

Ethical Issues in the Dispute Resolution Process

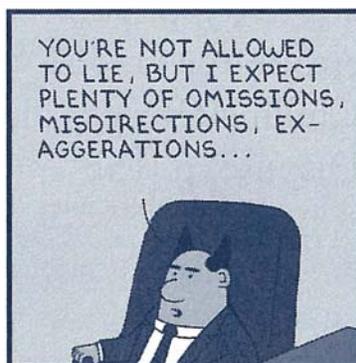
FM Panelists: Gerry Ranking & Jennifer McAleer
Guest Panelist: Fred Zemans, *Osgoode Hall Law School*

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...UNJUSTIFIED
OPTIMISM, LOST DOC-
UMENTS, UNCLEAR
EXPLANATIONS, GRAY
AREAS AND TACTICAL
IGNORANCE. OH, AND
SAY THAT WE HAVE
OTHER OFFERS.



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Fact Scenarios

- **Situation 1:** Your clients, the defendants, have told you that you are authorized to pay \$750,000 to settle the case.
 - a) In settlement negotiations after your offer of \$650,000, the plaintiffs' attorney asks, "Are you authorized to settle for \$750,000? Can you say, "No I'm not?"
 - b) How should you respond?

Fact Scenarios

- **Situation 2:** You represent a plaintiff who claims to have suffered a serious knee injury.
 - a) In settlement negotiations, can you say your client is “disabled” when you know she remains active?

Fact Scenarios

- **Situation 3:** In settlement talks over the couple's lender liability case, your opponent's comments make it clear that he thinks plaintiffs have gone out of business, although you didn't say that. In fact, the business is continuing and several important contracts are in the offing.
 - a) You are on the verge of settlement; can you go ahead and settle without correcting your opponent's misimpression?

Mediation

- Mediation is a consensual process in which a neutral third party (without power to impose resolution) works with the parties.
- Mediators assist the parties reach settlement.
- In a caucused mediation, the mediator meets privately with the parties and secures both confidential and non-confidential information.
- The flow of information thereafter is controlled by the mediator.

Fact Scenarios

- **Situation 4:** You act for an employee in a wrongful dismissal case. You have successfully manoeuvred an early mediation and are close to securing a \$500,000 lump sum payment, representing 12 months in lieu of notice. Your client secured another (more lucrative) job one week prior to the mediation. He has disclosed his new employment to you but the defendant, and its counsel, are clearly proceeding on the basis he has not secured employment.
 - a) Are you obligated to disclose your client's new employment?
 - b) You decide not to disclose the new employment but the mediator learns of it in a confidential caucus session. How should the mediator handle such disclosure?

Power of the Mediator

- The mediator has absolute control over what non-confidential information to convey.
- The mediator controls:
 - what is withheld
 - what is disclosed
 - when disclosure is made
- The mediator can suppress, enhance and manipulate information

Fact Scenarios

- **Situation 5:** Your client retains you to assert a personal injury claim arising from a slip and fall accident. You determine that the claim is statued barred. Opposing counsel, a newly called young lawyer, has not identified the *Limitations Act* as a defence and you are about to settle the case, with the assistance of a mediator. The settlement will see your client secure a substantial cash payment.
 - a) Are you obligated to disclose the *Limitations Act* defence?
 - b) Would your answer to subparagraph (a) be different if the other side was not represented by counsel?
 - c) Can the mediator raise the issue?

Fact Scenarios

- **Situation 6:** Your client, a software manufacture, has been sued for breach of contract and negligence arising from the alleged defective installation of its software in a casino gaming environment. Your client has defended the action alleging that all problems resulted from the purchaser's failure to properly implement your client's product and its failure to upgrade its hardware. You determine, through your client's productions (particularly emails between software programmers) that software problems did, in fact, exist. You raise the issue with your client who acknowledges the problems.

You proceed to mediation (before discovery) and your client maintains that its software is entirely robust and suitable for its intended purpose. He makes this statement in general session, as well as to the mediator in caucus.

a) What, if anything, do you do?



Mandatory Mediation

- Parties and counsel must carefully assess whether or not to proceed with ADR.
- Parties should not mediate if the dispute is not ready for settlement.
- Parties should not use the process for an improper purpose. It would be improper to proceed through mediation to:
 - delay/increase costs
 - secure discovery
 - intimidate party representatives



Summary

A. The “Truthfulness Standard”

Two competing philosophies:

a) lawyers must act honestly and in good faith, which means they should not accept results that are unconscionably unfair, even when otherwise in the client’s best interest;

OR

b) lawyers should resolutely represent their clients and take advantage of every opportunity to advance the client’s interest.



Summary

A. The “Truthfulness Standard” cont’d

- Reality is that the “competing philosophies” set out either end of the spectrum.
- Truthfulness in negotiation/mediation is typically between the extremes.

See: “*A Code of Negotiation Practices for Lawyers*” by Roger Fisher



Summary

A. The “Truthfulness Standard” cont’d

- A lawyer may not make a false statement of material fact.
- Statements that are considered to be “puffing” or statements regarding a party’s negotiating goals are normally distinguished from false statements of material fact.
- It is generally accepted that a party might exaggerate the strengths and minimize the weaknesses of its factual or legal position.



Summary

B. Practical Advice

- Little guidance as to what constitutes “truthfulness” in negotiation/mediation.
- Minimal regulation of the use of deception.
- Consult with your counsel to ensure he/she proceeds appropriately, given your “comfort level”.
- You should expect your counsel to:
 - explain how he/she intends to negotiate
 - explain his/her strategy
 - information to be disclosed/suppressed
 - when/why
 - for what purpose





Rules of Professional Conduct

A. Definitions

Rule 1.02 Definitions

“tribunal” includes courts, boards, arbitrators, mediators, administrative agencies, and bodies that resolve disputes, regardless of their function or the informality of their procedures.

B. Dispute Resolution - - Initial Assessment

Rule 2.02 Quality of Service

Honesty and Candour

2.02(1) When advising clients, a lawyer shall be honest and candid.

Encouraging Compromise or Settlement

2.02(2) A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings.

2.02(3) The lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

Dishonesty, Fraud etc. by Client

2.02(5) When advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

The *Rules of Professional Conduct* explicitly call for lawyers to **advise and encourage** clients to compromise or settle disputes. Several ethical and professional issues arise when a lawyer puts this into practice.

The first, and most important aspect of dispute resolution, involves the lawyer's assessment of **whether the dispute is ready for settlement**. When instructing counsel, or advising a client, one must understand not only the nature of the dispute but the underlying interests of the parties and whether there exists a good faith desire (on the part of all stakeholders) to settle or compromise.

C. Rule 4.01 — The Lawyer as Advocate

4.01(1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, ***suppressing what ought to be disclosed***, or otherwise assisting in any fraud, crime, or illegal conduct,

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,

(g) ***knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence*** or as a matter of which notice may be taken by the tribunal,

(h) deliberately refrain from informing the ***tribunal*** of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,

(j) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,

(k) needlessly abuse, hector, or harass a witness,

Discovery Obligations

4.01(4) Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate

(a) shall explain to his or her client:

(i) the necessity of making full disclosure of all documents relating to any matter in issue; and

(ii) the duty to answer to the best of his or her knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of the court or the rules of the tribunal

(b) shall assist the client in fulfilling his or her obligations to make full disclosure, and

(c) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

Disclosure of Error or Omission

4.01(5) A lawyer who has unknowingly done or failed to do something that if done or omitted knowingly have been in breach of this rule and who discovers it, shall, subject to rule 2.03 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

CANADIAN BAR ASSOCIATION - ONTARIO
ADR SECTION

MODEL CODE OF CONDUCT FOR MEDIATORS

I. OBJECTIVES FOR MODEL CODE OF CONDUCT FOR MEDIATORS

The main objectives of this Model Code of Conduct for mediators are as follows:

- (a) to provide guiding principles for mediators' conduct;
- (b) to provide a means of protection for the public; and
- (c) to promote confidence in mediation as a process for resolving disputes.

II. DEFINITIONS

In this Model Code of Conduct:

"mediation" means a process in which an impartial person, a mediator, helps disputing parties to try to reach a voluntary, mutually acceptable resolution of some or all of the issues of their dispute.

"mediator" means an impartial person whose role in mediation is to assist and encourage parties to a dispute:

- * to communicate and negotiate in good faith with each other;
- * to identify and convey their interests to one another;
- * to assess risks;
- * to consider possible settlement options; and
- * to resolve voluntarily their dispute.

"impartial" means being and being seen as unbiased toward parties to a dispute, toward their interests and toward the options they present for settlement.

"conflict of interest" means direct or indirect financial or personal interest in the outcome of the dispute or any existing or past financial, business, professional, family or social relationship which is likely to affect impartiality or reasonably create an appearance of partiality or bias.

4. Mediators' commitment is to the parties and the process and they shall not allow pressure or influence from third parties (persons, service providers, mediation facilities, organizations, or agencies) to compromise the independence of the mediator.

VI. CONFIDENTIALITY

1. Mediators shall inform the parties of the confidential nature of mediation.
2. Mediators shall not disclose to anyone who is not a party to the mediation any information or documents that are exchanged for or during the mediation process except:
 - (a) with the mediating parties' written consent;
 - (b) when ordered to do so by a court or otherwise required to do so by law;
 - (c) when the information/documentation discloses an actual or potential threat to human life;
 - (d) any report or summary that is required to be prepared by mediators; or
 - (e) when the information/documentation is non-identifiable, (unless all of the parties otherwise authorize identification), and is used for research, statistical, accreditation, or educational purposes and is limited only to what is required to achieve these purposes.
3. If mediators hold private sessions (breakout meetings, caucuses) with a party, they shall discuss the nature of such sessions with all parties prior to commencing such sessions. In particular, mediators shall inform parties of any limits to confidentiality applicable to information disclosed during private sessions.
4. Mediators shall maintain confidentiality in the storage and disposal of mediation notes, records and files.

VII. QUALITY OF THE PROCESS

1. Mediators shall make reasonable efforts to ensure the parties understand the mediation process before mediation commences.
2. Mediators have a duty to ensure that they conduct a process which provides parties with the opportunity to participate in the mediation and which encourages respect among the parties.
3. Mediators shall inform parties to a dispute that mediation is most effective when the parties with full authority to settle are in attendance and when they are willing to consider options for settlement.
4. Mediators who are lawyers shall not represent any party(ies) to the mediation.

- (d) the fact that the mediator is not compellable as a witness in court proceedings by any parties to the mediation.

XI. TERMINATION OR SUSPENSION OF MEDIATION

1. Mediators shall withdraw from mediation for the reasons referred to in paragraphs IV.3 and V.2.
2. Mediators may suspend or terminate mediation if requested by one or more of the parties.
3. Mediators may suspend mediation if in their opinion:
 - (a) the process is likely to prejudice one or more of the parties;
 - (b) one or more of the parties is using the process inappropriately;
 - (c) one or more of the parties is delaying the process to the detriment of another party or parties;
 - (d) the mediation process is detrimental to one or more of the parties or the mediator;
 - (e) it appears that a party is not acting in good faith; or
 - (f) there are other reasons that are or appear to be counterproductive to the process.
4. Mediators shall terminate mediation if the conditions referred to in XI.3.(a)-(f) are not rectified.

XII. OTHER CONDUCT OBLIGATIONS

Nothing in this Model Code of Conduct replaces, supersedes or alienates ethical standards and codes which may be imposed or additionally imposed upon any mediator by virtue of the mediator's professional calling.

RULE 24.1 MANDATORY MEDIATION

PURPOSE

24.1.01 This Rule provides for mandatory mediation in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes. O. Reg. 453/98, s. 1; O. Reg. 198/05, s. 2; O. Reg. 438/08, s. 15.

NATURE OF MEDIATION

24.1.02 In mediation, a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution. O. Reg. 453/98, s. 1.

DEFINITIONS

24.1.03 In rules 24.1.04 to 24.1.16,

“defence” means,

- (a) Revoked: O. Reg. 457/01, s. 5.
- (b) a notice of intent to defend,
- (c) a statement of defence, and
- (d) a notice of motion in response to an action, other than a motion challenging the court’s jurisdiction; (“défense”)

“mediation co-ordinator” means the person designated under rule 24.1.06.

(“coordonnateur de la médiation”) O. Reg. 453/98, s. 1; O. Reg. 627/98, s. 2;
O. Reg. 457/01, s. 5.

APPLICATION

Scope

24.1.04 (1) This Rule applies to the following actions:

1. Actions that were governed by this Rule immediately before January 1, 2010.
2. Actions that are commenced in one of the following counties on or after January 1, 2010:
 - i. The City of Ottawa.
 - ii. The City of Toronto.
 - iii. The County of Essex. O. Reg. 438/08, s. 16 (1).

LOCAL MEDIATION COMMITTEES

Establishment

24.1.07 (1) There shall be a local mediation committee in each county named in subrule 24.1.04 (1). O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 18 (1).

Membership

(2) The members of each committee shall be appointed by the Attorney General so as to represent lawyers, mediators, the general public and persons employed in the administration of the courts. O. Reg. 453/98, s. 1.

(3) The Chief Justice of the Superior Court of Justice shall appoint a judge or a case management master to be a member of each committee. O. Reg. 453/98, s. 1; O. Reg. 292/99, s. 3; O. Reg. 438/08, s. 18 (2).

Functions

(4) Each committee shall,

- (a) compile and keep current a list of mediators for the purposes of subrule 24.1.08 (1), in accordance with guidelines approved by the Attorney General;
- (b) monitor the performance of the mediators named in the list;
- (c) receive and respond to complaints about mediators named in the list. O. Reg. 453/98, s. 1.

(5) In carrying out their functions under subrule (4), committees may add mediators to the list and remove mediators from the list. O. Reg. 457/01, s. 6.

MEDIATORS

List of Mediators

24.1.08 (1) The mediation co-ordinator for a county shall maintain a list of mediators for the county, as compiled and kept current by the local mediation committee. O. Reg. 453/98, s. 1.

(2) A mediation under this Rule shall be conducted by,

- (a) a person chosen by the agreement of the parties from the list for a county;
- (b) a person assigned by the mediation co-ordinator under subrule 24.1.09 (6) or (6.1) from the list for the county; or
- (c) a person who is not named on a list, if the parties consent. O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 19.

(3) Every person who conducts a mediation under subrule (2), whether named on the list or not, is required to comply with this Rule. O. Reg. 453/98, s. 1.

Selection of Mediator

(4) The parties shall choose a mediator under subrule 24.1.08 (2). O. Reg. 453/98, s. 1.

(5) Before setting the action down for trial, one of the parties shall file with the mediation co-ordinator,

(a) a notice (Form 24.1A) stating the mediator's name and the date of the mediation session; or

(b) a mediator's report under subrule 24.1.15 (1) indicating that the mediation has been concluded. O. Reg. 438/08, s. 20 (5).

Assignment of Mediator

(6) If the mediation co-ordinator does not, within 180 days after the first defence has been filed, receive an order under subrule (1), a consent under subrule (3), a notice under clause (5) (a), a mediator's report or a notice that the action has been settled, he or she shall immediately assign a mediator from the list, unless the court orders otherwise. O. Reg. 438/08, s. 20 (5).

(6.1) If the mediation co-ordinator does not, within the time provided by an order under subrule (1) or a consent under subrule (3), receive a notice under clause (5) (a), a mediator's report or a notice that the action has been settled, and the action is set down for trial, he or she shall immediately assign a mediator from the list, unless the court orders otherwise. O. Reg. 438/08, s. 20 (5).

(7) The assigned mediator shall immediately fix a date for the mediation session and shall, at least 20 days before that date, serve on every party a notice (Form 24.1B) stating the place, date and time of the session and advising that attendance is obligatory. O. Reg. 453/98, s. 1.

(7.1) The date fixed for the mediation session shall be within 90 days after the appointment of the mediator, unless the court orders otherwise. O. Reg. 438/08, s. 20 (6).

(8) The assigned mediator shall provide a copy of the notice to the mediation co-ordinator. O. Reg. 453/98, s. 1.

24.1.09.1 Revoked: R.R.O. 1990, Reg. 194, s. 24.1.09.1 (3) (as amended by O. Reg. 198/05, s. 4 and O. Reg. 438/08, s. 21).

FAILURE TO ATTEND

Non-Compliance

24.1.12 If it is not practical to conduct a scheduled mediation session because a party fails to attend within the first 30 minutes of the time appointed for the commencement of the session, the mediator shall cancel the session and immediately file with the mediation co-ordinator a certificate of non-compliance (Form 24.1D). O. Reg. 453/98, s. 1.

NON-COMPLIANCE

24.1.13 (1) When a certificate of non-compliance is filed, the mediation co-ordinator shall refer the matter to a judge or case management master. O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 23 (1).

(2) The judge or case management master may convene a case conference under rule 77.08, and may,

- (a) establish a timetable for the action;
- (b) strike out any document filed by a party;
- (c) dismiss the action, if the non-complying party is a plaintiff, or strike out the statement of defence, if that party is a defendant;
- (d) order a party to pay costs;
- (e) make any other order that is just. O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 23 (2).

(3) Revoked: O. Reg. 394/09, s. 13.

CONFIDENTIALITY

24.1.14 All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions. O. Reg. 453/98, s. 1.

OUTCOME OF MEDIATION

Mediator's Report

24.1.15 (1) Within 10 days after the mediation is concluded, the mediator shall give the mediation co-ordinator and the parties a report on the mediation. O. Reg. 453/98, s. 1.

(2) The mediation co-ordinator for the county may remove from the list maintained under subrule 24.1.08 (1) the name of a mediator who does not comply with subrule (1). O. Reg. 453/98, s. 1.