6-1-2013

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Recommended Citation
Bobette Wolski. (2013) "An evaluation of the rules of conduct governing legal representatives in mediation: Challenges for rule drafters and a response to Jim Mason" Legal ethics, 16 (1), : ISSN 1460-728X.

An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation:
Challenges for Rule Drafters and a Response to Jim Mason

Bobette Wolski

Abstract:
This article provides a comparative analysis of the rules of conduct governing legal representatives in Australia, the United States of America and the United Kingdom as they apply to a range of ethical issues in mediation. The analysis has four main aims. First, it clarifies the position in Australia and the USA - the Australian and American mediation communities have not introduced separate codes for ‘mediation advocates’ as Mason recently suggested. But some provisions have been made for mediation practice. The second aim is to tease out from these provisions learning points for policy makers and rule drafters. Amongst the points to consider is whether or not, and under what circumstances, mediators should be regarded as courts, or as third parties for the purpose of the rules. Third, the analysis provides some grounds for arguing that the current rules of conduct are appropriate for legal representatives in mediation. Fourth, it identifies challenges associated with proposals to introduce rules which require legal representatives to participate in mediation in good faith in a non-adversarial manner according to higher standards of honesty and candour. The article concludes by identifying a number of assumptions which permeate the literature on this topic.

Key words: legal representatives, mediation, rules of conduct, duties owed to mediators.

1. INTRODUCTION

Many lawyers are now involved in mediation, either as a mediator or as a legal representative for one of the parties to the mediation. These roles raise a host of new ethical dilemmas for lawyers. A central question arises as to whether or not these dilemmas can be resolved through the application of existing rules of professional conduct for lawyers. The question seems to have been answered relatively easily in the case of lawyer mediators. Since mediators have no ‘client’ in the classic sense of the term, the existing rules seemed obviously not to fit their activities. Separate or supplementary ethical standards and guidelines have been developed for lawyer mediators in most jurisdictions by the professional bodies to which they belong (and by a number of other ADR practitioner accreditation organisations whose membership is not restricted to lawyers). In the case of legal

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1. Associate Professor of Law, Faculty of Law, Bond University, Queensland, Australia.

2. Phyllis E Bernard, ‘Dispute Resolution and the Unauthorized Practice of Law’ in Phyllis Bernard and Bryant Garth (eds), Dispute Resolution Ethics: A Comprehensive Guide (American Bar Association Section of Dispute Resolution, 2002) 89, 98. Much of the momentum towards the development of codes of conduct for mediators is attributable to a perceived need to professionalize the practice of mediation.

3. In Australia, guidelines for mediators have been promulgated by the peak national associations for lawyers (ie the Law Council of Australia and the Australian Bar Association) and by various state and territory law societies and bar associations. See eg Law Society of New South Wales, Revised Guidelines for Solicitors who act as Mediators (at 1 January 2008); Queensland Law Society, Standards of Conduct for Solicitor Mediators (at 23 September 1998).

4. See eg the Australian National Mediator Standards, Practice Standards For Mediators Operating Under the National Mediator Accreditation System (at September 2007) and the Institute of Arbitrators and Mediators Australia, Principles of Conduct for Mediators (2003). In the US, see the American Arbitration Association, the American Bar Association (Section of Dispute Resolution) and the Association for Conflict Resolution, Joint Standards, Model Standards of Conduct for Mediators (2005). In the UK, see the European Code of Conduct for
representatives, the answer to whether or not new or supplementary rules are needed for mediation practice is still being debated. Jim Mason is the latest contributor to this debate.\(^4\) Mason’s main concern is ‘whether an additional mediation advocates’ code is worthwhile in the quest to curb the adversarial imperative’.\(^5\) While Mason does not take on the task of drafting a new code,\(^6\) he suggests that such a code would need to be concentrated around three principles, namely: non-adversarial behaviour as the norm, good faith participation, and honesty vis-à-vis mediators.\(^7\) These are common ‘themes’ for commentators who call for new rules of conduct for mediation practice. In formulating his proposals, Mason draws on, and suggests that rule drafters in the United Kingdom (UK) might look to, initiatives in such jurisdictions as Australia and the United States of America (USA). This article clarifies the position of legal representatives under the rules in Australia and the USA - in neither jurisdiction do the rules ‘cover advocates’ practice during arbitration or mediation\(^8\) in any manner which is unique to mediation or different from ethical practice in litigation. Some accommodation for mediation has been made in the rules in Australia (the term ‘court’ has been defined to include ‘mediations’) and in the USA (cases and commentary suggest that a judge acting as a mediator should be treated as a tribunal). These provisions – while not amounting to a code - offer important learning points for policy makers and rule drafters in all jurisdictions.

To that end, this article provides a comparative analysis of the rules of professional conduct governing legal representatives in mediation in Australia, the USA and the UK. It is in eight parts. Part 2 examines the general duties owed by legal representatives in mediation and the sources of those duties. The question of where mediators belong in this predominantly tripartite system of duties is raised. Part 3 focuses on the particular duties owed by lawyers regardless of whether they are dealing with a court, a client or a third party. These are the lawyer’s obligations to be honest, fair and courteous. An important point arises from this discussion: although lawyers owe duties of honesty, courtesy and fairness to courts, clients and third parties with whom they deal, different standards are owed to each of these ‘entities’. Thus, the answer to the question of where mediators belong in the current scheme is an important one.

Part 4 considers whether or not lawyers are subject to a duty to act in good faith and to cooperate in mediation. Part 5 posits seven ethical dilemmas which might confront legal representatives in mediation and suggests how they might be resolved using the current framework of professional conduct rules. In the author’s opinion, these dilemmas can be resolved satisfactorily without the need for recourse to supplementary rules.

Part 6 evaluates a number of proposals for new rules for mediation practice and highlights challenges facing policy makers and rule drafters. Part 7 identifies some of the assumptions which permeate our work in relation to the regulation of lawyers’ conduct in mediation. The

\(^4\) Jim Mason, ‘How Might the Adversarial Imperative be Effectively Tempered in Mediation?’ (2012) 15 Legal Ethics 111.
\(^5\) Ibid, 116.
\(^7\) Mason (n 4) 111.
\(^8\) Ibid, 117.
article concludes in Part 8 by identifying directions for future research and analysis with respect to the legal profession’s rules of conduct and mediation.

Throughout the article, I use the terms ‘legal representative’, ‘legal practitioner’ and ‘lawyer’ interchangeably.

2 THE GENERAL DUTIES OWED BY LEGAL REPRESENTATIVES IN MEDIATION

While there has been some debate about whether or not mediators are engaged in the practice of the law, there is no doubt that a lawyer enters into a lawyer-client relationship and practises law when he or she represents a client in mediation. Consequently, the conduct of legal representatives in mediation is governed by the law of lawyering, that is, relevant portions of the law of contract, torts, equity, procedural law, general legislation, legislation governing mediation, the Legal Profession legislation, together with the rules of conduct promulgated by the law societies and bar associations to which lawyers belong.

Additional conduct obligations may be accepted by the parties and their legal representatives by virtue of an agreement to mediate or other dispute resolution clause (in the case of private mediations) or imposed on them by specific statutory directives to mediate (in

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9 Generally, on this issue, see American Bar Association Section of Dispute Resolution, Resolution on Mediation and the Unauthorized Practice of Law (adopted by the Section on 2 February 2002); Carrie Menkel-Meadow, ‘Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers’ Responsibility’ (1997) 38 South Texas Law Review 407, 422-424.
10 The rules in some jurisdictions make explicit provision to this effect. See eg Rule 15(d) of the Barristers’ Conduct Rules promulgated by the Australian Bar Association which provides that representation of a client in mediation falls within the scope of the work of a barrister. For solicitors, see Mark Richardson, ‘Defining Legal Work’ (2004) (June) Law Society Journal 63, 64.
11 The term ‘the law of lawyering’ is used here in a broad sense to cover all aspects of the law governing lawyers.
12 In the US, one needs to be cognisant of the American Law Institute’s Restatement (Third) of the Law Governing Lawyers (1998) which ‘clarifies and synthesizes the common law applicable to the legal profession’: see introduction to the Restatement. Although it appears as part of the Restatement Third series, there is no previous Restatement of this subject.
13 See eg Civil Procedure Rules 1998 (UK); Federal Court Rules 2011 (Cth); Federal Rules of Civil Procedure (As amended to 1 December 2010) (USA).
14 Regard must be paid to legislation such as the Australian Consumer Law which is set out in Schedule 2 of the Competition and Consumer Act 2010 (Cth).
15 Currently there is no general national legislation in Australia governing the conduct of parties and their legal representatives in mediation. In the US, there has been some general legislative attempt to regulate behaviour in mediation with the promulgation of the Uniform Mediation Act (2001). However, the Act is primarily concerned with the issues of confidentiality and enforcement of mediated settlement agreements (MSAs). It does not have the force of law until it is adopted in a given state. In the UK, lawyers involved in EU cross-border mediations of civil and commercial matters commenced on or after 6 April 2011 must have regard to Part 78 of the Civil Procedure Rules which implements aspects of the EU Mediation Directive 2008/52/EC into the laws of England and Wales. However, as with the legislation in the US, the regulation in the UK is primarily concerned with the issues of confidentiality and enforcement of MSAs.
16 In the UK, see the Legal Services Act 2007 (UK). In Australia, see eg Legal Profession Act 2004 (NSW).
17 The Legal Profession legislation in the UK and in the states and territories of Australia permits the Councils of the Law Society and the Bar Councils and Associations to make rules with respect to the practices of solicitors and barristers. In fact, the rules in several jurisdictions have now been given a statutory foundation and other regulatory bodies are involved in the rule-making process. For a description of the process in Australia, see Gino Dal Pont, Lawyers’ Professional Responsibility (Lawbook Co, 3rd ed, 2006) 17-18; and in the UK, see Andrew Boon and Jennifer Levin, The Ethics and Conduct of Lawyers in England and Wales (Hart Publishing, 2nd ed, 2008) 117-120.
the case of mandatory mediations). The focus in this article is on the rules of conduct promulgated by lawyers’ professional bodies for they set minimum standards which apply to legal representatives regardless of how mediation comes about. The article briefly considers general law and procedural law requirements in so far as they impact the duties owed under the rules.

Recently, there have been a number of changes made to the professional conduct rules in the jurisdictions under consideration, although none have had an impact on mediation practice. In some Australian jurisdictions, solicitors are now governed by the Australian Solicitors’ Conduct Rules (hereafter ASCR) rather than the Law Council of Australia’s Model Rules of Professional Conduct and Practice (hereafter the Model Rules) on which Mason based his observations. The Model Rules (or a variant of them) continue to be used in other states and territories of Australia. New national conduct rules for barristers have also been adopted in some states and territories. This article focuses on the ASCR and the new Barristers’ Conduct Rules (hereafter Australian Bar Rules). In the UK, solicitors are governed by the Solicitors Regulation Authority Code of Conduct 2011 (hereafter SRA Code of Conduct) which replaced the Solicitors’ Code of Conduct 2007. Barristers in the UK are still governed by the Code of Conduct of the Bar of England and Wales (hereafter UK Bar Rules). The main source of regulation for lawyers in the USA is the American Bar Association Model Rules of Professional Conduct (hereafter the ABA Model Rules) which have been adopted in whole or in part by most states.

18 It is widely agreed that these rules set only minimum standards or base levels of conduct rather than ceilings. See Dal Pont (n 17) 4; Boon and Levin (n 17) 7; Carol Rice Andrews, ‘Highway 101: Lessons In Legal Ethics That We Can Learn On the Road’ (2001-2002) 15 Georgetown Journal of Legal Ethics 95. There are a number of other sources (and degrees) of regulation of lawyers’ behaviour in mediation which are not discussed in this article. For instance, in Australia, Commonwealth Government Agencies (and their legal counsel) and Family Dispute Resolution system lawyers are all subject to additional regulation, see Legal Services Directions 2005 (Ch) and Family Law Act 1975 (Ch) s 60K(1) and s 10F respectively. Generally see National Alternative Dispute Resolution Advisory Council (NADRA), Maintaining and Enhancing the Integrity of ADR Processes: From Principles to Practice Through People. A Report to the Attorney-General (February 2011), Appendix 2.1, 117 for a list of Australian federal legislation prescribing conduct obligations in ADR. There is also additional regulation at the state level in Australia. See eg the Victorian Law Reform Commission (VLRC), Civil Justice Review Report No 14 (March 2008) Chapter 3: ‘Improving the Standards of Conduct of Participants in Civil Litigation’ (‘Civil Justice Review Report’).

19 Mason (n 4) 111. The Law Council of Australia (hereafter LCA) approved new National Conduct Rules (the Australian Solicitors’ Conduct Rules) in June 2011. To date, they have been adopted by law societies in Queensland and South Australia. The Barristers Conduct Rules (hereafter Australian Bar Rules) were approved by the Australian Bar Association on 1 February 2010 and updated on 8 October 2010. They replaced the Australian Bar Association Model Rules (at 8 December 2002) in a number of states and territories.

20 See Solicitors Regulatory Authority Code of Conduct 2011 (dated 17 June 2011, commencing 6 October 2011) (hereafter SRA Code of Conduct). Although a different approach has been adopted in the SRA Code of Conduct in that it sets out outcomes-focused conduct requirements, the general duties and priorities remain the same as those adopted in the SRA Solicitors’ Code of Conduct 2007.


22 As is the case with the model rules in Australia, the American Bar Association Model Rules of Professional Conduct (2010) (hereafter the ABA Model Rules) are not in and of themselves binding but the rules adopted in a particular state are enforceable against practitioners practising in that state.
With one exception, law societies and bar associations in Australia, the UK and the USA have not promulgated new or supplementary rules to govern their members’ conduct when they are acting as legal representatives in mediation. The exception is paragraph 708.1 of the UK Bar Rules which makes specific provision about the need for ‘honesty’ in mediation. One accommodation has been made for mediation in the Australian Rules: both sets of conduct rules in Australia define ‘court’ to include ‘mediations (and arbitrations)’. These provisions are discussed in more detail later in the article.

Some non-binding guidelines for legal representatives in mediation have emerged in Australia and the USA (and it is to these guidelines that Mason refers in the body of his work). The Law Council of Australia (LCA) published Guidelines for Lawyers in Mediation in March 2007. These guidelines do not impose any additional obligations on legal practitioners; nor do they derogate from the usual obligations imposed on them. The American Bar Association (ABA) promulgated Ethical Guidelines for Settlement Negotiations (hereafter ABA’s Settlement Guidelines) in 2002. As its title suggests, the ABA’s Settlement Guidelines are aimed at settlement negotiations. While the ABA notes that ‘[a]s a general rule ... the involvement of a third party neutral in the settlement process does not change the attorney’s ethical obligations’, it also makes it clear that ‘to the extent there may be ethical issues specific to mediation’, those issues are beyond the scope of the Settlement Guidelines. As is the case with the guidelines in Australia, the ABA’s Settlement Guidelines do not ‘replace existing law or rules of professional conduct ... and should not serve as a basis for civil liability, sanctions, or disciplinary action’.

From the various sources mentioned above, a number of duties are imposed on legal practitioners. Of paramount importance is the practitioner’s duty to the court and the administration of justice. As an aspect of the duty to the administration of justice, legal practitioners must comply with the law including the rules of conduct of the profession. They must foster respect for the law and its administration. They must behave in a way which maintains the trust placed in them by the profession and the public. They must not engage in, or assist, conduct that is illegal or dishonest or otherwise discreditable to a practitioner, prejudicial to the administration of justice or which might otherwise bring the legal profession into disrepute. Importantly, these general duties are not restricted to court

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24 The Australian Solicitors’ Conduct Rules (hereafter ASCR) and the Australian Bar Rules define ‘court’ to mean any body described as such, a range of judicial and statutory tribunals, investigations and inquiries established by statute or a Parliament, Royal Commissions and ‘arbitrations and mediations’ (with the ASCR using the phrase ‘an arbitration or mediation or any other form of dispute resolution’): see glossary of terms, ASCR and definitions section, Australian Bar Rules. These definitions have been carried over from the LCA Model Rules of Professional Conduct and Practice (at 16 March 2002) and the Australian Bar Association Model Rules (at 8 December 2002): Definition Sections, LCA Model Rules and Barristers’ Rules.
25 Mason (n 4) 117.
26 The LCA has also released a document titled Guidelines for Parties in Mediations (at August 2011).
27 Introduction Note, LCA, Guidelines for Lawyers in Mediation (at March 2007). Also see the Law Society of New South Wales, Professional Standards for Legal Representatives in a Mediation (January 2008) (the standards were first promulgated in 1993).
28 ABA, Ethical Guidelines for Settlement Negotiations, Section 1, Preface.
29 Ibid.
30 Ibid.
31 ASCR, r 3.1; Australian Bar Rules, Statement of Principles, Clause 5. Also see Re Foster (1950) 50 SR (NSW) 149, 151.
32 ASCR, r 4.1.5; SRA Code of Conduct, Principle 1.
33 ASCR, r 4.1.1; SRA Code of Conduct, Principles 3 and 6; UK Bar Rules, para 307(a).
34 ASCR, r 5; Australian Bar Rules, r 12; UK Bar Rules, para 301; ABA Model Rules, r 8.4.
proceedings; nor are they ‘far removed from mediation practice’. Rather, they apply to all aspects of a lawyer’s professional and personal life. So important are they, that they are variously described as ‘fundamental ethical duties’, ‘fundamental principles’, and ‘mandatory principles which apply to all’ and which ‘embody key ethical requirements’ of those involved in the provision of legal services.

2.1 A Tripartite System of Duties

The professional conduct rules provide a number of specific duties that are owed to courts, clients and other parties. For instance, legal practitioners must act with honesty, fairness and courtesy towards courts and other tribunals. They must ensure that proper and responsible use is made of the court process and privilege (a lawyer cannot, for example, make allegations in court unless he or she has reasonable grounds for supporting them) and use their best endeavours to avoid unnecessary expense or waste of the court’s time.

Legal practitioners owe a range of duties to their clients such as those of honesty and courtesy, competence and diligence, loyalty and confidentiality. The scope of the duty of confidentiality depends on the source to which it is traced but it is generally ‘very broad’. It is subject to a number of exceptions, for example, disclosure is permitted when it is ‘for the sole purpose of avoiding the probable commission of a serious criminal offence’. Disclosure of information may also be authorised by the client to whom the duty is owed.

Legal practitioners also owe duties to third parties, including their opponents. Each jurisdiction uses slightly different terminology to describe the ambit of these duties but the basic thrust of the rules is the same – legal practitioners must act with honesty, courtesy and fairness towards third parties with whom they deal.

As this discussion illustrates, for the most part, lawyers’ duties can be categorised according to whether they are owed to the court, a client or a third party. Although this categorisation risks over-generalisation, it is useful when considering the position of

35 Mason (n 4) 116.
37 ASCR, r 4.
38 UK Bar Rules, Preamble to Part III.
39 SRA Code of Conduct, Part 1, Notes 2.1.
40 Some rules use the term ‘integrity’ instead of honesty: see eg SRA Code of Conduct, Principle 2.
41 ASCR, r 4.1.2; SRA Code of Conduct, Principle 2.
42 ASCR, r 4.1.2; SRA Code of Conduct, O(1.1).
43 ASCR, r 4.1.3, 7.1; Australian Bar Rules, r 7(a); SRA Code of Conduct, O(1.5); UK Bar Rules, paras 303(a) and 701(a); ABA Model Rules, r 1.1, 1.3.
44 ASCR, r 4.1.1 and rr 10-12; Australian Bar Rules, rr 112-114; SRA Code of Conduct, Chapter 3; UK Bar Rules, paras 303(b) and 703; ABA Model Rules, rr 1.7-1.10.
45 ASCR, r 9.1; Australian Bar Rules, rr 108-111; SRA Code of Conduct, Chapter 4; UK Bar Rules, para 702; ABA Model Rules, r 1.6.
46 For a discussion about the scope of the duty of confidentiality, see Dal Pont (n 17) 228-230; Boon and Levin (n 17) 223-226.
48 ASCR, r 9.2.4; ABA Model Rules, r 4.1(b).
49 ASCR, r 4.1.2; Australian Bar Rules, Statement of Principles, Clause 5 (c); SRA Code of Conduct, Principle 2. Also see ABA Model Rules, r 4.4.
50 This categorisation does not take account of the duties owed by lawyers to ‘collective third parties’ (such as the profession as a whole, the state, and the wider public): see Boon and Levin (n 17) 285.
mediators who like clients and third parties (and even judges), are identifiable individuals. The position of mediators is considered in more detail next.

2.2 Mediators: Courts (Judges) or Third Parties?

The question arises as to whether mediators should be treated, and afforded the same duties, as courts, or alternatively as third parties. It appears that different answers have been adopted by lawyers’ professional bodies in the jurisdictions under consideration.

Crucially to the position in Australia, both sets of rules (that is, those for solicitors and those for barristers) define ‘court’ to include ‘mediations’. 51 Unfortunately, it is not clear whether the drafters of the rules meant mediators and/or the other parties to the mediation, or the mediation process. (This uncertainty does not arise when one is dealing with a court for the court is personified by the judge, tribunal member or other official person such as a court registrar before whom legal practitioners appear). The most obvious interpretation is that the reference to ‘mediations’ is intended to mean ‘mediators’. This is because:

1. There are already rules in place governing relations with opponents and other third parties. 52 The only ‘entity’ for whom provision is not otherwise made is the mediator.
2. It is difficult to conceive of practitioners owing duties to a process (although clearly, they may owe duties to certain persons, entities or even ‘the public’ involved in, or implicated by, a process). 54
3. To the extent that we might look to provisions in other jurisdictions for insights, the Model Code of Professional Conduct of the Federation of Law Societies of Canada defines ‘tribunal’ to include ‘mediator’. 55

The Australian approach (and that of the Canadian Federation of Law Societies) is the least common. The more common approach is to restrict the definition of ‘court’ or ‘tribunal’ to bodies that are adjudicative in nature, an approach which excludes mediation. This is the approach adopted in the ABA Model Rules; 56 the SRA Code of Conduct (and its predecessor, the Solicitors’ Code of Conduct 2007), 58 and the UK Bar Rules. 59 The rules governing relations with courts and tribunals in these jurisdictions (for example, Rule 3.3 of the ABA Model Rules) also make no reference to mediation. The implications of including ‘mediations’ in the definition of court (or conversely, not including it) are discussed in more detail in the next part of the article.

51 See definitions (n 24).
53 See ASCR, r 22 (communications with opponents), rr 30-33 (relations with other solicitors) and rr 34-35 (relations with other persons); Australian Bar Rules, rr 48-55 (duty to opponent).
54 Properly conceived, even the duty owed to the court is owed, not to any particular judge, but ‘to the larger community which has a vital public interest in the proper administration of justice’. David A Ipp, ‘Lawyers’ Duties to the Court’ (1998) 114 Law Quarterly Review 63, 63 (footnotes omitted).
55 Model Code of Professional Conduct of the Federation of Law Societies of Canada (13 December 2011), Definitions Section 12. Compare with the Canadian Bar Association Code of Professional Conduct 2009, Interpretations Section, which does not include mediations or mediators in the definition of court or tribunal.
56 ABA Model Rules, r 1.0 (see definition of ‘Tribunal’).
57 SRA Code of Conduct, Glossary (see definition of ‘Court’).
58 SRA Solicitors’ Code of Conduct 2007, r 24 (see definition of ‘Court’).
59 UK Bar Rules, Part X (see definition of ‘Court’). Also see the definition of ‘Court’ provided in the Legal Services Act 2007 (UK), s 207.
3. PARTICULAR DUTIES OWED BY LEGAL REPRESENTATIVES

To all of the entities with whom they deal, that is, courts, clients and third parties, legal practitioners owe a duty to act with honesty (but not necessarily with candour), fairness and courtesy. However, as the discussion which follows shows, different standards are owed depending on whether practitioners are dealing with a court, or a third party. Other possible duties – such as a duty to participate in various dispute resolution processes in good faith and a duty to cooperate with other participants, are emerging in the literature, court rules and some statutory schemes. The discussion below focuses on the requirement of honesty for it is a central component of all other duties owed by lawyers.

3.1 The Duty of Honesty

The term ‘honesty’ is not defined by the rules. An analysis of particular rules in each jurisdiction indicates that a distinction can be drawn between the concepts of honesty as against misrepresentation (an issue which concerns the accuracy of information conveyed), and candour as against non-disclosure (an issue which concerns the sharing of information or conversely, the withholding of it). As will become apparent, while legal representatives are subject to a duty of honesty, they are generally not subject to a duty of candour.

Standard owed to the Court

In all jurisdictions under consideration, legal representatives are prohibited from deceiving or knowingly or recklessly misleading the court. They are obliged to correct any misleading statement as soon as possible after becoming aware that it is misleading. In simple terms, practitioners should never provide the court with inaccurate information about any matter. As for the obligation of candour to the court, a distinction is made in the rules between matters of law and matters of fact. A practitioner must inform the court of any relevant binding authorities and legislative provisions of which he or she is aware but as a general rule – at least when one’s opponent is also present before the court, there is no obligation to disclose adverse facts and there is no obligation to ‘correct an error in a statement made to the court by the opponent or any other person’. This is not to say that

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60 ASCR, r 4.1.2; Australian Bar Rules, Statement of Principles, Clause 5; ABA Model Rules, Preamble [2].
61 SRA Code of Conduct, O(1.1) and O(11.1).
62 ASCR, r 4.1.2; Australian Bar Rules, rr 2-4; UK Bar Rules, para 701(a); ABA Model Rules, Preamble [2].
63 Wolski (n 52).
64 ASCR, r 19.1; Australian Bar Rules, r 26; SRA Code of Conduct, O(5.1); UK Bar Rules, para 302. Also see ABA Model Rules, r 3.3(a)(1) which prohibits lawyers from making a false statement of fact or law to a tribunal.
65 ASCR, r 19.2; Australian Bar Rules, r 27; SRA Code of Conduct, IB(5.4); ABA Model Rules, r 3.3(a)(1). This duty continues even after trial: see *Vernon v Bosley* (No. 2) [1997] 3 W.L.R. 683.
66 ASCR, r 19.6; Australian Bar Rules, r 31; SRA Code of Conduct, IB(5.2); UK Bar Rules, para 708(c); ABA Model Rules, rr 3.3(a)(1), 3.3(a)(2).
67 Legal practitioners owe the court higher standards of candour when seeking any interlocutory relief in an ex parte application: ASCR, r 19.4; Australian Bar Rules, r 29; ABA Model Rules, r 3.3(d). For discussion of the standard of candour owed by them in these circumstances, see Satz v ACN 069 808 957 Pty Ltd [2010] NSWSC 365 (30 April 2010) [55]-[68] (Barrett J).
68 There is also no obligation to assist one’s opponent by putting before the court evidence which is favourable to the other side: see *Khudados v Hayden & Ors* [2008] C.P. Rep. 12 [38].
69 ASCR, r 19.3.
adverse facts should never be revealed to the court; rather that they should not be revealed without client consent.\textsuperscript{70}

\textbf{Standards owed to Opponents}

As to the duty of honesty owed to opponents or counterparts in mediation, the relevant rules are as follows:

1. In Australia, lawyers are prohibited from knowingly making false statements to an opponent in relation to the case, including its compromise.\textsuperscript{71} Although this rule appears to be limited in its application by the title ‘advocacy and litigation’, the court has held that rules such as this apply beyond the context of litigation to other aspects of legal practice.\textsuperscript{72}

2. In the USA, Rule 4.1(a) of the ABA Model Rules prohibits a practitioner ‘in the course of representing a client’ from knowingly making a false statement of material fact or law. Guideline 4.1 of the ABA’s Settlement Guidelines reiterates this prohibition. The term ‘material’ is not defined directly in either document.

3. In the UK, the SRA Code of Conduct provides that practitioners must ‘not take unfair advantage of third parties in either [their] professional or personal capacity’.\textsuperscript{73} Special provision is made for mediation in the UK Bar Rules, with practitioners being prohibited from ‘knowingly or recklessly misleading a party or their representative’.\textsuperscript{74}

The prohibition against misleading one’s opponent does not extend to all statements. In Australia and the USA, statements about ‘immaterial’ matters or matters that do not relate to fact or law are not caught by the rules.\textsuperscript{75} Under the rules in both jurisdictions, some allowance is made for posturing, exaggeration and bluffing. For instance, in Australia, Rule 34.1.1 of the ASCR allows exaggeration as long as statements do not ‘grossly’ exceed ‘the legitimate assertion of the rights or entitlements of the [practitioner’s] client’, and the LCA Guidelines for Lawyers in Mediations, while warning practitioners to ‘be careful of puffing’, do not prohibit it.\textsuperscript{76} In the USA, commentary to the ABA’s Model Rule 4.1 provides that certain types of statements ‘ordinarily are not taken as statements of material facts’.\textsuperscript{77} Such statements include ‘[e]stimates of price or value placed on the subject of a transaction’\textsuperscript{78} and statements about ‘a party’s intentions as to an acceptable settlement of a claim’.\textsuperscript{79} Ultimately, the question as to whether or not there has been a false statement about a material fact will

\textsuperscript{70} In this instance, the public interest in maintaining legal professional privilege outweighs the public interest in discovering the truth: Dal Pont (n 17) 384, 386. On the importance of maintaining lawyer-client confidentiality, see Bolkiah v KPMG [1999] 2 AC 222, 236 (Lord Millett).

\textsuperscript{71} ASCR, r 22.1; Australian Bar Rules, r 48. The term ‘compromise’ is defined in the ASCR to include ‘any form of settlement of a case, whether pursuant to a formal offer under the rules or procedure of a court, or otherwise’: glossary of terms.

\textsuperscript{72} Legal Practitioners Complaints Committee and Fleming [2006] WASAT 352 (7 December 2006) (‘Fleming’).

\textsuperscript{73} SRA Code of Conduct, Chapter 11, Relations with Third Parties, and O(11.1). The position was the same under the SRA Solicitors’ Code of Conduct 2007.

\textsuperscript{74} UK Bar Rules, para 708.1.


\textsuperscript{76} LCA, Guidelines for Lawyers in Mediations, Clause 6.2.

\textsuperscript{77} ABA Model Rules, Comment [2] to r 4.1.

\textsuperscript{78} Ibid.

\textsuperscript{79} Ibid.
turn on the facts of the case. As one author opines, “made-up” alternative offers might be treated as a misrepresentation of material fact when the opponent is unsophisticated; the offers are specific, are coupled with ultimatums, and are impossible to investigate.

The current UK provision for solicitors is not very precise (nor was its predecessor Rule 10.01 of the Solicitors’ Code of Conduct 2007). Boon and Levin suggest that we might seek guidance in Principle 19.01 of the earlier Guide for solicitors which raised the issues more explicitly, requiring practitioners to “act towards other solicitors with frankness and good faith consistent with the overriding duty to the client.” As to what these phrases meant, Boon and Levin suggest that “[f]rankness could have meant that information supplied was to be accurate,” while good faith suggested a “refusal to seek an unconscionable advantage.”

A duty of frankness (or in the terminology adopted here, a duty of honesty) does not prohibit all misleading statements. Boon and Levin note that bluffing in negotiation “has been defended from a number of positions,” such that it “can be seen part [sic] of the process of concession exchange rather than outright deception.” While not condoning it, they acknowledge that “[i]f positional bargaining is accepted in professional circles, only a fool would conduct it by telling the other side immediately the minimum payment he would accept.” It appears then that solicitors in the UK can also bluff and exaggerate and mislead on immaterial matters such as the client’s acceptable settlement point.

It is not clear that paragraph 708.1 of the UK Bar Rules imposes a higher standard of honesty on barristers in that jurisdiction. The provision is unique in its application to mediation, as discussed further below. Notably, the provision has not been retained in the draft new Code for barristers.

As to the requirements to share information with an opponent, for the most part, the rules in Australia and the USA speak to actions, not omissions. While they prohibit certain misrepresentations, they generally require no affirmative disclosure. There is no obligation to inform an opposing party of relevant facts or law, subject to any requirements imposed

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80 ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-439, ‘Lawyer’s Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation’, 12 April 2006, 3 (hereafter ABA Formal Opinion 06-439). Also see Peters who argues that the term ‘material’ would take its meaning from the law of contract and torts such that a representation will be material if it would induce reasonable persons to enter into an agreement: Don Peters, ‘When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal’ [2007] Journal of Dispute Resolution 119, 128.
82 SRA Solicitors’ Code of Conduct 2007, r 10.01.
84 Boon and Levin (n 17) 380.
85 Ibid (footnotes omitted).
86 Ibid, 379.
87 Ibid.
88 Ibid.
89 Ibid.
90 See n 22.
91 ABA Model Rules, Comment [1] to r 4.1.
by substantive law, procedural law or specific legislative directive.\(^{92}\) Nor is there any obligation to correct the other side’s misunderstandings, misconceptions or false assumptions\(^{93}\) providing that a practitioner is not ‘the moving force ... in the other side’s misconception’ \(^{94}\) and that he or she is scrupulous about not endorsing any misunderstanding.\(^{95}\)

The position of UK solicitors vis à vis their opponents was articulated by the court in *Thames Trains Ltd v Adams*.\(^{96}\) There, the court was concerned with the application of Principle 19.01 of the Guide and the general law. The plaintiff’s solicitor in a personal injuries case accepted an offer to settle paid into court by the defendant. Acceptance was made by a fax sent to the office of the defendant’s solicitor. The fax was not received because of a systems error at that office. A more favourable offer was subsequently made by the defendant during a telephone conversation between the parties’ solicitors.\(^{97}\) The plaintiff’s solicitor accepted the increased offer and did not inform the defendant’s solicitor about the fax. The defendant sought to have the settlement agreement set aside on learning about the fax. The court held that the conduct of the plaintiff’s solicitor was ‘not unconscionable, nor deceitful, nor sharp practice, nor was she taking unfair advantage’ of the ignorance of the other side.\(^{98}\) The duty of frankness did not extend to speaking out to correct the opponent’s misapprehension ‘where speaking out would not be in the client’s interests’.\(^{99}\) The court noted that a different outcome may have ensued had the defendant asked the plaintiff’s lawyer a specific question about the earlier transaction.\(^{100}\) Importantly, his Honour Justice Nelson took into account a number of case-specific circumstances in arriving at the conclusion that the solicitor concerned was entitled to remain silent and accept the increased offer.\(^{101}\)

There are a number of exceptions to the general rule that candour is not required.\(^{102}\) First, there is a duty to correct an opponent in the case of obvious errors in some circumstances, for instance, when taking advantage of the error ‘would obtain for a client a benefit which has no supportable foundation in law or fact’.\(^{103}\) Second, there is a positive duty to disclose

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\(^{92}\) Parties to litigation are required to disclose various documents and information to each other pursuant to civil procedure rules. Similar obligations may be imposed under specific statutory schemes, see eg *Motor Accident Insurance Act 1994* (Qld) ss 45, 51A, 51B.

\(^{93}\) See ASCR, r 22.3; Australian Bar Rules, r 50.

\(^{94}\) *Fleming* [2006] WASAT 352 (7 December 2006) [66] (Chaney J). In the UK, see *Ernst & Young v Butte Mining Co* [1996] 1 W.L.R. 1605 where His Honour Robert Walker J, held that solicitors must ‘be scrupulously fair and not take unfair advantage of obvious mistakes. The duty … is intensified if the solicitor in question has been a major contributing cause of the mistake’: at 1622. In the US, see eg *In re Conduct of Eadie* 36 P.3d 468 (Or. 2001) 476.

\(^{95}\) Wolski (n 52).


\(^{97}\) In fact, the court considered the fax to be an offer to settle that could be withdrawn at any time, but this does not alter the analysis undertaken here: see *Thames Trains Ltd v Adams* [2006] EWHC 3291 (QB) [52] (‘*Thames Trains*’).

\(^{98}\) *Thames Trains* [2006] EWHC 3291 (QB) [56].

\(^{99}\) Boon and Levin (n 17) 381.

\(^{100}\) *Thames Trains* [2006] EWHC 3291 (QB) [56].

\(^{101}\) *Thames Trains* [2006] EWHC 3291 (QB) [50]-[54].

\(^{102}\) See Richmond (n 47) 282 for a discussion of ‘four regular exceptions’ to this general rule.

\(^{103}\) See eg ASCR, r 30.1 which covers so called scrivener errors. Such a situation arose in *Chamberlain v Law Society of the Australian Capital Territory* (1993) 43 FCR 148 where the practitioner deliberately took advantage of an obvious error (a misplaced decimal point) in a writ issued against him by the Deputy Commissioner of Taxation and ‘set in train the events and documents which … led to the entry of the [erroneous] consent judgment’: [49] (Lockhart J).
information when it is required to qualify a statement or to avoid a partial truth (that is to say, the prohibition against misleading extends to statements which are false by reason of the need for some qualification or the addition of omitted information). Thus, in what is regarded as a classic example of the positive duty to disclose relevant information, the Court held that a statement that a property subject to sale was ‘fully let’, ought to have been qualified by the information that the tenants in question had given notice to quit. Third, disclosure is required when it is necessary to correct a statement previously made by the practitioner about a client’s case where the practitioner now knows the statement to be false. The same exceptions have been etched out in the general law.

**Standards owed to Mediators**

The standards of honesty and candour owed to mediators vary between jurisdictions, primarily because of the different definitions of ‘court’ and ‘tribunal’ adopted in the rules.

The Australian rules define ‘court’ to include ‘mediations’. If this reference is taken to mean ‘mediators’, legal representatives in Australia owe mediators the same standards of honesty and candour as they owe to courts and tribunals. They are prohibited from providing mediators with inaccurate information about any matter, a prohibition which might extend to statements concerning a client’s position, interests, settlement priorities, settlement goals and the extent of the lawyer’s settlement authority. They are subject to a duty to inform mediators of any relevant binding authorities and legislative provisions of which they are aware. The rules do not stipulate whether disclosure has to be made in a joint session with all the parties present or whether disclosure in a separate session will suffice. Legal representatives are not subject to a duty to inform mediators about adverse facts (nor are they obliged to disclose information pertaining to their client’s position, interests, settlement priorities or goals, or the extent of their authority to settle) and they have no obligation to correct inaccurate statements made to the mediator by the other side.

The ABA Model Rules do not define ‘tribunal’ to include mediations or mediators. The ABA’s Standing Committee on Ethics and Professional Responsibility has confirmed that a mediator is not a ‘tribunal’ as defined in Model Rule 1.0 and that a lawyer’s ‘duty of candour’ both toward mediators and other parties in mediation is governed by Rule 4.1. This is the case even when the mediator is ‘caucused’. Thus, legal practitioners in the USA owe mediators the same standards of honesty and candour as they owe to their opponents - at least this is the case when the mediator is not a judge. The Committee has also opined that Rule 3.3 (which governs candour to a tribunal) applies to ‘statements made to a tribunal when

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104 Dimmock v Hallett (1866) LR 2 Ch App 21. For a more recent example of this principle, see the facts in Krkosweski v Earolynx Properties Ltd (1995) 183 CLR 563. Generally, see Lam v Ausintel Investments Australia Pty Ltd and Others (1989) 97 FLR 458, 475 (Gleeson CJ).

105 ASCR, r 22.2; Australian Bar Rules, r 49. In the US, see In re Carpentino’s Case, 651 A.2d 1, 4 (N.H. 1994); Richmond (n 47) 281. In Australia, see Legal Services Commissioner v Mullins [2006] LPT 012, discussed in Wolski (n 52).

106 See Myers v Elman [1940] AC 282, 292; Lam v Ausintel Investments Australia Pty Ltd and Others (1989) 97 FLR 458, 475. Additionally, an obligation to disclose information might arise by virtue of a special relationship between the parties.

107 Wolski (n 52).

108 ABA Formal Opinion 06-439 (n 80) 2, footnote 2. Also see ABA Model Rules, Comment [5] to r 2.4. Other authors agree that mediation does not fall within the definition of tribunal as it presently stands. See eg Robert P Burns, ‘Some Ethical Issues Surrounding Mediation’ (2001-2002) 70 Fordham Law Review 691, 705.

109 ABA Model Rules, Comment [5] to r 2.4. A caucus refers to a separate meeting between the mediator and a party.
the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates’.110

It is difficult to reconcile the Committee’s opinions. Richmond has suggested that the Committee’s analysis with respect to the application of Rule 4.1 to caucused mediations ‘was abbreviated, and its conclusion is therefore debatable’.111 Richmond favours the imposition of a higher standard of honesty and candour, that is, the standard set out in Rule 3.3, at least for court-sponsored mediations.112 The better view may be that the standard of Rule 4.1 is sufficient.

The kind of situation envisaged by the Committee arose in In Re Fee.113 In this medical malpractice action, the parties negotiated a settlement with the ‘assistance’ of a settlement judge from the court in which the matter was pending. The settlement hinged partly on the contingency fees which the plaintiff was to pay to her lawyers. The plaintiff’s lawyers allowed the judge-mediator to think that a particular fee arrangement had been agreed and failed to disclose the existence of a new fee agreement arrived at in a separate meeting with their client. (The judge had earlier expressed the opinion that the fees were excessive). The Arizona Supreme Court held that Rule 3.3(a)(1) applied and that ‘a judge acting as [a] mediator is still a judge to whom the ethical duty of candor is owed’.114 The court found that the lawyers had violated Rules 3.3(a)(1) and 8.4(c) of Arizona’s professional conduct rules.

It is suggested that the lesson to be learned from In Re Fee is that a legal practitioner should not mislead a mediator about a material fact. It was not necessary for the court in In Re Fee to rely on Rule 3.3. The same result would have been achieved through an application of Rule 4.1 which prohibits the making of false statements (including ‘half-truths’) to third parties. The lawyers misled the judge-mediator about a material fact by allowing him to affirm (by reading out) terms of settlement which were no longer an accurate reflection of the agreement arrived at between them and their client. The Arizona Supreme Court expressed the opinion that the ‘respondents should have either disclosed the complete arrangement or politely declined any discussion of fees’.115 A positive obligation to speak out only arose because of the conduct of the lawyers.

In the UK, the SRA Code of Conduct restricts the definition of ‘court’ to adjudicative bodies. There is no mention of mediators or mediations. In the absence of alternative provisions, it appears that solicitors in the UK owe mediators the same obligations as they owe to third parties. Thus, while they should not mislead mediators – at least in relation to material facts and law – they have no obligation to convey information to mediators, except in the limited circumstances discussed above (that is, to correct a half-truth or a statement now known to be false).

The UK Bar Rules make special provision for mediation as a result of a 2005 amendment which states: ‘[a] barrister instructed in mediation must not knowingly or recklessly mislead

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111 Richmond (n 47) 289.
112 Ibid.
113 In Re Fee 898 P.2d 975 (Ariz. 1995).
115 In Re Fee 898 P.2d 975 (Ariz. 1995).
the mediator or any party or their representative. However, it seems unlikely that this provision has raised the standards of honesty and candour owed to mediators (or to other parties to the mediation) for while the rule prohibits misleading, it does not require candour, that is, there is no obligation to reveal information. It is not clear whether the rule prohibits all misleading or only misleading in relation to material facts and law. As mentioned above, the rule has not been retained in the draft new Code.

3.2 Requirements in Relation to Fairness and Courtesy

Legal representatives owe a duty of fairness to those with whom they deal (the rules do not appear to set different standards for courts and third parties). The concept of ‘fairness’ is not defined in the rules. It is a concept which can be applied both to the procedure and outcome of a dispute resolution process. Sometimes procedural unfairness (for example, failure to disclose vital information) will bring about an unfair outcome. As this simple example illustrates, ‘fairness’ overlaps with the concepts of ‘honesty’ and ‘candour’.

In the context of mediation, it is suggested that legal representatives discharge their duty of fairness with respect to procedural matters by complying with reasonable guidelines set by the mediator since the mediator is explicitly responsible for ensuring procedural fairness. Lawyers act contrary to the requirements of procedural fairness in mediation when they make threats, attempt to cross-examine or interrogate the other party or do not allow the other party to speak freely. The concept of fairness also overlaps with that of ‘courtesy’ and includes matters such as not interrupting when someone else is speaking and not denigrating a party. Most mediators will intervene to correct the types of inappropriate behaviour mentioned here.

Legal representatives have no specific obligation to ensure that a mediated outcome is fair to other parties to the mediation (or other affected third parties) except where special obligations are imposed by legislation as is the case in family law matters. That said, lawyers must keep in mind their duty to the administration of justice. In some cases the court has held that a lawyer’s actions in securing an agreement and in failing to disclose information to an opponent were so unfair that the agreement in question should be set aside. The grounds relied on by the court in setting aside these agreements have varied – ranging from breach of principles of contract law, to breach of the practitioner’s common law obligations to the administration of justice and to the court, to breach of the professional conduct rules. Agreements have been set aside by the court where:

116 UK Bar Rules, r 708.1.
117 Some definitions are available in the literature. For example, White notes that the concept of fairness ‘speaks to a variety of acts in addition to truthfulness and also different from it’: James J White, ‘Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation’ (1980) American Bar Foundation Research Journal 926, 928. It speaks to eg the threats a negotiator may use, the favours he or she may offer, and extraneous factors that may be used in negotiation: White, 928. Also see Hazard (n 91) 182.
118 See for instance Family Law legislation which seems in all jurisdictions to make the interests of the children paramount.
120 Craver (n 119) 722.
• The plaintiff’s lawyer failed to advise the defendant that the plaintiff in a personal injuries action had died from unrelated factors prior to completion of settlement discussions.\textsuperscript{121}

• The defendant’s lawyer failed to tell the plaintiff that he had a life-threatening medical condition which had been overlooked by the plaintiff’s own doctors.\textsuperscript{122}

• The plaintiff’s barrister and solicitor failed to inform the defendant that the plaintiff in a personal injuries matter had been diagnosed with terminal cancer subsequent to the provision of estimates of future losses.\textsuperscript{123}

It is difficult to glean general principles from these cases with decisions about what is fair or unfair depending on an assessment of case-specific circumstances.

4. THE IMPACT OF OTHER DUTIES OWED BY LAWYERS

4.1 The Question of Good Faith Participation

Currently the professional conduct rules do not impose on legal representatives a specific obligation to participate in mediation in good faith. But absence of explicit provision does not give practitioners a licence to act in bad faith. They are still bound by their general duties. Some guidelines for mediation issued by lawyers’ professional associations do seek to impose an obligation of good faith on the parties and their lawyers. For example, Guideline 2.2 of the LCA Guidelines for Lawyers in Mediations provides that ‘[l]awyers and clients should act, at all times, in good faith to attempt to achieve settlement of the dispute’.\textsuperscript{124} It further provides that ‘[a] lawyer should not continue to represent clients who act in bad faith or give instructions which are inconsistent with good faith’.\textsuperscript{125} Guideline 2.3 of the ABA’s Settlement Guidelines states that ‘[a] lawyer’s conduct in negotiating a settlement should be characterized by honor and fair-dealing’,\textsuperscript{126} while Guideline 4.3.1 provides that ‘[a]n attorney may not employ the settlement process in bad faith’. There is also a plethora of legislation in Australia and the USA which imposes on parties an obligation to participate in ‘good faith’ or to act ‘genuinely’ in mediation.\textsuperscript{127}

Despite the frequent use of the terms ‘good faith’ and ‘bad faith’, they are rarely defined. Some common threads of what it means to act in good faith have been discerned from cases

\textsuperscript{121} Virzi v Grand Trunk Warehouse and Cold Storage Co 571 F Supp 507, 512 (ED Mich 1983).

\textsuperscript{122} Spaulding v Zimmerman 116 NW 2d 704 (Minn 1962).

\textsuperscript{123} Legal Services Commissioner v Mullins [2006] LPT 012; Legal Services Commissioner v Garrett [2009] LPT 12.

\textsuperscript{124} LCA, Guidelines for Lawyers in Mediation (at March 2007) s 2.2.

\textsuperscript{125} LCA, Guidelines for Lawyers in Mediation (at March 2007) s 2.2. Similar provision is made by the Law Society of New South Wales, Professional Standards for Legal Representatives in a Mediation (at 1 January 2008) s 5.4. Also see the LCA, Guidelines for Parties in Mediation (at August 2011) s 10 which requires the parties to approach the mediation in good faith, but again, does not provide a definition of operative terms.

\textsuperscript{126} The terms ‘honor’ and ‘fair-dealing’ are not defined.

\textsuperscript{127} See eg Civil Procedure Act 2005 (NSW) s 27 (the parties are required to participate in good faith in mediation); Family Law Act 1975 (Cth) s 60E(1) and s 10F (the parties are required to ‘make a genuine effort to resolve’ a dispute before commencing court proceedings); and Civil Dispute Resolution Act 2011 (No 17, 2011)(Cth) ss 6-7 (prospective litigants are required to lodge a ‘genuine steps statement’ with the court when commencing certain civil proceedings in the Federal Court of Australia or in the Federal Magistrates Court). The position appears to be similar in the US with several authors noting that none of the statutes or court rules containing requirements of good faith in mediation provide a clear definition of what it means. See eg John Lande, ‘Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs’ (2002-2003) 50 University of California Los Angeles Law Review 69, 80.
and commentaries concerning good faith obligations in agreements to mediate and dispute resolution clauses. They include some preparation, attendance at the mediation and having someone in attendance with authority to settle.  

Similarly, there is agreement that some behaviour, such as misleading a mediator or an opponent about a material fact, will constitute bad faith (the distinction between misleading which is prohibited, and non-disclosure which is generally permitted, still holds). Regard can also be had to the Committee Notes which accompany Guideline 4.3.1 of the ABA Settlement Guidelines. The Notes provide examples of bad faith behaviour in mediation. They include use of mediation ‘solely’ to delay litigation (or to burden the opposing party) or to secure discovery.

But these common threads do not add up to universally agreed definitions of good and bad faith. Mason observes that ‘good faith provisions frequently flounder domestically on the grounds that “no-one is quite sure what they mean.”’ He was speaking of the position in the UK. This is also the case in Australia and the USA. The court in Australia has on some occasions struck down dispute resolution clauses containing good faith provisions on the ground that such provisions are too vague as to the conduct required of the parties and hence, too uncertain to be enforceable. More recently the New South Wales Court of Appeal expressed the view that ‘[w]hat the phrase “good faith” signifies in any particular context and contract will depend on that context and that contract’. Similar views have been expressed by the Supreme Court of Western Australia. Ultimately, decisions about whether or not a legal representative has acted in good faith or bad faith will turn on a combination of factors set in the context of each individual case.

4.2 Requirements in Relation to Cooperation

The professional conduct rules do not require practitioners to cooperate with mediators or with opponents in mediation. As Peppet summed up in relation to negotiation, there is no professional requirement ‘to cooperate rather than compete’.

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130 ABA Settlement Guidelines, Committee Notes to Guideline 4.3.1, 49.  
131 Mason (n 4) 177 (footnotes omitted).  
132 For a discussion of relevant authorities in Australia and the USA, see David Spencer, ‘Requiring Good Faith Negotiation’ (1998) 1 ADR Bulletin 37, 44; Carter (n 129) 367.  
134 Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd [No 3] [2009] WASC 352 (1 December 2009) [94]-[99].  
Practitioners are required to maintain a certain level of cooperation and collegiality with each other in order to discharge their duties to the court in the conduct of litigation, an obligation which can be sourced to general law136 and to procedural law requirements. In most jurisdictions, procedural law now regulates the pre-action conduct of the parties and their advisers. Parties are required to ‘cooperate’ with each other and the court137 and to ‘use reasonable endeavours to resolve a dispute by agreement ... by appropriate dispute resolution’,138 as well as to exchange stipulated information and documents. The term ‘cooperation’ is generally not defined, although some legislation provides examples of steps ‘that could be taken by a person as part of taking genuine steps to resolve a dispute’.139 In applying legislation such as this, the courts have indicated that decisions as to whether or not genuine steps have been taken depend on the nature and circumstances of the dispute.140

5. RESOLVING ETHICAL DILEMMAS IN MEDIATION

In mediation, as in any other context, the duties owed by lawyers may conflict. An ethical dilemma might arise in mediation where:142

1. A client instructs his or her lawyer to mislead a mediator and/or an opponent about material facts.
2. A legal representative is instructed to mislead a mediator and/or an opponent about the client’s bottom line.
3. A legal representative knows of a binding legal authority which is adverse to the client’s interests.
4. A legal representative has made a statement to the mediator and/or an opponent which statement the practitioner now knows to be false.
5. A client instructs her legal representative to withhold confidential information from the mediator and/or from an opponent.
6. A legal representative is instructed to use mediation for an ‘improper purpose’ such as to delay commencement of legal proceedings or to fish for information.143
7. A client instructs his lawyer to use aggressive hard-ball negotiation tactics.

In each of these situations, there is potential for conflict between the duties owed to the client and the duties owed to the administration of justice, to the mediator and to an opponent. Some guidance on the relative priority to be given to particular duties is provided in the professional conduct rules and in the general law in the UK and Australia. First, a legal practitioner is an officer of the court and as a consequence, he or she owes an ‘overriding’ or

137 Civil Procedure Act 2010 (Vic) s 20.
138 Civil Procedure Act 2010 (Vic) s 22.
139 See eg the requirements imposed by Civil Procedure Rules 1998 (UK), Practice Direction - Pre-action Conduct, Pre-action Protocol for Personal Injury Claims. Also see the pre-litigation requirements imposed under the Family Law Act 1975 (Cth) s 60I and Family Law Rules 2004 (Cth) r 1.05 and sch 1, pt 1 for financial cases and pt 2 for parenting cases.
141 For a case in which the court held that the lawyers involved had failed in their duty, see Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys [2012] FCA 282.
142 In formulating this list of ethical issues I have drawn upon literature pertaining to negotiation ethics. See eg Carrie Menkel-Meadow, ‘Introduction: What’s Fair in Negotiations? What is Ethics in Negotiation?’ in Carrie Menkel-Meadow and Michael Wheeler (eds), What’s Fair: Ethics for Negotiators (Jossey-Bass, 2004) xviii. Also see Burns (n 108) 697.
143 I recognise that whether or not these circumstances constitute an improper purpose is itself a threshold question of ethical judgment.
‘paramount’ duty to the court and the administration of justice rather than to the client. Second, duties owed to clients will normally take precedence over those owed to third parties except where action (or inaction) taken on the client’s behalf also impinges on duties owed to the administration of justice. Third, whenever there is a conflict between the duties owed by lawyers, they should exercise an independent judgment in the conduct and management of a case. The principle of lawyer independence is not confined to litigation.

Lawyers in the USA are also recognised as officers of the legal system but the matter of relative priorities – and the question of lawyer independence versus client authority, is stated in different terms. The ABA Model Rules provide that lawyers shall abide by their client’s decisions in respect of objectives to be achieved from a representation providing those objectives are lawful and consult with their client in respect of the means used to achieve objectives where means includes styles, approaches and tactics to be used in the mediation.

Application of these principles to the ethical dilemmas posited above suggests the following outcomes:

1. The rules prohibit practitioners from making false or misleading statements about material facts to third parties - mediators and opponents (the decision as to whether or not a statement pertains to material facts will depend on the facts of the case). Practitioners should not follow their client’s instructions in this situation.

2. There is some room for puffing under the rules and the general law in all jurisdictions. Statements which exaggerate bottom lines are not problematic as long as they are not framed as factual misrepresentations. The line between permissible puffing and misleading will often depend on case-specific factors.

3. In Australia, assuming the reference to ‘court’ in the definition section of the professional conduct rules means ‘mediators’, a legal representative has a duty to disclose relevant binding legal authorities to the mediator (but not to her or his opponent). No such duty exists under the rules in the USA or the UK.

4. Where a practitioner now knows a statement to be false, he or she is under a duty to correct the statement where the statement concerns material facts or law. This rule applies across all jurisdictions.

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144 On the primacy of the duty to the court, see Giannarelli v Wraith (1988) HCA 52 [12] (Mason CJ); Rondel v Worsley [1969] 1 AC 191, 227 (Lord Reid). Also see eg Legal Services Act 2007 (UK) s 188(3); ASCR, r 3.1; Australian Bar Rules, Statement of Principles, Clause 5; SRA Code of Conduct, O(1.2); UK Bar Rules, para 302.

145 See, for instance, UK Bar Rules, para 303(b). In Australia, see Law Society of NSW v Harvey [1976] 2 NSWLR 154, 170 (Street CJ).

146 See Legal Service Act 2007 (UK) s 188 (2); Arthur Hall v Simons [2002] 1 AC 615, 726 (Lord Hope). In Australia, see Australian Bar Rules, r 41 (and for solicitor advocates, ASCR, r 17.1).


148 ABA Model Rules, Preamble [1].

149 ABA Model Rules, r 1.2(a) and 8.4(d); ABA Settlement Guidelines, Guideline 3.1.3. Categorisation of instructions into means or objectives is not always easy. For instance, Burns argues that instructions to negotiate in a cooperative manner could be either a choice of means or a choice of the goals of the representation: Burns (n 108) 699.
5. It is impossible to suggest an appropriate course of action for a lawyer who finds himself or herself in the fifth situation without knowing the specifics of the information which the client wants to withhold. Legal representatives are not under a duty to disclose information about the client’s interests, bottom lines and willingness to settle, either to a mediator or to an opponent. But the cases mentioned above are sufficient to illustrate that in some circumstances, failure to disclose information (such as information about the existence of a life-threatening medical condition in the other party) will constitute a breach of a lawyer’s paramount duty to the administration of justice. This is not to say that the practitioner should actually disclose the information for he or she is still bound by the duty of confidentiality and loyalty owed to the client. The practitioner’s first course of action should be to seek to obtain the client’s instructions to reveal the information. If the practitioner considers the information in question to be material and the client does not agree to disclose it, it is submitted that the practitioner has good cause for refusing to continue to act for the client. In rare circumstances, a practitioner might disclose the information contrary to the client’s instructions and argue that it was necessary to do so in order to discharge the higher duty to the administration of justice in any claim brought in relation to the breach of duties owed to the client.

6. A client’s instructions to use mediation for an improper purpose appear to concern an objective of mediation and on the face of it, a lawyer would be bound to follow the instructions. However, although there is no clear authority on point, a lawyer who wanted to decline the brief in this situation might argue that it was a breach of his or her duty to the administration of justice to act for a client in these circumstances. Of course, many clients will not ‘own up’ that this is their objective and indeed it may not be their sole objective. Many clients will have mixed motives for participating in mediation and decisions about whether or not to act for them will not be so clear-cut.

7. A practitioner does not have to follow a client’s instructions to play hard-ball. Practitioners may make tactical and technical decisions about how best to advance a client’s objectives and they may choose their own preferred negotiation style.

In the next part of the article, I consider some proposals for new rules of conduct for legal representatives in mediation.

**6. PROPOSALS FOR NEW RULES: CHALLENGERS FOR RULE DRAFTERS**

A number of commentators have argued that new rules of conduct are needed for mediation practice. Most recently, Mason has suggested that new rules for mediation advocates should be centred around three principles, as follows:

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1. Lawyers should act in the client’s best interests at all times. Interests can be protected by non-adversarial behaviour. This should be the norm in mediation settings.
2. Lawyers should act in good faith at all times in their dealings with all other participants in mediation, including the mediator.
3. Lawyers must never deceive or knowingly or recklessly mislead the mediator or knowingly allow the mediator to be misled.\(^{152}\)

These proposals are considered in turn, in reverse order.

6.1 Increasing Standards of Honesty and Candour

Mason is not alone in suggesting that higher standards of honesty should be owed in mediation. Several authors have suggested that Rule 4.1 of the ABA Model Rules should be amended. Alfini suggests that the word ‘material’ be omitted from Rule 4.1, thus forbidding lawyers from making any false statement of fact or law to a third person (a party or a mediator).\(^{153}\) Peters suggests that Rule 4.1 be amended so as to prohibit the making of false statements about interests and priorities to another party or the mediator (Peters defines interests in such a way as to exclude value estimates and settlement intentions).\(^{154}\) Under both of these proposals, some puffing and exaggeration would still be permitted.

Clearly rule drafters have to consider whether or not to attempt to prohibit all misleading statements in mediation or only those that relate to material facts and law (however material is defined). A distinction might also need to be made between statements of fact and law on the one hand, and on the other, statements of opinion. Arguably, it is unrealistic to prohibit all misleading statements in mediation. It seems almost to be universally accepted that ‘some form of deceit, at least in the broadest sense of the word, is inherent in all negotiations’.\(^{155}\) Deception over matters such as settlement points appears to be legitimate and even necessary in ‘many traditional modes of bargaining’.\(^{156}\) Indeed, the ‘truth’ may be more elusive in mediation than in some other contexts. Mediation is a highly dynamic and fluid process. In


152 Mason (n 4) 118.
153 Alfini (n 151) 270. Bordone (n 151) 30 (who suggests a similar mandatory ethical guideline for negotiation).
154 Peters (n 80) 139. There has been much criticism of r 4.1 of the ABA Model Rules and many authors have suggested that it be changed. For example, Bordone calls it a ‘euphemism for lying’: Bordone (n 151) 13. On the other hand, some commentators assert that the exception allowed in r 4.1 is ‘actually quite narrow. It merely permits “puffing” and “embellishment” but no overt or subversive misstatements of true material fact’: Charles B Craver, ‘Negotiation Ethics for Real World Interactions’ (2010) 25 Ohio State Journal on Dispute Resolution 299, 345.
commenting on the difficulties of drafting a rule which requires truth-telling in mediation, Cooley argues that what is true for a party in mediation now (for example, their risks, desires, BATNAs\(^{157}\)) may not be true in 15 minutes from now as the parties continuously develop and share information and interact with the mediator.\(^{158}\)

Policy makers would need to consider and articulate the reasons why mediation should be treated any differently from unassisted negotiation. Some commentators argue that higher standards of honesty and candour are required in mediation because of the involvement of the mediator and the holding of separate sessions.\(^{159}\) They argue that separate sessions create a deception synergy\(^{160}\) leading to greater inaccuracy of information in a context in which the opponent is not present to test it.\(^{161}\) Conversely, other commentators argue that separate sessions provide opportunity for mediators to ‘converse directly about and indirectly around suspected misrepresentations’.\(^{162}\) The holding of separate sessions does not in itself appear to justify an increase in the standards of honesty and candour owed by parties and their advisers.

The second part of Mason’s proposal in relation to honesty and candour is problematic. Rule drafters would need to specify who should inform mediators that they have been misled and in what forum, that is, in a joint session with everyone present or in a separate session with the mediator. Problems loom if a lawyer is expected to correct his or her own client (involving a possible dismantling of the lawyer-client privilege) and to correct an opponent (an obligation which is not imposed when appearing before a court). These provisions have a flow-on effect to the mediator and are complicated by the holding of separate sessions in mediation. Most mediators and parties consider information divulged in separate sessions to be confidential. If a practitioner corrects a matter in a separate session, should the mediator be allowed or even required to pass on the correction to the other side?

It is noteworthy that Mason’s proposal does not involve a raising of the standard of candour owed by practitioners, that is, they would still be under no obligation to reveal information save if it was necessary to prevent a mediator from being misled. Different suggestions have been made by other authors. Peters argues that lawyers should be required to disclose all facts known to them and known to be important to their counterpart.\(^{163}\) Menkel-Meadow proposes that Rule 4.1 and Rule 3.3 of the ABA Model Rules be amended\(^{164}\) such that lawyers would have a positive duty to disclose relevant facts and law to an opponent, to a mediator and to a judge. There would be no safety in silence, and deflection or outright refusal to answer relevant questions would not be permitted. Other authors assert that the safety of silence should be maintained. For instance, Temkin argues that there ought to be some definite limits on the duty of candour in mediation, what he calls a ‘silent safe harbor’. He maintains that:


\(^{158}\) Cooley (n 151) 274-275.


\(^{160}\) ABA Formal Opinion 06-439 (n 80) 7.

\(^{161}\) Douglas and McMillan (n 159) 3.

\(^{162}\) Peters (n 80) 124.


Absent court rule, principle of substantive law, or prior factual representation, an attorney should have no duty to make affirmative factual representations in the course of settlement negotiations, subject only to the crime/fraud exception contained in the Model Rules. In short, there should be a silent safe harbor. An attorney who makes no representations (and does not condone or repeat those of a client) makes no misrepresentations. Once an attorney speaks, what is said should be truthful, consistent with the attorney’s duty to preserve client secrets and confidences.\footnote{Temkin (n 119) 181.}

This is where the ‘line’ on candour has been drawn in the professional conduct rules in the USA and the UK vis à vis mediators and opponents; and in Australia, vis à vis opponents. Currently practitioners in the USA and the UK do not have to reveal information to a mediator, while their counterparts in Australia appear to be under a duty to inform a mediator about relevant legal authorities and legislation. Just why they should have to do so when mediators do not have power to make decisions about substantive law matters, is unclear. Opponents are not owed a duty of candour in any jurisdiction – save for in the special circumstances discussed above. Rule drafters should consider if these lines on candour should be maintained. If a duty of candour is to be imposed, the extent of that duty must be specified. The questions for policy makers and rule drafters are: what information should legal representatives be required to disclose to whom and in what forum (joint or separate sessions) and what is the flow-on effect to mediators?

Caution is needed in dealing with what are essentially public policy matters. If lawyers were required to disclose adverse facts and information about a client’s interests and bottom lines, few parties or lawyers would participate in mediation. Few clients would confide in their lawyers. Unrepresented clients might fare better than those who are represented. It might be better in the longer term to rely on mediators to earn the trust of the parties so that the parties feel comfortable enough to volunteer the information necessary to forge mutually satisfactory outcomes.

6.2 Imposing an Obligation to Act in Good Faith

Several authors have suggested that a good faith requirement should be imposed on participants in mediation. They argue that such a requirement will promote more constructive and meaningful participation.\footnote{Generally see Kimberlee K Kovach, ‘Good Faith in Mediation - Requested, Recommended, or Required? A New Ethic’ (1997) 38 South Texas Law Review 575, 598; Weston (n 128) 630. Also see NADRAC, Maintaining and Enhancing the Integrity of ADR Processes: From Principles to Practice Through People, A Report to the Attorney-General of the Commonwealth of Australia (February 2011) 34 [2.5.1].} While it is difficult to mount an argument that lawyers should be permitted to act in bad faith, it is another matter to require them to act in good faith. All authors who propose that a ‘good faith’ obligation be imposed have had difficulty defining the concept. Kovach offers a suggested ‘Model Rule for Lawyers Requiring Good Faith Participation in the Mediation Process’\footnote{Kovach (n 166) 617 and 622-623.} that consists of an itemised list of behaviours which would constitute good faith. Such behaviour includes:\footnote{Kimberlee K Kovach, ‘New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation’ (2000-2001) 28 Fordham Urban Law Journal 955, 963. Also see Weston (n 128) 630, who endorses this proposal.}

- arriving at the mediation prepared (with a knowledge of the case including the facts and possible solutions);
• having all necessary decision makers present in person;
• ‘coming to the mediation with an open mind’;\(^{169}\)
• ‘demonstrating a willingness to listen and attempting to understand the other side’;\(^{170}\)
• ‘taking into account the interests of the other parties’;\(^{171}\)
• having a willingness to discuss one’s own position in detail, explaining the rationale for a particular offer or refusal of an offer;
• participating in meaningful discussions with the mediator and all other participants, and
• refraining from conveying information that is misleading or false.\(^{172}\)

But even this proposal does not give us a clear understanding of what good faith means or requires from a party or from his or her lawyer.\(^ {173}\) Most of the elements articulated by Kovach such as ‘coming to the mediation with an open mind’\(^ {174}\) and ‘attempting to understand the other side’, depend on an assessment of a person’s state of mind, that is, they are subjective and vague.\(^ {175}\) Even the seemingly objective requirement of having someone present with authority to settle poses a problem, for it may be difficult to know ahead of time what terms will be agreed to at mediation and who has the requisite authority to sanction the agreement.\(^ {176}\)

A good faith requirement cannot be imposed unless everyone is clear about what it means and requires. There must be reliable guidelines for what is, and what is not, appropriate behaviour and objective grounds for sanctions.\(^ {177}\)

There are other concerns with the imposition of a good faith duty, which cannot be investigated in depth here. They include the potential for: satellite litigation,\(^ {178}\) inroads to be made into the confidentiality of mediation (someone – usually the mediator must report good-faith participation violations);\(^ {179}\) and abuse by mediators,\(^ {180}\) especially in mandatory programs where there is potential for coercion of the parties.\(^ {181}\)

6.3 Setting Non-adversarial Behaviour as the Norm

It is beyond contention that lawyers should act in the best interests of their client (except where it is contrary to their duty to the administration of justice) and that a client’s best interests can often be served through reconciliation rather than combat. Mason suggests that non-adversarial behaviour should be the norm. Other authors (and even some professional

\(^{169}\) Kovach (n 166) 616.
\(^{170}\) Kovach (n 168) 963.
\(^{171}\) Ibid.
\(^{172}\) Kovach (n 166) 622.
\(^{173}\) Boettger (n 129) 17; Lande (n 127) 77.
\(^{174}\) Kovach (n 166) 616.
\(^{176}\) Boettger (n 129) 23; Lande (n 127) 95.
\(^{177}\) For negative views on good-faith requirements, see generally Lande (n 127) 73.
\(^{178}\) Lande (n 127) 98-99; Bennight (n 175) 2.
\(^{179}\) Weston (n 128) 638; Boettger (n 129) 28; Lande (n 127) 102-105; Sherman (n 175) 15.
\(^{180}\) Lande (n 127) 106; Boettger (n 129) 26; Bennight (n 175) 2.
\(^{181}\) Boettger thought that a good-faith requirement in mandatory mediation would further deplete the parties’ self-determination: Boettger (n 129) 12.
guidelines) assert that legal representatives should behave in a non-adversarial manner in mediation. But what exactly is meant by non-adversarial behaviour (or adversarial behaviour) and are there circumstances in which a lawyer might have valid reason for acting more adversarily than less adversarily to protect the interests of a client? The term ‘non-adversarial’ may prove as difficult to define as that of ‘good faith’.

Another issue which is often discussed in this context is whether or not advocacy has a place in mediation. Mason and many other commentators support the use of advocacy in mediation (some authors have described it as conflict resolution advocacy). If by advocacy, we mean the use of persuasion on behalf of our client, then it is well placed in mediation. In mediation, an advocate will try to persuade the other side that a particular option represents an optimal solution for all concerned. Advocacy can even be a cooperative exercise. Bordone speaks of advocates engaging in joint problem-solving, while Macfarlane speaks of the advocate working with the other side. An advocate will consider solutions that accommodate the interests of other parties as well as those of their client, and help clients to see that solutions, not judgments, may be in their best interests.

It is the worst excesses of adversarialism with which Mason has a problem because of its capacity to damage the mediation process. It is difficult to disagree with his view. There is broad agreement that excessive adversarial zeal (however one defines zeal) is out of place, in mediation and in litigation. There is no place in either context for ‘table-pounding, endless discovery or boisterous behaviour’ or ‘for a win-at-all costs mentality, and out-and-out dishonesty’.

According to Mason, adversarial excesses in mediation include:

- Putting a client’s position as aggressively as possible;

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182 Mark C Rutherford, ‘Lawyers and Divorce Mediation’ (1986) Mediation Quarterly 17, 27-31; Bowie (n 151) 34. Also see Christine Parker and Adrian Evans, Inside Lawyers’ Ethics (Cambridge University Press, 2007) 135 who draw upon the Law Society of New South Wales, ‘Professional Standards for Legal Representatives in a Mediation’ (at 1 January 2008) s 2.3 (a provision which is not drafted in the language of a binding rule).

183 Jean R Sternlight, ‘Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting’ (1998-1999) 14 Ohio State Journal on Dispute Resolution 269, 280; Lawrence Fox, ‘Mediation Values and Lawyer Ethics: For the Ethical Lawyer the Latter Trumps the Former’ in Bernard and Garth (n 1) 39, 39-41 (who argues that zealous advocacy and mediation are compatible concepts and that lawyers’ duties are to their clients not the mediation process). For other authors who argue that advocacy, and even zealous client representation, is indispensable in mediation: see eg John W Cooley, Mediation Advocacy (National Institute for Trial Advocacy, 2nd ed, 2002) 127; Harold I Abramson, Mediation Representation: Advocating in a Problem-Solving Process (National Institute for Trial Advocacy, 2004) 7; Bordone (n 151) 11, 23.


186 Bordone (n 151) 23.

187 Macfarlane (n 184) 66.


189 Mason (n 4) 115.


191 Fox (n 183) 41.

• Making high demands;
• Exaggerating;
• Posturing (using emotional displays and manipulation);
• Misleading (even passively so);
• Bullying, and
• ‘[M]aking concessions only to the extent necessary to get greater concessions from the other side’. 193

Much of this behaviour could be labelled as the tactics of positional negotiation. Presumably, the following behaviour could be categorised as non-adversarial:

• Taking a non-aggressive stance;
• Making moderate demands;
• Moving from positions to reveal interests;
• Sharing information;
• Disclosing the client’s real goals and bottom line;
• Making reciprocal concessions;
• Not misleading.

Apart from the fact that these terms are imprecise (is all exaggeration impermissible?), this type of list drawing assumes a clear dichotomy, and a clear choice, between negotiation approaches and tactics. This is one of a number of assumptions which underlie proposals for new rules of conduct for mediation advocates. Such assumptions are explored next.

7. SHAKY DICHOTOMIES AND ASSUMPTIONS

7.1 Negotiation is Either Cooperative or Competitive

Some proponents for new rules for mediation advocates assert that they should use interest-based negotiation (also referred to as principled, problem-solving or cooperative negotiation). 194 So called cooperative tactics (for example, being open, sharing information and not misleading about minimum requirements) are thought appropriate to interest-based negotiation while more competitive tactics (making high opening offers and small and slow concessions, concealing and misrepresenting information, threatening and bluffing) are generally associated with positional negotiation. 195 But this dichotomy is unsound. Commentators agree that most negotiations involve both a cooperative and competitive stage and that effective negotiators move between these two approaches depending on the stage of negotiation. 196 Negotiators may simultaneously (or sequentially) employ both cooperative

193 Mason (n 4) 114.
194 Negotiation theorists generally identify two approaches to negotiation, namely principled or interest-based vs. positional (Fisher and Ury (n 157) 11); integrative vs. distributive (Howard Raiffa, The Art and Science of Negotiation (Belknap Press of Harvard University Press, 1982) 33); cooperative vs. competitive (Dean G Pruitt, Negotiation Behavior (Academic Press Inc., 1981) 15); problem-solving vs. share-bargaining (C L Karrass, The Negotiating Game (Thomas Y. Crowell Publishers, 1970) 127); or in popular terminology, win/win vs. win/lose.
and competitive tactics in the course of a single negotiation. Lawyers should be able to select approaches and tactics to suit the situation.

7.2 Mediation is Non-Adversarial by Nature

Some authors assume that non-adversarial behavior is essential to the nature of mediation. It is not. Mediation need not be non-adversarial to retain its character as mediation. A client may approach mediation as a contest, determined to advance his or her legal position, rather than to secure an agreement which satisfies everyone’s interests. This fact does not mean that the dispute is inappropriate for mediation and it does not make mediation ineffective. In order for the parties to reach an agreement, a proposal need only address the other side’s interests sufficiently well to move toward agreement. It may still be to everyone’s advantage to avoid legal costs and the trauma associated with a court case.

In her work on negotiation, Norton expresses the view that ‘the basic character of the [negotiation] relationship is always in some respect adversarial’ although ‘cooperative or problem-solving bargaining strategies and tactics are used’. Indeed, she believes that ‘[a]n adversarial posture is necessary in bargaining to protect and advance the parties’ interests, including their interests in ethical treatment’. An adversarial posture ‘facilitates the search for truthful information, helps guard against injurious disclosures, and helps prevent treatment that could prejudice a party’s interests’. But lying and unfairness are ‘not a necessary function of the adversarial posture’. ‘The posture requires partisanship, not its excesses’.

7.3 Law and Mediation Do Not Mix

Lawyers are sometimes criticised for bringing law into mediation but if legal rights and obligations are involved, parties can benefit from an adversarial look at their position. ‘A prediction of the likely results of adversary processing is necessary for an informed, fully voluntary decision about a mediated solution’. Lawyers can support and enhance the values of empowerment and self-determination in mediation by promoting informed consent. They can ‘safeguard client voice’ and ‘guide clients towards responsible decisionmaking’. They do this best by acting as partisan advocates for their clients.


198 Bowie (n 151) 34.


200 Abramson (n 151) 118.

201 Norton (n 156) 530. Also see Condlin (n 155) 73.

202 Norton (n 156), 530.

203 Ibid, 529.

204 Ibid, 530.

205 Ibid, 531.

206 Ibid.


208 Nolan-Haley (n 207) 1376-1377.

209 Ibid.
concludes that while the ‘adversarial/materialistic perspective’ of advocates has been criticised, ‘[y]et it is precisely the stance of partisanship that causes representative lawyers – advocates - to provide the fullest possible information to their clients’. At the same time, lawyers can remind clients that ‘merit’ is only one matter that they should be considering and encourage them to look at broader interests and their relationship with the other party.

7.4 Lawyers Act Inappropriately in Mediation

The call for new rules to ‘curb the adversarial imperative’ rests on an assumption that lawyers use excessive adversarial zeal in mediation and that such behaviour is prevalent enough to change the rules of conduct.

We know a good deal about how lawyers can be helpful in mediation. Many authors, including Mason, acknowledge that there are good reasons for lawyers to be present. However, we do not know much about the way in which lawyers behave in mediation or about why they behave the way they do.

In Australia and in the USA, only limited research has been conducted on the nature of lawyers’ behaviour in mediation. The little evidence that is available is anecdotal, dated, based on small sample groups, or confined to mediation in particular contexts or to mediation of particular types of disputes. As Wissler points out, the ‘[e]xisting

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210 Stark (n 207) 793.
211 Fox (n 183) 45.
215 One of the most often cited studies (one which finds that lawyers tend to help rather than hinder the progress of mediation) is that conducted by Craig A McEwen, Nancy H Rogers, and Richard J Maiman, ‘Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation’ (1994-1995) 79 Minnesota Law Review 1317. In Australia, one of the most often cited works is that undertaken by Micheline Dewdney, Bridget Sordo and Christine Chunkin, Contemporary Developments in Mediation Within the Legal System and Evaluation of the 1992-93 Settlement Week Program (The Law Society of New South Wales, Sydney, 1994).
217 See eg Roselle L. Wissler, ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17 Ohio State Journal on Dispute Resolution 641; Rundle (n 216); Sourdin (n 216).
empirical research ... is too limited in several respects to be able to conclude that lawyers either play an essential role in mediation or are not needed, or that they are particularly helpful or detrimental to the mediation process.219

There is no conclusive evidence that lawyers act inappropriately in mediation by bullying, being rude, misleading and taking unfair advantage of their opponent. There is some evidence that although lawyers are trained in adversarial techniques they are as likely to be conciliatory as combative in practice220 – but this evidence also needs to be tested and verified before any conclusions about lawyers’ behaviour can be made.

8. CONCLUSION: DIRECTIONS FOR FUTURE RESEARCH AND ANALYSIS

This article has considered a number of ethical dilemmas which might confront legal representatives in mediation and has attempted to demonstrate that they can be satisfactorily resolved through use of the existing rules of professional conduct. The rules discussed here are the minimum standards of conduct owed by practitioners. Candour and cooperation are not prohibited by the rules. ‘[L]awyers are not ethically required to press for every advantage, take every permissible step, react to every point raised, or to otherwise play hardball’.221 ‘Nothing in the rules imposes an obligation to act in a win-lose manner designed to deprive opposing parties of fair terms’.222 The existing rules enable lawyers to cooperate, collaborate and use joint problem-solving methods, in the appropriate circumstances. This is perfectly consistent with the discharge of duties owed to a client for it will often times be in the best interests of the client for a lawyer to act cooperatively. So too there are many reasons why it might be in the client’s best interests to be fully candid with a mediator (for example, it might lead to the formation of a mutually satisfactory outcome, one which is not susceptible to later attack).

The rules in Australia and the USA do need some finetuning. Rule drafters in Australia should specify if the reference to ‘mediations’ in the definition of ‘court’ means ‘mediators’ and if so, provide some guidance as to whether or not required disclosures should be made in joint or separate sessions. If disclosures are to be made in separate sessions, the flow-on effects for mediators must also be considered. In the USA, the ABA’s Standing Committee on Ethics and Professional Responsibility might consider the wider impact of its opinion.223 The Committee has not explained why a judge–mediator should be owed a higher standard of honesty and candour than that owed to third parties. Rule drafters in both jurisdictions should provide a rationale for treating a mediator as a court (judge). Given that mediators have no power to make substantive law decisions, it is not clear why they should be advised of legal authorities and legislation. If the mischief at which these provisions are aimed is misleading statements (and half-truths), rather than lack of candour, it is sufficient that mediators are treated as third parties.

Rule makers also need to clarify if all misleading is prohibited in mediation. Currently in Australia, the prohibition against misleading mediators seems to extend to statements

219 Wissler (n 213) 468.
222 Craver (n 154) 311.
223 ABA Formal Opinion 06-439 (n 80).
Concerning a client’s position, interests, settlement priorities, settlement goals and the extent of the lawyer’s settlement authority. For the reasons given earlier in this article, this is too onerous a standard for mediation.

Consideration might be given to developing a more sophisticated system of rules, one which recognises mediators as comprising a class of their own. But formulation of appropriate rules for mediation is a tricky business. More rules in mediation would freeze a standard of behaviour in place as ‘the only correct one’. It is impossible to provide a single formula – a single correct answer - for lawyers ‘to follow in order to achieve ethical and effective negotiation behaviour’. More rules might result in the creation of a complex grid of rules, making it difficult for lawyers to know which set of rules to follow and in what circumstances (for mediation and litigation often take place simultaneously). This article has sought to show that decisions about honesty (or lack of it), fairness and courtesy, cooperation and good faith, are contextual. Lawyers need to be able to weigh up competing duties (and the values which underpin them) and to make decisions which they are able to justify in the light of all the circumstances of the case. It is possible that different lawyers will arrive at different decisions when confronted with the same or similar ethical dilemmas. According to the literature, that does not matter providing each lawyer is able to justify their decision in the particular context. The existing rules provide an adequate framework from which to derive appropriate behaviour, while preserving fundamental values of the legal profession.

But there is much about which we need to know more. Amongst the questions that need to be addressed by rule drafters and policy makers are the following:

- Should mediators be treated as judges and if so why, and in what circumstances (for example, when a matter is pending before a court)? Does the same reasoning apply to judicial registrars and other court officials?
- Alternatively, should mediators be treated as ‘third parties’ for the purpose of the rules and if so, why?
- Alternatively, should mediators be treated differently from judges and third parties, and if so, how and why?
- Should mediation be treated any differently from unassisted negotiation and if so, how and why?
- In what ways might duties and standards differ for court-annexed mediation as opposed to private mediation? Are there special concerns attached to mandatory mediation as some authors claim and if so, how can they be addressed?
- What allowances need to be made to accommodate the fact that mediation may be conducted in whole or in part, via separate sessions?

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226 Loder (n 224) 330.
• What evidence is there that lawyers act with (excessive) adversarial zeal in mediation? How prevalent is this behaviour and what effect does it have on mediation?

• What factors impact the behaviour of lawyers in mediation? Some authors suggest that the mediator’s approach (and in particular, how facilitative, evaluative or transformative the mediator might be) is one of the single most important factors impacting the role undertaken by legal representatives.\(^\text{228}\) This is a complex question, made more so by the fact that mediators may use a variety of approaches during a single mediation (or even a single meeting with the parties).\(^\text{229}\)

• To what extent can and do mediators counter negative lawyer behaviours (assuming such behaviour exists)?

• How can mediators encourage positive participation by lawyers?\(^\text{230}\)

• If lawyers are to be required to act in good faith and in a non-adversarial manner, how should these terms be defined and what sanctions can be applied for breach? Who will decide whether or not there has been non-compliance and on the basis of what evidence? How will the confidentiality of mediation be maintained?

• In what circumstances would lawyers have ‘just cause’ for acting more adversarially, rather than less adversarially? What are the potential problems with these concepts (for example, absence of objective definitions, satellite litigation and inroads into the confidentiality of mediation)?

• How can the diversity of mediation practice be captured and catered for in the rules of professional conduct?

• Are rules the best way in which to modify the behaviour of lawyers?

• How can education and training be used to convince lawyers and parties to engage meaningfully in the mediation process?

These aspects of the law governing lawyers in mediation require thoughtful analysis, not ad hoc piecemeal provisions. We need compelling reasons for introducing more rules to govern lawyers’ behaviour in a practice setting which is dynamic and fluid, and ideally, informal and flexible.

\(^{228}\) Abramson (n 200) 124.
