is that it is extraordinarily challenging – perhaps impossible - to render legal advice to one party or to both parties simultaneously without having a conflict of interest, which would constitute a violation of, at a minimum, Rule 1.7 (Conflict of Interest)." Mr. Rubinson aptly points out that other canons governing mediation allow mediators to "provide information," but uniformly prohibit "giving legal advice or other professional advice." He thus frames the crux of the issue:

> It is the distinction between "providing information" and "providing legal advice" noted by the Standards that generates such difficulty in practice. As with the challenge facing lawyers who encounter pro se parties and "should not give legal advice to an unrepresented person, other than the advice to secure counsel," where is the line to be drawn? This intensely contextual question cannot be answered here. What can be said, however, is that attorneys should remain acutely sensitive to the risks of engaging in the practice of law in mediation and should strive to avoid it.

So, in dealing with *pro se* parties, is there a meaningful line between providing legal information and legal advice? If a lawyer-mediator explains to the *pro se* parties that they are not clients and that the neutral will not be providing legal advice, can the lawyer-neutral then provide an analysis of the legal issues and an assessment of the likely outcome of trial without crossing an ethics line? Rule 2.4 specifically requires a lawyer-neutral to inform unrepresented clients that the lawyer is not representing them and, when necessary, to explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

With regard to explaining these differences, Comment 3 to the Rule only mentions ensuring that the pro se party understand "the inapplicability of the attorney-client evidentiary privilege." Explaining the specific contours of these different roles may hold the key. When mediating between *pro se* parties, lawyer-mediators must draw proper and meaningful lines between the lawyer's role as a third party neutral and a lawyer's role as one who represents a client - and then stay within those lines. Given the great benefit that mediation provides to both the parties and the courts, arguably these lines should be drawn in a manner that can be reconciled with the Professional Rules, but also in a manner that advances and fosters the greater use of mediation services.

These same issues gave rise to a related question: Can a lawyer-mediator draft a binding settlement agreement for unrepresented parties? This question has spawned much debate and discussion in the legal commu-

nity, and differences of opinion exist across the country. The Maryland State Bar Association Ethics Committee addressed this question in Opinion No. 2007-19 and recognized that:

> It is common for mediators to assist the parties in preparing a term sheet or a memorandum of understanding to set forth the essential terms of the mediated resolution of the dispute. This activity is undertaken as a mediator, not as a lawyer for either party. We see no problem with a lawyer-mediator engaging in this task.
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> When the task changes from memorializing the understanding to drafting legally binding documents, the mediator's role as scrivener changes to legal practitioner. Historically, drafting pleadings or contracts for third parties has constituted the practice of law in Maryland.

The Committee looked to section 10-101(h) of the Business Occupations Article, which defines the "practice of law" to include "preparing or helping in the preparation of any form or document that is filed in a court or affects a case that is or may be filed in a court."

The Committee concluded "where mediation involves two ***unrepresented*** parties and the mediator seeks to draft legally binding documents or legal pleadings that affect the interests of each party, the mediator practices law and is bound by the Rules. Being bound, the mediator cannot represent both parties in a dispute." The Committee concluded that such conduct would violate Rule 1.7, which governs conflicts of interest. In rendering its Opinion, the Committee specifically recognized that the "issue is not one without a difference of opinion" and that states had come down on both sides of the issue reaching opposite conclusions.

Contrary to the Committee's Opinion, it could be suggested that Rule 2.4 suggests that lawyer-neutrals are not representing either party in a mediation and, therefore, Rule 1.7 – which prohibits conflicts in the representation of a client - simply does not apply. Here, the intended operation of Rule 2.4 becomes significant and results in something of a chicken and egg dilemma. That is, under Rule 2.4, are unrepresented parties never "clients" of a lawyer-neutral who acts as a mediator or can the parties become clients if the lawyer-neutral provides legal advice or recommends the provisions of the settlement agreement? Put another way, does engaging in the latter activities muddle the "difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client?"

The elusive business of defining "practice of law" and "legal advice," viewed in connection with the varying practices that are called "mediation," suggests that broad brush answers are not readily available to many questions. Given the different meanings ascribed to mediation that seemingly place it on one side of the "practice of law" fence or the other, as well as the recognition that other forms of ADR more closely approximate the practice of law, the monies garnered from ADR services provided by lawyers may well be viewed as "legal fees."

Consequently, if lawyers are considering forming a group of lawyers and non-lawyers to render mediation services, the lawyers must be mindful of the ethical prohibition against sharing legal fees with non-lawyers. In Opinion No. 2003-02, the Ethics Committee opined that a "safe harbor" existed if the "mediation" services provided were limited to the purely facilitative variety contemplated under Rule 17-102(d).

Acknowledging that it lacked authority to define the practice of law and that the Court of Appeals may, in the future, speak further to the issue, the Committee cautioned that if "you or your partners engage in any other form of mediation [beyond Rule 17-12(d)] or ADR, this may entail the practice of law and [sharing fees] would risk violating Rule 5.4(b) and (d)." The Committee again acknowledged that this issue has spawned great division and national debate and remains unsettled. A review of the varying state ethics opinions emphasizes that discussions about mediation ethics must begin with a consistent definition of mediation.

As with many of the ethical issues arising in mediation, lawyers should simply be mindful that there continues to be a lack of consensus on a number of fronts. "Mediation" continues to be imbued with a spectrum of different meanings, while notions of the "practice of law" and the traditional role of lawyers continue to change and evolve. Any litigation attorney practicing more than a few years has seen the financial and emotional toll that litigation can take. Courts have almost unanimously recognized the tremendous benefits of ADR – both to the litigants and to the judicial system. As the ethical issues are fleshed out, the primary focus should be protecting and serving the parties.

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