

Ethical Enigmas: Some Turbulent Issues for the Aviation Litigator

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INTRODUCTION

Despite encountering the occasional practitioner that does not appear so motivated, it has been my experience in dealing with the aviation bar for the past 21 years that we all prize little above our reputations. We encounter the same “cast of characters” again and again, and we want not only our reputations for advocacy, but for fairness and ethics to precede us. So, join me once again as we pose some ethical obstacles and struggle, as we should, to “do the right thing.”

Issue 1:

Retention of Counsel

Facts

Stage One – After an aviation accident, the airline involved in the crash, in cooperation with its insurance broker and its underwriter, confer as to possible counsel to represent the airline in the inevitable litigation. Three potential firms are identified. In-house counsel for the airline calls the proposed lead counsel at each firm for an upcoming “beauty contest.” The only facts discussed over the phone are that the retention relates to the well-known accident and the identity of the insurer. Has an attorney-client relationship been formed? Is privilege expected?

Stage Two – Assume that in-house counsel advises the proposed firms that if they are interested in the case and have no conflict, in-house counsel will provide a packet to counsel, setting forth internal investigatory information and corporate counsel’s initial analysis of strategy and litigation/settlement goals. All three of the defense firms gladly accept the packet. Is this package privileged? What precautions should be taken?

Stage Three – A law firm is chosen. When litigation is initiated against multiple defendants, one of the law firms not chosen appears on behalf of co-defendants. Is this representation precluded because of

receipt of the “fact packet?” Does it depend upon whether the same lawyer is being used and how widely the fact packet has been distributed?

Stage Four – The fact packet is inadvertently disclosed in a massive document production to opposing counsel. Waiver of privilege?

Stage Five – After realizing the mistake, in-house counsel and outside defense counsel elect not to attempt to recall the document. The previously sensitive facts are all now a matter of public record with the NTSB. Moreover, defense strategy has been drastically altered over time and it is hoped that the old packet will mislead opposing counsel. Wise decision?

Analysis

Privilege, as defined in Black’s Law Dictionary, is “the right to prevent disclosure of certain information...especially when the information was originally communicated in a professional or confidential relationship.”¹ Perhaps the most well-known relationship giving rise to such a privilege is the relationship between attorney and client, from which arises the attorney-client privilege.² In accordance with this privilege, a lawyer is generally prohibited from revealing information relating to the representation of a client without first receiving authorization to do so, *i.e.*, informed consent from the client;³ “unauthorized” disclosure of privileged information is permissible if necessary to carry out representation.⁴

In order to assert the attorney-client privilege each of the following 4 factors must be present:

1. Client—the holder of the privilege is a client or, at the time of disclosure to the attorney, seeks to become a client;
2. Legal Representation—the communication was made to an attorney in connection with legal representation;

¹ BLACK’S LAW DICTIONARY 974 (Bryan A. Gardner, ed., 2000).

² BLACK’S LAW DICTIONARY 974 (Bryan A. Gardner, ed., 2000).

³ ABA Model Rules of Professional Conduct Rule 1.6 (2010).

⁴ *See id.*

3. In Confidence—the communication was made by the client (or prospective client), without the presence of strangers, for the purpose of securing legal services or an opinion of the law; and,
4. Claimed—the privilege is claimed or asserted (not waived) by the client.⁵

No clear test exists for determining when an implied attorney-client relationship is formed, perhaps because every situation is different. However, the trend of the case law is that such a relationship may be found to exist when a client reasonably believes that an attorney has become his/her lawyer and reasonably relies upon advice given by the attorney. Rule 1.18 of the ABA Model Rules of Professional Conduct governs duties to prospective clients. The Rule states that “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”⁶ As such, even though no client-lawyer relationship exists, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation. Comment 2 expands upon the formation of the relationship and states that not all persons who communicate information to a lawyer are entitled to protection under this Rule. If no reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship exists, then a person who communicates information to a lawyer is not a “prospective client.”⁷ Given the facts in Stage One, it seems difficult to believe the in-house counsel (client) believes that any of the three attorneys represent his interests in a fiduciary capacity. However, any confidences revealed may prove to be privileged.

Moving along to Stage Two of the scenario, ethical rules define a category of information about a client that a lawyer may not ordinarily reveal except to benefit the client. Rule 1.6(a) of the Model Rules of Professional Conduct states that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation.⁸ A fundamental principle in the client-lawyer relationship is that, in the absence of

⁵ See generally *In re Grand Jury Subpoena*, 341 F.3d 331, 336 (4th Cir. 2003).

⁶ ABA Model Rules of Professional Conduct Rule 1.18(a) (2010).

⁷ *Id.* at Comment [2].

⁸ ABA Model Rules of Professional Conduct Rule 1.6(a) (2010).

the client's informed consent, the lawyer must not reveal information relating to the representation. Moreover, "privilege applies to all confidential communications made to an attorney during preliminary discussions of the prospective professional employment, as well as those made during the course of any professional relationship resulting from such discussions."⁹ Even if the in-house counsel in Stage Two has not yet established an attorney-client relationship, all three defense firms have a duty to a prospective client to safeguard any documents or other property placed in the lawyer's custody.¹⁰

Stage Three of the scenario brings to light the often ubiquitous conflict of interest discussion. Conflicts come in many shapes and sizes. The Restatement of the Law Governing Lawyers §121 defines a conflict of interest as "a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person." The devil here is surely in the details. Much depends on how one defines "substantial," "materially," and "adversely." The Model Rules of Professional Conduct, while helpful, are not determinative. Rule 1.7 states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person.¹¹ Subsection (b) of the Rule fleshes out the exceptions to the Rule, which include the ability of a lawyer to represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.¹² It is safe to say that conflict issues present some of the most complex problems in the area of legal ethics. However, even if the lawyer decides no conflict exists, Rule 1.18 prohibits the lawyer from using or revealing the contents of the packet of information, even if the client or lawyer decided not to proceed with the representation.

⁹ *Hooser v. Superior Court*, 101 Cal. Rptr. 2d 341(Ct. App. 2000).

¹⁰ *Supra* Note 6, Comment [1](2010).

¹¹ ABA Model Rules of Professional Conduct Rule 1.7(a) (2010).

¹² *Id.* at (b)(1).

Under the ABA Model Rules of Professional Conduct, the duty of a lawyer to provide competent representation to a client requires the attorney to refuse to accept or continue employment if the representation of one client will be directly adverse to another client, or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.¹³ The substantial relationship test, used to determine whether disqualification of an attorney is required for his or her successive representation of parties with adverse interests, is intended to protect the confidences of former clients when an attorney has been in a position to learn them.¹⁴ However, a lawyer may represent a client if: the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and each affected client gives informed consent, confirmed in writing.¹⁵ Query, has the recipient of the packet been tainted the point where he could not appear adversely to prospective client?

In Stages Four and Five, counsel inadvertently discloses the packet in a massive production. Cases involving involuntary disclosure of privileged communications tend to be fairly straightforward as to waiver of the attorney-client privilege; jurisdictions differ most on how much of the communication is “involuntarily” waived. Court rulings are generally dependent on the type and nature of the disclosure.¹⁶ The Model Rules provide guidance in situations where confidential information is acquired by opposing counsel. Rule 4.4(b) states that “a lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” However, the Rule does not determine the status of the inadvertently disclosed document other than to say that the question of privileged status is beyond the scope of the

¹³ ABA Model Rules of Professional Conduct Rule 1.1 (2010).

¹⁴ *Knight v. Ferguson*, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007).

¹⁵ ABA Model Rules of Professional Conduct Rule 1.7(b) (2010).

¹⁶ *Eastman Kodak Co. v. International Harvester Co.*, 14 FR Serv.2d 1272 (S.D.N.Y. 1970); *Duplan Corp. v. Deering Milliken, Inc.* 397 F.Supp. 1146 (D.C. 1974).

Rules.¹⁷ Attorneys who inadvertently disclose privileged material are open to censure. In the case of *In re Holley*, the Court opined that “respondent’s failure to take adequate precautions to safeguard confidential materials of a client, even if considered unintentional, was careless conduct that reflects adversely on his fitness to practice law.”¹⁸

Issue 2:

Overlap of Coverage and Substantive Issues (and a little bit of privilege too).

Facts

Discovery in litigation involving an uncontained engine failure reveals a history of failures of the Hardsell Stage Two Turbine Disc. Hardsell’s internal investigation reveals that the disc failure was due to Hardsell’s improper 1-shot peening of the disc’s forged alloy blades resulting in “decreased fatigue resistance, a loss in tensile strength, embrittlement, and a greater susceptibility to vibration damage and fatigue failure.”

Further investigation at Hardsell reveals that blade serial numbers 11200-11350, the entirety of “Lot 150” from which the failed blade came, had been subject to the same improper peening.

Investigation also reveals the following critical documents:

- Minutes from a December 1, 2007 meeting of the Hardsell Product Integrity Board in which it was determined that these blades, Lot no. 150, S/Ns 11200-11350 potentially have “serious metallurgical deficiencies” and unanimously agreed to recommend a recall of the entire lot.
- A memorandum of December 3, 2007 from the Product Integrity Board to Hardsell’s Senior Vice-President of Quality Control recommending this recall.
- A memorandum of December 7, 2007 from Hardsell’s Director of Risk Management to the Director of Quality Control advising that the “action item” with respect to Lot No. 150 had been deferred until sometime after the January 1, 2008 renewal of Hardsell’s product liability policy with Push-Pull Insurance Co. (PPI). This document has come to be known as the *Pearl Harbor Memorandum*.

No further action with respect to Lot No. 150 was ever taken and no failures were reported to Hardsell until the accident that is the subject of this litigation.

HARSELL LIABILITY POLICY DETAIL:

The Hardsell policy contains the following exclusion:

¹⁷ *Id.* at Rule 4.4, Comment [2] (2010).

¹⁸ 729 N.Y.S.2d 128 (1st Dept. 2001).

* * * * *

WE WILL NOT INSURE: Any loss arising from the intentional conduct of the insured that materially increases the risk to PPI and is deliberately withheld from PPI.

* * * * *

THE PEARL HARBOR MEMORANDUM:

Insurance counsel for Hardsell, having had significant experience with aviation coverage as well as some basic understanding of common law fraud is of the opinion that the *Pearl Harbor Memorandum* presents serious coverage issues. He advises Hardsell of his concerns and assures Hardsell that he will not share his coverage opinions with the insurer. However, because of the significance of this document in the context of the litigation, he wants to report it to the insurer in his regular status report, on which Hardsell is routinely copied.

- Has counsel for PPI conducted himself ethically?
- Is PPI entitled to be advised of the document and its content despite its obvious coverage implications?
- What are insurance counsel’s options if Hardsell insists that he make no mention of these events and documents?
- Does it make a difference if these critical documents are currently subject to production pursuant to open discovery requests?

Analysis

Normally, an insurer’s duty to defend is coupled with the right to control the defense of the litigation. The purpose of this right is to allow insurers to protect their financial interest in the outcome of litigation and to minimize unwarranted liability claims. Giving the insurer exclusive control over litigation against the insured, safeguards the orderly and proper disbursement of the large sums of money involved in the insurance business.¹⁹ However, the lawyer may not take up the cudgels of the insurance carrier, when its interests are diametrically opposed to the interests of the insured. A lawyer who represents a client is required to do so wholeheartedly and with full determination to assert his client’s

¹⁹ *Parker v. Agricultural Ins. Co.*, 109 Misc.2d 678, 681-82, 440 N.Y.S.2d 964, 967 (N.Y. Sup. Ct. 1981); accord *Desriusseaux v. Val- Truck Corp.*, 230 A.D.2d 704, 705, 646 N.Y.S.2d 161, 162 (App. Div. 1996).

cause and to protect his rights.²⁰ With that said, he is not required to participate in or to help in perpetrating a fraud, and if he is satisfied that his client is so conducting himself, it is his duty as an officer of the court to withdraw as counsel.²¹ He may not, however, take up the defense of one upon whom the fraud is sought to be practiced, particularly where he has already received the confidence of his client.²²

When coverage issues exist, some courts are concerned that counsel may prejudice the insured by aiding the insurer in escaping coverage. Thus, where a material coverage issue exists, some courts allow the insured to retain independent counsel of its choice and control the defense of the litigation unless the insurer is willing to waive its coverage defenses. The insurer will be held responsible for the reasonable costs of this additional representation.²³ How the defense counsel discovers the information affecting coverage will determine his or her next step. If the information is discovered through the communications with your client insured, you must protect those attorney-client communications from third parties, including the insurer.²⁴ If the information discovered did not result from communications with the insured, the attorney should caution that the information about to be disclosed may affect coverage defenses. The attorney still has the duty to apprise the insurer of the status of the matter.²⁵ In both scenarios defense counsel are generally barred from disclosing the information to the insurer.²⁶ If

²⁰ *Schwartz v. Sar Corp.*, 195 N.Y.S.2d 496, 497 (N.Y. Sup. Ct. 1959), *rev'd on other grounds*, 195 N.Y.S.2d 819 (App. Div. 1959).

²¹ *Schwartz v. Sar Corp.*, 195 N.Y.S.2d 496, 503 (N.Y. Sup. Ct. 1959), *rev'd on other grounds*, 195 N.Y.S.2d 819 (App. Div. 1959).

²² *Id.*

²³ Debra A. Winiarski, WALKING THE FINE LINE: A DEFENSE COUNSEL'S PERSPECTIVE, 28 TORT & INS. L.J. 596 (1993).

²⁴ Ryan, CONFIDENTIALITY, DISCLOSURE, AND DISCOVERABILITY IN THE REPRESENTATION OF INSURER AND INSURED, 48 INS. COUNS. J 163 (1981).

²⁵ *See State Farm Mut. Auto. Ins. Co. v. Walker*, 382 F.2d 548 (7th Cir. 1967); *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973).

²⁶ Douglas R. Richmond, WALKING A TIGHTROPE: THE TRIPARTITE RELATIONSHIP BETWEEN INSURER, INSURED, AND INSURANCE DEFENSE COUNSEL 73 NEB. L. REV. 265, 281.

the attorney breaches the confidentiality obligation, he or she may be subject to disciplinary procedure and/or malpractice liability.²⁷

Issue 3:

Duty of Candor in Negotiation

Facts

Before the onset of litigation in a Warsaw/Montreal claim, counsel for plaintiff and defendant are engaged in settlement negotiations. Negotiations are going well and a mutually agreeable settlement seems imminent. However, plaintiff's counsel is unaware of the two-year condition precedent to suit under Warsaw/Montreal. The two-year SOL period is looming on the horizon. Is defendant's counsel under a duty to disclose the applicability of the Convention, or can she just let the SOL lapse in good faith? Does it matter if there is an open offer?

Analysis

The rule applicable in negotiations is Model Rule 4.1(a), which prohibits a lawyer, in the course of representing a client, from making "a false statement of material fact or law to a third person."²⁸ 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.²⁹ A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. The duty of candor set out in Model Rule 3.3 comes into play only when the tribunal itself is participating in the negotiations.³⁰

According to the ABA's Committee on Ethics and Professional Responsibility, a lawyer has no ethical duty to inform an opposing party in negotiations that the statute of limitations has run on his client's claim; to the contrary, it might violate Rules 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client") and 1.6 (confidentiality of information) to reveal such

²⁷ *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991).

²⁸ ABA Model Rules of Professional Conduct Rule 4.1(a) (2010).

²⁹ *Id.* at Comment 1.

³⁰ ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports Ethics Opinions, 22 LMPC 235 (May 17, 2006).

information without the client's consent.³¹ It follows that where the opposing party and his counsel appear to be unaware that the limitations period has expired, the lawyer may not discontinue negotiations over the claim simply on this ground in the absence of instruction from her client that she do so. Nor is the lawyer constrained by the rules of ethics from filing suit to enforce a time-barred claim, unless the rules of the jurisdiction preclude it.³² Nonetheless, revealing information so detrimental to your own case would seem contrary to the lawyer's obligation to her own client. In this author's view, the lawyer should refrain from misleading conduct while nonetheless preserving her limitations defense. One approach would be to clearly break off settlement negotiations at or near the expiration of the limitations period. This could, at minimum, prevent any misleading of one's adversary that an "open offer" traversed beyond the two-year limit.

Issue 4:

Mediator's Dilemma

Facts

Counsel for defendant airline and the estate of a deceased passenger attend mediation. Both attorneys are seasoned aviation litigators having experience together before the same mediator, who they chose mutually based upon past positive experiences. After joint opening statements, the parties adjourn to individual caucuses. The latest negotiation status is, demand:\$3.5 Million; offer: \$1 Million.

The mediator meets first with the plaintiff's group. Plaintiff's counsel, with his client's consent and in the presence of his client tells the mediator, in confidence. "This is a clear liability case. The decedent had ample life insurance, and my client is more interested in closure than in maximizing her recovery here. My client's bottom line is US\$1.5 Million. You have our authority to handle our demands as you think will best get us to our number by the end of the day."

Upon completion of this caucus, the mediator proceeds across the hall to meet with the attorney for the airline, and airline representative, and its insurer. Before the mediator can get a word in, the attorney blurts out, in confidence, "We know this is a liability case. We have a sympathetic decedent and

³¹ ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-387.

³² *Id.*

plaintiff. We have US\$2 Million to spend today. You can present a series of offers as you see fit to cut a deal by the end of the day.”

What are the mediator’s options? He has a case he can settle immediately based upon the confidential positions relayed by both sides. Does he pick a number? Split the difference? Recommend a number based upon his own evaluation of the case? Should he just tell the parties that there is overlap in their confidential settlement positions or would this of itself be some sort of indirect violation of confidence?

Issue 5:

Mediator Misconduct?

Facts

The parties in an aviation wrongful death case have had a long and frustrating day of mediation. Despite their best intentions of trying to settle, they are still miles apart. The demand stands at US\$5 Million, the offer at US\$1.5 Million after seven hours in session. In a last effort to settle the case while in caucus session, the parties ask the mediator to make a recommendation on a settlement figure.

The mediator approaches the plaintiff. He advises, “Look, I have thought this over and looked at all of the evidence. I know you do not want to hear this, but my evaluation of the case is going to be much closer to defendants than it is to yours. Do you want to proceed with my recommendation, or shall we try to revisit our offers and demands one more time?”

Thereafter, the mediator approaches the airline team, he advises, “look, I have thought this over and looked at all of the evidence. I know you do not want to hear this, but my evaluation of the case is going to be much closer to plaintiff’s than it is to yours. Do you want to proceed with my recommendation or shall we try to revisit our offers and demands one more time?”

After further negotiations, the case settles at US\$2.5 Million. Was the mediator’s conduct proper?

What if the mediator went ahead and provided two different recommendations, each one closer to the position of the adversary. The parties then settle at US\$2.5 Million, each thinking that they had done far better than the recommendation they received?

Did the mediator's conduct exceed ethical bounds? Does it matter that he made actual differing recommendations rather than just "bluff" as in the first mediation scenario?

Analysis

When a lawyer acts as either the mediator, he remains a lawyer subject to all of the applicable ethical constraints. However, neither party to the mediation is his "client," making for some grey areas as to the bounds of the mediator's conduct.

Although the ABA Model Rules of Professional Conduct do not deal with mediation directly, they do mention the attempts of some groups to develop a uniform standard. Comment 2 to the ABA Model Rule of Professional Conduct 2.4 notes that in performing the role of third-party neutral, "the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes...or the Model Standards of Conduct for Mediators..."³³

One could argue that a set of laws governing the role of the "third-party neutral" in addition to the states' codes of professional conduct would be superfluous. Many of the ethical standards that apply to an attorney acting as a party representative in court should also apply to an attorney involved in the mediation process. Although conduct in mediations is not specifically addressed by the Model Rules, these rules are not suspended in mediation. Model Rule 8.4 says, "It is professional misconduct for a lawyer to...(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Mediation processes certainly fall under this broad umbrella. Nonetheless, the mediation ritual is often replete with bluffing, puffing, feigned indignation, overstated legal positions, and a variety of somewhat insincere negotiating techniques. Should mediation be subject to no better standards than a game of poker?

The line between negotiating savvy and dishonesty has not been precisely established – and probably never will be. However, it can be reasonably inferred that misrepresentation as to facts can be distinguished from "misrepresentation" as to position, opinion, and intention. When another lawyer in mediation represents that he will never settle a case for less than 5X knowing he and his client will in fact

³³ MODEL RULES OF PROF'L CONDUCT R. 2.4, Cmt 2

accept X, this is generally considered a mere part of the mediation/negotiation ritual. However, a representation as to the critical facts, e.g., the client's medical condition at the time of the accident, would stand on shakier ethical ground.

In 2001, the National Conference of Commissioners of Uniform State Laws recommended that all states adopt their Uniform Mediation Act ("UMA"). However, only a handful of states had adopted the UMA: New Jersey, Ohio, Iowa, Idaho, South Dakota, Washington, Utah, the District of Columbia and Vermont. Five states are considering the UMA Nevada, Hawaii, Minnesota, New York and Rhode Island. See <http://www.karlbayer.com/blog/?p=5530> (*Tracking UMA Adoption*). While in some states, the UMA reinforces standard procedure, in many states, it conflicts with the laws already in place and is thought to be less stringent than laws already in place. See <http://apps.americanbar.org/environ/committees/adr/uma.shtml>.

The UMA is comprised of sixteen sections that were designed to cover the following five areas of mediation: (1) prevention of matters disclosed in mediation from leaking into judicial proceedings; (2) limit mediation reports to courts or other authorities to the most basic facts, such as whether it occurred, who participated, and whether an agreement was reached; (3) mediator conflicts of interest; (4) standardizing categories of permitted participants; and (5) matters privileged against disclosure and privilege exceptions.

The UMA calls for all communications during a mediation to be privileged and confidential. This can create problems if the results of the mediation are disputed. It would appear to follow that any misrepresentation or verbal deception committed during the mediation could not be proven as it could never be revealed. In *Reese v. Tingey Construction*, a workers' compensation claims service intervened to mediate a dispute between a workers' compensation claimant and a manufacturer of a balcony railing. After the mediation, the agreement faltered. The court held that the claims service's attorney could not be compelled to testify regarding any of the mediation communications or the existence of an alleged oral agreement. Having adopted the UMA, Utah law prohibited any "person attending an ADR proceeding... [from] disclos[ing] or be[ing] required to disclose any information obtained in the course of an ADR

proceeding” unless all parties and the mediator agree otherwise.³⁴ Shielded by the UMA, there was no way to prove the content of what was likely a fairly-negotiated settlement.³⁵

However, Section Six of the UMA does provide participants to a mediation with important protection from fraud during a mediation. Section 6(a)(5) reads that “[t]here is no privilege under Section 4 for a mediation communication that is...sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator.”³⁶ The Act does not define professional misconduct.

The Model Standards of Conduct for Mediators:

In 2005, a joint committee comprised of the ABA Section of Dispute Resolution, the American Arbitration Association and the Association for Conflict Resolution developed Model Standards of Conduct for Mediators. Initially, these model rules were developed to provide guidance on “the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.”³⁷ There are nine standards to which mediators should be held. The sections are entitled (1) Self-Determination, (2) Impartiality, (3) Conflicts of Interest, (4) Competence, (5) Confidentiality, (6) Quality of the Process, (7) Advertising and Solicitation, (8) Fees and Other Charges and (9) Advancement of Mediation Practice. Similarly to the UMA, these model rules have not been adopted by many states and therefore they do not have the force of law. However, these standards are used by some professional organizations that offer mediation services, such as the American Arbitration Association.

The first model standard, “Self-Determination,” requires the mediator to help the parties in dispute to make voluntary and unforced decisions. This refers not just to decisions surrounding settlement offers, but also to various other stages of the mediation including mediator selection. According to the model rules, a mediator can advertise for business. Like an attorney, “a mediator shall

³⁴ Utah Code Ann. §78-31b-8(4)

³⁵ 177 P.3d 605 (Utah 2008)

³⁶ Uniform Mediation Action §6(a)(5)

³⁷ *Preamble*, The Model Standards of Conduct for Mediators (September 2005).

be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator’s qualifications, experience, services and fees.”³⁸ The Advertising and Solicitation section emphasizes upholding the integrity of the mediation process, and specifically warns against any advertisements that make promises as to outcome.³⁹

The second standard recognizes and confirms what is arguably the cornerstone of mediation: the mediator must be neutral. “A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.”⁴⁰ If the mediator is prevented from upholding the quality of the mediation process due to a bias towards one side, he should withdraw. This is also true if after the mediation process has begun, the mediator learns of a potential conflict of interest that might reasonably bring into question the mediator’s impartiality. “If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.”⁴¹ He should also withdraw if it becomes clear that he does not have the training or experience or understanding to competently conduct the mediation. “If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall...take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.”⁴²

The mediator’s responsibility is to facilitate a mutually agreeable resolution of the dispute. The fifth model standard recognizes the important role confidentiality plays in achieving a mediation’s purpose. “(A) A mediator shall maintain the confidentiality of all information obtained by the mediator in a mediation, unless otherwise agreed to by the parties or required by applicable law...(C) A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.”⁴³

³⁸ Model Standards of Conduct for Mediators Standard VII-A

³⁹ Model Standards of Conduct for Mediators Standard VII-A(2)

⁴⁰ Model Standards of Conduct for Mediators Standard II-A

⁴¹ Model Standards of Conduct for Mediators Standard II-C

⁴² Model Standards of Conduct for Mediators Standard IV-B

⁴³ Model Standards of Conduct for Mediators Standard V-A, C

Looking at the two scenarios presented above. In the case of the mediator presented with dual overlapping and confidential settlement positions, the good news is that he knows he has a case he can settle. The bad news is that he needs to protect the confidential positions of both parties. In this author's opinion there are several safe courses he can navigate with the underlying theme of honesty being the best policy. If the mediator is of the view that even advising the overlap in settlement positions is a violation of confidentiality, might he not advise the parties that based upon conversations with both sides he has a high confidence of a successful early resolution. He might then ask the parties if they would accept an early settlement proposal that he believes will settle the case in a mutually acceptable range. If the parties consent, they would appear to have endorsed the mediator's discretion to evaluate the claim, and the mediator would seem free to roam between the offer and the demand to recommend a settlement he considers fair.

Alternatively, the mediator could advise the parties that he considers settlement prospects good and insist on an exchange for formal demands and offers, ultimately bring the settlement to consummation through a somewhat anticlimactic mediation waltz. Either of these two scenarios would seem infinitely better than the mediator creating his own "faux" set of demands and offers, giving the impression of bargaining "give and take" when there is none.

The proposed Model Standards for the Conduct of Mediators ("MSCM") provides. "A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation." MSCM VI (A) (4).

ABA Model Rule 4.1 provides:

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; 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.

However, who is the mediator's client? Absent a client, this rule would seem inapplicable. Nonetheless Model Rule 8.4 declares that it is misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

In the hypothetical presented, our mediator has misrepresented his supposedly objective views of the case to advance settlement. He has knowingly stated two different mutually incompatible settlement positions to wrongly procure a settlement – a settlement premised upon the parties reliance on the presumed objectivity and fairness of the mediator. In this author's view, it matters not whether the mediator puts forth actual numbers or simply falsifies a general settlement evaluation. In both instances, he has misrepresented his views of the case; he has just done so more specifically in the second scenario.

Issue 6:

False Evidence/Testimony

Facts

You represent pilot training entity Safety Flight Training Worldwide ("SFT"). In the aftermath of an accident involving a failed engine compounded by pilot error, you request the training record for the accident's captain, Stephen Cary. Your investigation reveals that Captain Cary twice failed a simulated engine failure test (comments on the simulation test sheet read: "loss of situational awareness; failure to don oxygen equipment during simulated loss of cabin pressure."); nonetheless, SFT incorrectly passed him for recertification in the MB500. Upon interviewing the instructor, you discover that Captain Cary never even completed the recertification course because he had to leave early for a family emergency. In reviewing documents for discovery, you are surprised to find a training sheet added to the file showing Captain Cary had successfully completed recertification training and had been "retrained and passed" on emergency engine failure procedures. Moreover, the director of SFT is about to be deposed and will

apparently testify that Captain Cary completed his training. What are your obligations with regard to producing the document and the witness?

Analysis

All attorneys are under a duty not to present false or perjurious testimony. Both the Model Rules and Model Code impose an affirmative duty to avoid participation in wrongdoing, including knowingly presenting false or perjurious testimony, or facilitating a crime or fraud by the client.⁴⁴ Rule 3.3 of the ABA Model Rules of Professional Conduct states:

(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 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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

While an advocate is responsible for pleadings and other documents prepared for litigation, he does not create the underlying facts. The situation changes quite a bit if a lawyer knows that the client

⁴⁴ ABA Model Rules of Professional Conduct Rule 3.3(a)(2010); Model Code of Professional Responsibility DR 7-102 (repealed 2009).

intends to testify falsely or wants the lawyer to introduce false evidence. The lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence.⁴⁵

Rule 3.3's prohibition against offering false evidence is the counterpart to Rule 3.4's prohibition against falsifying evidence. Rule 3.3 casts the obligation as part of a lawyer's duty of candor toward a tribunal, while Rule 3.4(b) frames the obligation as being owed to an opposing party and counsel. A single act, of course, can violate both obligations.⁴⁶

The suspicion or outright exposure of perjury can not only cause serious harm to the merits of the client's case, but may also lead to personal and professional censure for the lawyer. Both perjury and subornation of perjury are criminal offenses.⁴⁷ Punishment of a criminal defendant may be enhanced based on perjury. A lawyer who knowingly presents false testimony is subject to fines and other sanctions, including attorney fees, disqualification and disbarment.⁴⁸ Even if the perjury is not immediately exposed and the client wins the case, the subsequent exposure of the perjury may be grounds for relief from the judgment for fraud on the court under Fed. R. Civ. P. 60(b)(3).

In the hypothetical, the lawyer has strong reason to believe that a given document that has “turned up” has been fraudulently created and inserted into the case. The focus here would seem to be on the meaning of “knowingly” using false evidence. Moreover, is the lawyer “using” it if he does not affirmatively himself rely on it? Does the lawyer here have an obligation to affirmatively “out” his client? What if his admonitions to his client are unheeded and the client proceeds to rely on the document under oath? What can the lawyer do short of withdrawing from the case? The lawyer would seem to be facing the Hobson’s choice of introducing false evidence or breaching the attorney-client privilege.

Conclusion

⁴⁵ ABA Model Rules of Professional Conduct Rule 3.3 Comment [6] (2010).

⁴⁶ *In re Swarts*, 30 P.3d 1011 (Kan. 2001) (after learning that evidence consisting of brown paper sack containing handkerchief was missing, county prosecutor brought his own to court and placed it on counsel table during plea change and sentencing hearing, intending to lead defendant to believe evidence was not lost).

⁴⁷ *United States v. Dunnigan*, 507 U.S. 87, 88-89, 113 S. Ct. 111, 122 L. Ed. 2d 445 (1993).

⁴⁸ *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1487 (S.D.N.Y. 1986).

We hope you have enjoyed pondering these ethical issues with us. As is often the case, many of these scenarios create more questions than answers. However, if in the course of our advocacy, we nonetheless bear in mind our duties of honesty, candor, and fairness [to court and adversary] as well as our role as “Officers of the Court,” we will likely anticipate and avoid ethical missteps in the early going.

FPA June 9, 2011