Diving into ADR Ethics:
Exploring the Ethical Obligation of Attorneys as Advisors, Advocates, and Third-Party Neutrals

By Kenneth Florey and Christopher Gorman

Recently, we were invited by the DuPage County Bar Association to present on ethical considerations for attorneys practicing alternative dispute resolution ("ADR"). We were fortunate that Tania K. Harvey, who focuses on leveraging ADR to settle family law disputes, could provide insight into aspects of ADR that do not receive as much attention as they should, namely collaborative law.

Attendees participated in what we hoped would be a conversation about the ethical dilemmas commonly faced by attorneys during ADR and provided meaningful feedback on our presentation. However, one comment stood out. Our presentation was what one attendee described as "too basic."

Indeed, in many ways, it was. The presentation was *intended* to provide a basic overview of common ethical dilemmas confronting attorneys practicing ADR—hoping that the issues discussed would serve as an introduction for attorneys unfamiliar with ADR practice and a refresher for seasoned attorneys. Our motivation was simple. There are simply too many ethical considerations to explore to their fullest depth in an hour. And, at times, we can all use a refresher.

The various roles of attorneys practicing in ADR and their relationship to clients—commonly characterized as advisor, advocate, and third-party neutral—carry with them unique and complex responsibilities for ensuring an attorney's ADR practice meets their ethical responsibilities. Simply put, even "basic" ethics is difficult to navigate in an hour-long presentation. So, we were thrilled when DCBA offered the opportunity to create a series of articles delving deeper into the obligations of attorneys and the practice of ADR, regardless of their role.

The Complications of Identifying Ethical Obligations of Attorneys by Role

Consistent with our presentation, it is easiest to begin at the surface of legal ethics in ADR practice before diving deeper. Ethical considerations for attorneys involved in ADR diverge depending on the role an attorney plays, the goals of their client, and their relationships with other parties involved in ADR. The ethical considerations compound for attorneys acting as third-party neutrals or attorneys dealing with third-party neutrals who may or may not be attorneys themselves.

For example, the ethical considerations for attorneys acting merely as advisors are more straightforward than for attorneys acting as advocates. An attorney acting in the role of an advocate must navigate the ethical implications of their relationship not only to their client but to the opposing party, the third-party neutral, and potentially the court, all while keeping an eye on the overall strategy for resolving a matter in their client's best interest. In other words, an attorney as advisor typically has to focus only on those ethical considerations involved in directly advising their client on the potential resolution of the case without the additional ethical burdens that come with interacting with third parties as a case moves through discovery and toward a full-blown trial.

Of course, few practicing attorneys are strictly either advisors or advocates. Rather, attorneys must navigate the uncertain depths of their obligations in one role while anticipating the obligations required in other roles. This is true when such an attorney as an advisor may be required to assume the role of an advocate as a matter moves through ADR before needing to adopt a much stronger role as an advocate in litigation. As a result, all attorneys must be aware of the ethical obligations to be observed in either.

In contrast, a third-party neutral typically needs to be aware only of the ethical considerations in resolving the dispute before them. Yet, their role is not without its own unique ethical demands. To complicate matters further, there is often a nettlesome overlap between the ethical obligations of attorney roles as advisor, advocate, and third-party neutral.

Sources of Ethical Considerations for Attorneys in ADR Practice

Given the challenging nature of analyzing ethical practice in ADR through the overlapping roles of attorneys, it is helpful to understand where ethical rules and standards can be found, especially for attorneys with limited experience in the many forms of ADR. While such an understanding may be "basic," it is helpful for attorneys as they delve deeper into the ethical standards for ADR practice and beyond surface-level understandings.

Ethical Rules and Standards for Advisors and Advocates

To a certain extent, the ethics for attorneys practicing in ADR, either as an advisor or advocate, are not altogether different than the broader ethical responsibilities of attorneys. That is, many of the ethical rules and standards applicable to representing clients in ADR are found in familiar waters—the Illinois Supreme Court Rules of Professional Conduct and comparable rules in other jurisdictions, applicable court decisions relating to attorney ethics in the area, and local court rules. As with any practice, each will impact an attorney's role as an advisor or advocate in ADR.

For example, Rule 1.1 of the Illinois Supreme Court Rules of Professional Conduct requires that a lawyer provide competent representation to their clients, meaning that they provide representation consistent with "the legal knowledge, skills, thoroughness, and preparation reasonably necessary for the representation" of the client and their interests.[1]

For attorneys practicing in ADR, this rule requires a thorough grasp of how to maintain confidential communications throughout the dispute resolution process. As with any practice, this requires a nuanced understanding of applicable rules and statutes. For instance, if an attorney representing a public body mistakenly believes all statements and records shared during the mediation will be confidential and privileged because the parties agreed to keep such confidentiality in a written mediation agreement, they would be mistaken. Section 6 of the Illinois Uniform Mediation Act excepts any mediation communication that is "public under the Freedom of Information Act [("FOIA")]" from mediation communications that are otherwise privileged under the act.[2] The attorney's lack of awareness that certain statements made, or documents shared in connection with mediation, may not be privileged would arguably be a violation of the attorney's duty of competency.

To compound the attorney's problems, it may have been worthwhile to understand that Local Rule 83.5 of the United States District Court for the Northern District of Illinois may have preserved the confidentiality of any communications subject to FOIA through 28 U.S.C. § 652 (d) if the attorney had an opportunity to remove the case to federal court and pursued referral or approval of non-binding ADR. As with Local Rule 83.5, such rules regarding confidentiality for proceedings "referred or approved" by the court may differ from privileges available through private ADR.

At a minimum, this requires that any attorneys practicing in ADR understand that parties must put expectations regarding the confidentiality of communications during mediation in writing, especially if the mediation is not required by court order or administrative mandate. From an ethical perspective, it also requires a thorough understanding of how privilege

1. Ill. Sup. Ct. R. 1.1.
2. 710 ILCS 35/6(a)(2).

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