Ethics and Conduct in ADR

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I. [6.1] INTRODUCTION

Stepping out of litigation and into ADR does not insulate counsel from the myriad of ethical rules and standards of conduct that apply in the traditional legal process. Whether viewed as another aspect of advocacy or as a settlement procedure, ADR carries with it the same ethical strictures for counsel. Although the venue may have changed, counsel still are required to apply the same rules and standards to the new and unfamiliar format.

Moreover, new ethical principles arise in ADR, particularly when an attorney wears the different “hats” of advisor, advocate, and neutral. Increasingly, attorneys are acting as arbitrators, mediators, and other neutrals. A prime example of attorney participation in ADR is the highly-successful mandatory arbitration program now operating in many Illinois court systems. See Illinois Supreme Court Rules 86 – 95.

Understanding and properly applying both the old and new ethical rules and standards of conduct in ADR has many benefits, including (a) advocating effectively and fully for a client’s interest; (b) avoiding malpractice claims; and (c) advancing the system of justice for the public good. Counsel should view ADR not as an additional burden of practice, but rather as an opportunity to excel and enhance one’s professional stature and reputation. Those opportunities grow as ADR gains in popularity and is requested increasingly by clients or required by the courts.

A. [6.2] The Focus Is on Three Attorney Relationships

Ethics rules and standards of conduct arise in and apply to an attorney’s relationships with others. This chapter focuses on the relationships attorneys have (1) with both clients and the opposing parties and the counsel of those parties when acting as counsel and (2) with both sides of the dispute when acting as a neutral. (Indeed, the neutral’s actions could also affect persons who are interested in the dispute but not actually parties to it.) The ethics rules and standards of conduct are always present and are triggered by each new relationship. Thus, three relationships or contexts arise out of ADR and are discussed in this chapter:

Attorney-Client: in which counsel advises a potential or existing client about ADR. This is the usual one-on-one relationship.

Attorney as Advocate: in which counsel represents a client in an ADR proceeding. Here, the relationship is more complex, as it continues the attorney-client relationship, but also adds the attorney-tribunal relationship and attorney-opposing party relationship.

Attorney as Neutral: in which an attorney is asked to decide a dispute in ADR or assist the disputants to resolve their ADR dispute. Strictly speaking, there is no attorney-client relationship (in the sense of providing legal advice) in this situation, but rather there exists an attorney-parties relationship and, perhaps to a greater extent than the other two contexts, an attorney-justice system relationship.
The duties of an attorney as an advocate or neutral traditionally have been seen as role-based. The duties were defined by what was done by counsel depending on which "hat" was being worn. However, from an ethical perspective, those roles and duties are better viewed by the relationships arising in each activity.

As discussed in more detail in §§6.9 – 6.13, the ethical demands are complicated when counsel acts as an advocate. The number of relationships, and therefore the applicable rules, are multiplied due to the various demands of the position. Akin to a juggler with three balls, counsel must simultaneously negotiate the fluid and demanding relationships with the client, the neutral, and the opponent. Oftentimes, the strictures seem inconsistent and even contradictory. Perhaps the clearest example of the complexity of the advocate’s role is the tension that exists between the rules regarding confidentiality (an attorney-client issue) and the fundamental principles against fraud and misrepresentation (implicating the advocate’s dealings with both the neutral and the opponent). These competing obligations impose difficult choices on counsel to which there are simply no bright-line, general answers. See §6.12. Counsel is left to his or her judgment in order to best serve the client and pursue justice.

There are many ethical and conduct issues that are beyond the scope of this chapter, including the following:

1. ethics rules and standards of conduct not unique to ADR (i.e., conflicts of interest, billing practices, etc.);

2. qualifications of counsel to act as a neutral — these are increasingly subject to legislation (The primary ethical issue raised is counsel’s accurate marketing and disclosure of his or her qualifications.);

3. the unauthorized practice of law and multidisciplinary practices (This is the classic turf issue because it focuses on non-lawyers’ activities in the process. There are good arguments to support and rebut the claim that lawyers make better or worse neutrals; the answer may depend on whether one is talking about an arbitrator or a mediator. Notably, the standards, guidelines, and legislation applicable to neutrals generally do not distinguish between lawyers and non-lawyers. However, the formerly proposed Illinois Mediator Certification Act would have supplanted and superceded the Illinois rules when an attorney is a mediator. There are already conflicting opinions as to whether being an ADR neutral constitutes the practice of law. For a further discussion, see Rick Guzman, ADR and the Unauthorized Practice of Law, 5 In the Alternative (ISBA, June 1999); and John W. Cooley, Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR, 55 Disp.Resol.J. 72 (Aug. – Oct. 2000.));

4. strategies or techniques in an ADR proceeding, such as whether to take a competitive or cooperative stance in mediation and which specific ADR process is best for a particular dispute; and

5. the application of pleading rules, such as Federal Rule of Civil Procedure 11 and Illinois Supreme Court Rule 137.
This chapter is limited to the most important rules and standards that arise from ADR proceedings, not general litigation. Strategies and techniques in an adversarial ADR process are primarily matters of individual style. Style, however, does not trump the ethical rules and standards of conduct.

This chapter focuses on the two primary categories of ADR: arbitration and mediation. Although there are clear differences between these two methods of resolution, on the one hand, and the many other ADR processes, for purposes of applying and evaluating the ethics rules and standards of conduct, there is no major difference. The other ADR procedures also involve or trigger the same relationships. If there are any distinctions in a particular process, they arise when a court, rather than a non-court tribunal, maintains full jurisdiction over the dispute, such as with a summary jury trial. In that case, of course, the attorney will not be the neutral, so those ethics issues surrounding the attorney’s role as a neutral will not arise. See §6.14 – 6.19.

B. [6.3] The Sources of the Rules and Standards

Adhering to the varied rules and standards of law practice is hard enough for attorneys. Applying and resolving the conflicts among and between those rules increases the difficulty of the burden. The task is further complicated by the multiple sources of rules and standards that apply to the different relationships. Thus, the first step toward full compliance with legal standards is knowing where to find them.

In general, ethical rules or codes govern the first two relationships, i.e., the attorney-client and the attorney-as-advocate situations. Similarly, there are different sets of ethical rules or codes that might govern the conduct of a neutral. For example, the relationship might be subject to the Illinois Rules of Professional Conduct (Illinois Rules) (RPC), the Rules of Professional Conduct issued by the Northern District of Illinois (Federal Rules), and the American Bar Association Model Rules of Professional Conduct (Model Rules). See also Bankruptcy Rules 1000 – 1010 (Mediation) of the United States Bankruptcy Court for the Northern District of Illinois (Bankruptcy Rules). The foregoing rules and codes are amplified by Illinois cases, federal court decision§, Attorney Registration and Disciplinary Commission (ARDC) opinions, Illinois State Bar Association (ISBA) advisory opinions, and ABA rulings from its Center of Professional Responsibility. Further guidance is available in the rules and cases from other jurisdictions.

Many of these rules have subtle differences and implied directives. Thus, even after counsel decides the difficult question of which rules apply, counsel still faces the more difficult task of determining what the rules imply and what is the controlling answer to an ethics problem. Moreover, these ethical obligations apply to counsel even before litigation.

Counsel’s actions as a neutral are primarily governed by the standards of conduct discussed in this chapter. See §§6.14 – 6.19. For example, ethics codes and standards of conduct are issued by the various ADR organizations (e.g., American Arbitration Association (AAA), the Association for Conflict Resolution (the merged organization of the Society of Professionals in Dispute Resolution (SPIDR), the Academy of Family Mediators, and the Conflict Resolution Education Network), or the self-regulatory organizations such as the National Association of Securities Dealers (NASD), the National Futures Association (NFA), etc.). For labor issues, the
Code of Professional Responsibility for Arbitrators of Labor-Management Disputes provides its own standards of conduct. There are differences between and among these codes, and in order to determine which rules of conduct apply, counsel should look to the rules of the specific organization for which he or she is acting as neutral.

As additional guidance, counsel also must be alert to applicable legislation. That would include the Federal Arbitration Act, 9 U.S.C. §1, et seq., and the Illinois Uniform Arbitration Act, 710 ILCS 5/1, et seq. The Federal Arbitration Act and the Illinois Uniform Arbitration Act are particularly relevant to the conduct of neutrals, as discussed in §§6.14 – 6.19. There is also the federal Alternative Dispute Resolution Act of 1998, 28 U.S.C. §651, et seq., which contains provisions regarding immunity and confidentiality, and the Illinois International Commercial Arbitration Act, 710 ILCS 30/1-1, et seq., which is designed to supplement the Uniform Arbitration Act. Moreover, the foregoing legislation is not static. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is now revising the Uniform Arbitration Act, and the proposals contain new rules affecting an attorney’s relationships in ADR. For example, see §§6.15, 6.18, 6.19.

Also, typical of any industry experiencing substantial growth, there are many new organizations being formed and many new standards and guidelines being proposed that could complicate counsel’s evaluation of his or her ethical duties, particularly those responsibilities that pertain to a neutral. The NCCUSL is also now tackling the huge task of proposing a totally new Uniform Mediation Act, which could add yet another layer of standards of conduct for mediators in Illinois. Other new Illinois-specific legislation includes recently enacted Illinois Supreme Court Rule 96, permitting each judicial circuit to implement its unique mediation program; the formerly proposed Illinois Mediator Certification Act; the Supreme Court rules for divorce mediation; and the Circuit Court of Cook County, Law Division, proposed mediation program. The foregoing does not identify all of the disparate sources, as this chapter could not possibly discuss every guideline affecting the conduct of participants to a mediation. Therefore, counsel must be alert to the ever-expanding and evolving codes and standards.

One could expect (and hope!), however, that the pendulum would eventually swing away from fragmentation and back toward consolidation of both the organizations and guidelines. Indeed, the recent merger of SPIDR with the Academy of Family Mediators and the Conflict Resolution Education Network signals that shift and may also forecast simplification and uniformity of the ethical and conduct guidelines. Until such a unification is complete, however, counsel must accept the burden of constantly reacquainting themselves with the many rules, particularly if counsel intends to act as a neutral.

Finally, counsel must also consider the power of the parties in ADR to alter or waive certain of these rules or standards. Since ADR is in great part a creature of contract, the parties may mix, change, or even abandon certain standards that would otherwise apply to formal litigation. See, however, NFA Code of Arbitration (NFA Code) §17, providing that, subject to the NFA’s approval, the NFA Code supersedes both contradictory or limiting provisions in the parties’ agreement, as well as agreements that impose additional obligations on the NFA or its arbitrators. Note, however, that the ability to change standards or rules generally is limited to only two of the three relationships — when counsel is an advocate in an ADR proceeding and when counsel is a neutral in such a proceeding. For example, the parties may make their own
agreement regarding confidentiality or may waive a slight conflict that a neutral has disclosed. (The neutral should resign and not even ask for waiver if the conflict is significant.) But the alteration or waiver of such guidelines presumes full disclosure, and thus informed consent of the client or parties. Unless modified by the parties’ agreement, however, the matrix of codes and standards applies to the case.

C. [6.4] Confidentiality in ADR

The complex issues of confidentiality arise in all three of the relationships discussed in this chapter. Moreover, guidelines for confidentiality are continuously being proposed, often by groups with divergent interests. The NCCUSL, drafters of the proposed Uniform Mediation Act, uncovered 2,500 statutes in the country that just dealt with confidentiality in mediations. (ABA Journal, Jan. 6, 2000, p. 66.) Additionally, more confidentiality rules are being proposed, such as the recently adopted Local Rule 83.5 of the Northern District of Illinois. Local Rule 83.5 is intended to implement the requirements of §652(d) of the ADR Act of 1998. It differs, however, from Bankruptcy Rule 1007, despite the fact that both rules must coexist in the same judicial district. See also new Illinois Supreme Court Rule 96(b)(2)(ix), requiring judicial circuits to address confidentiality in local mediation rules.

Although confidentiality is one area in which the parties to the dispute, by contract, can set the rules, this freedom, paradoxically, may be the greatest impairment on the rights of nonparties to the dispute. For example, severe confidentiality limits could interfere with the nonparties’ normal rights of discovery. Perhaps this issue best explains why there exists such a confusing array of rules on this topic and a consequent inability to achieve a consensus on how to reconcile the many conflicting interests.

While ADR proceedings are generally private (perhaps with the exception of a court-directed summary jury trial), privacy does not necessarily equate to confidentiality. Chapter 7 in this handbook discusses confidentiality in depth, although selected confidentiality issues are addressed elsewhere in this chapter. See the confidentiality/prevention of fraud tension discussed in §6.12.

II. [6.5] ATTORNEY AS ADVISOR — THE ATTORNEY-CLIENT RELATIONSHIP

The issues raised in the following sections concern disclosure and informed consent. They arise on a matter-by-matter basis, and thus require matter-by-matter advice because a counsel’s recommendation and the client’s decision may change depending on the specifics of a situation. Disclosure and informed consent issues arise at the beginning of the attorney-client relationship and continue throughout that relationship. The obligations are particularly acute during an ADR proceeding, such as mediation, in which counsel and client need to continuously reevaluate, for example, whether participation in the mediation is worthwhile and likely to achieve the client’s goals. Unlike arbitration, mediation is a voluntary process, and either party may withdraw at any time. The choice to stay in the mediation, therefore, is an ever-evolving decision that requires the constant conference between counsel and client.
As ADR gains in popularity, questions of whether to use it and, if so, which process to use arise more frequently. ADR is not a panacea for all disputes. Indeed, some disputes are best litigated because of their precedential value or important public interest. Other cases are better tried because a party feels that the limits or disadvantages of ADR outweigh its advantages. Advantages may include privacy and confidentiality, choice of procedural rules, obtaining a neutral who has special expertise in the area of dispute, and preserving long-term relationships. Disadvantages, particularly in arbitration, may include minimal discovery, limited rights of appeal, and the absence of a full opinion explaining the reasons for the award. Thus, it may be as detrimental to a client to put a matter into ADR that should not be there as it would be not to utilize ADR for a case in which it clearly should be employed to resolve a matter.

Education is the key to compliance with the ethics rules and standards of conduct governing an attorney acting as an advisor. Education involves two primary areas: (a) the attorney’s self-education of the opportunities, benefits, and detriments of ADR; and (b) counsel’s education of the client, so that the client can make an informed decision of whether to use ADR to resolve a dispute. The client will rely on counsel in deciding whether to use ADR, when to choose ADR, and which form of ADR to elect.

A. [6.6] Counsel Must Consider ADR in the Client’s Interest

Both the Illinois Rules of Professional Conduct and the ABA Model Rules require lawyers to (1) resolve a client’s disputes in the most cost-effective way and shortest time possible and (2) protect the client’s best interest. The concluding sentence of the Preamble to the Illinois Rules states:

Rather, it is the duty of all lawyers to seek resolution of disputes at the least cost in time, expense and trauma to all parties and to the courts.

In addition, both RPC 2.1 and Model Rule 2.1 urge counsel to consider things “such as moral, economic, social and political factors” when representing a client. [Emphasis added.] Further, RPC 3.2 states that a lawyer “shall make reasonable efforts to expedite litigation,” and Model Rule 1.3 similarly requires reasonable diligence and promptness in representing a client. The Illinois Supreme Court Rules recognize that ADR should be discussed at case management conferences as a means of short-circuiting expensive and time-consuming litigation. S.Ct. Rule 218(a)(7). Accordingly, the Illinois Rules collectively require lawyers to assess a client’s economic posture when evaluating how to resolve a dispute or handle a matter.

Since ADR is recognized as a less costly method, in terms of both money and time, to resolve disputes, counsel should consider ADR as one avenue to satisfy a client’s objectives and thus meet the attorney’s ethical obligations. Note, however, that these inferential obligations only urge the consideration of ADR, but do not require its use. No Illinois rule currently mandates the use of ADR, just as no Illinois rule states that counsel should ignore ADR.

B. [6.7] Counsel Must Explain the Risks and Benefits of ADR

It is not counsel’s role to single-handedly decide whether ADR should or should not be used to resolve a particular dispute. The rules implicitly require counsel to explain what options to litigation, such as ADR, exist for a client’s consideration. For example, both the Illinois Rules
and the Model Rules state that "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." RPC 1.4(b); Model Rule 1.4(b). Similarly, RPC 1.2 and Model Rule 1.2, both entitled "Scope of Representation," state that a lawyer "shall consult with the client as to the means by which [the objectives of representation] are to be pursued." [Emphasis added.] "Means" must include ADR as a tactic that often can best achieve the client’s objective. Indeed, ABA policies expressly refer to ADR as means, stating: "In appropriate cases, I will counsel my client with respect to mediation, arbitration, and other alternative methods of resolving disputes."

Proposed changes to the ABA Model Rules underscore this heightened duty of counsel to discuss ADR with clients. For example, the ABA Ethics 2000 Commission has proposed that "informed consent" means agreements between counsel and client "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." The proposed comments refer to "a discussion of the client’s or other person’s options and alternatives" as a condition of informed consent. Also, "tribunal" was expanded to include "an arbitrator in a binding arbitration proceeding." Although that change has more impact on the ethical standards governing an attorney’s role as an advocate (see §6.10), the shift shows that the new Model Rules clearly recognize ADR as a means to resolve disputes. Similarly, comments to Model Rule 1.4(b) emphasize the increased responsibilities of lawyers to discuss tactics to resolve a case. The ADR Act of 1998 requires federal courts "to encourage and promote the use" of ADR by requiring litigants in most civil cases to consider the use of ADR. 28 U.S.C. §§651(b), 652(a). Thus, an attorney needs to discuss ADR with clients whether he or she practices in Illinois state or federal court.

These ethical obligations can arise well before any actual dispute. Thus, transactional lawyers must anticipate bumps or breakdowns in business relationships when negotiating contracts such as leases and buy-sell agreements. The transactional lawyer must think of dispute resolution as an integral part of negotiations, despite counsel’s and the client’s understandable denial that the deal may sour at some time in the future. ADR clauses should be included in the underlying agreements. Indeed, after the collapse of the completed transaction, it may be too late to get the parties to agree to a less litigious means to resolve the dispute. By that time, the emotions may be too high and attacks on character too insulting to expect the parties (let alone counsel) to consider or adopt an ADR approach. Contract clauses for arbitration and mediation can be found in Drafting Dispute Resolution Clauses – A Practical Guide (AAA, 2000), and A DRAFTER’S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION (ABA, 1991), as well as many other sources.

C. [6.8] The Risks of Not Counseling About ADR

The Illinois Rules can be considered as a standard of care in malpractice actions. Mayol v. Sommers, Watkins & Kimpel, 223 Ill.App.3d 794, 585 N.E.2d 1176, 166 Ill.Dec. 154 (4th Dist. 1992); Nagy v. Beckley, 218 Ill.App.3d 875, 578 N.E.2d 1134, 161 Ill.Dec. 488 (1st Dist. 1991). In Mayol, the appellate court held that attorney disciplinary rules establish minimum standards of conduct. 585 N.E.2d at 1186. In Nagy, although the court held that the rules do not alone support a private right of action, the court stated that the rules may nonetheless be relevant to the

For partial lists of cases, rules, and legislation in other jurisdictions that require or urge attorneys to advise clients about ADR, see Suzanne Schmitz, Is There a Duty To Advise Clients About ADR?, 5 In the Alternative (ISBA, Apr. 1999); and Stuart M. Widman, ADR and Lawyer Ethics, 82 Ill.B.J. 150 (1994). See also Londoﬀ v. Vuylsteke, 996 S.W.2d 553, 557 (Mo.App. 1999), for a holding that the state rules of professional conduct “have the force and effect of judicial decision.”

Even settlement of cases, to which mediation might be comparable, is subject to the different rules. ARDC rulings have punished counsel for settling a case for an offer that was previously rejected by the client, or settling a case without the client’s approval. In re Dombrowski, 71 Ill.2d 445, 376 N.E.2d 1007, 17 Ill.Dec. 678 (1978); In re Gavin, 21 Ill.2d 237, 171 N.E.2d 588 (1961). Similar claims could be made against counsel who fails to inform a client about ADR, or gives wrong advice about whether to use ADR and the process to be used.

The ABA’s Ethics 2000 Commission has recommended that the scope of the Model Rules be changed to acknowledge that a violation of ethics rules may be evidence of a breach of a lawyer’s duty of care. Therefore, it is important that counsel follow the implicit obligations placed on an attorney by the rules that he or she know and advise clients about ADR.

III. [6.9] THE ATTORNEY AS ADVOCATE — THE ATTORNEY’S RELATIONSHIPS IN AN ADR PROCEEDING

The ethical requirements and standards of conduct are perhaps most complex in the attorney-as-advocate environment because (a) the lawyer has responsibilities to different participants, (b) some of those participants are not the lawyer’s clients, and (c) the responsibilities often conflict.

In general, the two primary responsibilities of an attorney as an advocate are truthfulness and good-faith participation. Those obligations generally govern the attorney’s statements to and dealings with the neutral and opposing parties. At the same time, however, the attorney has continuing duties to the client, most particularly zealous representation and preserving confidentiality. There is a potential for tension, however, between the multiple obligations that are created by the different relationships. Also, like many ethical quandaries, there are few absolute answers to guide counsel in the ADR proceeding when a conflict arises between the ethics rules.

The Illinois Rules and the Model Rules contain numerous (and generally similar or even identical) rules addressing fraud, concealment of evidence, and confidentiality. See, e.g., RPC 1.2(d), 1.6, 3.4, and 4.1; Model Rules 1.2(d), 1.6, 3.4, 4.1. These rules are discussed in more detail in §6.11 below.

The preliminary issue, however, is whether those ethical precepts apply to an arbitration or mediation. More specifically, the question is whether an arbitration panel or a mediator is considered a “tribunal,” an issue that triggers those rules. See Illinois Rule 3.3; Model Rule 3.3. The proposed amendments to Model Rule 1.0 broaden the definition of “tribunal” to include arbitration panels. Also, the “tribunal” effect of arbitration is implied when an arbitration award is deemed res judicata or collateral estoppel of later litigation. See Herriford v. Boyles, 193 Ill.App.3d 947, 550 N.E.2d 654, 140 Ill.Dec. 769 (3d Dist. 1990). See also Rogers v. Peinado, 85 Cal.App.4th 1, 101 Cal.Rptr.2d 817 (1st Dist. 2000), permitting a malicious prosecution claim to proceed based on a bad-faith claim made in arbitration. Indeed, with the increasing popularity of ADR, it makes little sense to exclude arbitration panels from the scope of ethics rules, even when only a single arbitrator is involved. Similarly, because advocacy skills and client obligations arise in mediation, a mediator also should be deemed a tribunal for purposes of the ethical strictures. In any event, RPC 3.4 and Model Rule 3.4 prohibit falsification or concealment without reference to a venue or tribunal. There would be an enormous loophole for attorneys to avoid their ethical duties if ADR proceedings were not also covered by ethics rules. ADR would then become the wild west of dispute resolution, without the various protections of the client, the opposing parties, and the process that are essential for the complete and proper administration of justice.


The Illinois Rules state: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” RPC 1.2(d). Further, the Illinois Rules state:

In the course of representing a client a lawyer shall not:

(a) make a statement of material fact or law to a third person which statement the lawyer knows or reasonably should know is false; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless disclosure is prohibited by Rule 1.6. RPC 4.1. See also Model Rule 4.1.

These prohibitions against fraudulent statements of material fact apply more absolutely to arbitration, which is more akin to litigation’s offers of evidence through witnesses and documents. In contrast, the information given to a mediator and the opposing side may be a blend of both evidence and negotiation. As a result, the prohibitions against fraud are more ambiguous in mediation. During mediation, many types of statements are not treated as
statements of material fact because they are deemed made in negotiation. For example, statements of intention, puffing, or estimates are permissible without committing fraud. Thus, careful wordsmithing is often practiced in mediation, in which terms like “may,” “at this time,” and “current authority” replace absolutes such as “cannot,” “never,” and “bottom line.”

Similar to fraudulent misrepresentation, RPC 3.4 addresses concealing evidence and states:
“A lawyer shall not (1) . . . conceal a document or other material having potential evidentiary value . . .; (2) falsify evidence, counsel or assist a witness to testify falsely, . . .; or (3) request a person other than the client to refrain from voluntarily giving relevant information to another party.”

Thus, a failure to disclose or an omission of information when reasonably requested can also be an ethical violation. Of course, when there has been no such request for information, it is more difficult to support a claim of concealing evidence. This is particularly true in ADR, as arbitration usually has restricted discovery, including few or no depositions. Indeed, under most arbitration rules, parties are typically only required to request and exchange documents unless the arbitration is complex enough to justify depositions or the parties otherwise agree. Compare AAA Commercial Rule R-23 (Exchange of Information) with Commercial Rule L-4 (Preliminary Hearing). Moreover, mediations often occur early in cases or before litigation commences, and therefore the parties have had little or no opportunity to request or see the other side’s evidence. See also Model Rule 3.4. But see Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F.Supp. 507, 512 – 513 (E.D.Mich. 1983), in which a settlement was rescinded because counsel failed to disclose plaintiff’s death during the three weeks between the mediation and the time when the settlement was reached.

Thus, in advising a client about the risks and benefits of ADR, counsel should also disclose the possible effect of limited discovery. A limit on discovery may be a benefit to one’s client if it has most of the information relevant to the issue in dispute (such as breach, performance, damages). As a result, the analysis of whether limited discovery is a benefit or detriment depends on the nature of the dispute and which side has the information necessary for a complete resolution. These elements may alter the decision of whether to use ADR, which process to use, and when to use it.

C. [6.12] The Conflict Between Maintaining Confidentiality and Not Committing Fraud

The Illinois Rules generally provide that a lawyer may not reveal information relating to the representation of a client unless the client consents after consultation. RPC 1.6. See also Model Rule 1.6. Tension is apparent, therefore, when a client has requested that counsel not disclose particular information, but counsel knows that failing to disclose it would be a concealment of evidence because it was reasonably requested by the opposing side. The conflict is even more severe when the client makes an intentional misrepresentation of material fact, but counsel is instructed not to disclose the confidential truth. Until recently, there has been no firm guidance for Illinois counsel about what to do in those situations.

Recently, however, ISBA issued an advisory ruling specifically addressing this question and providing direction to counsel. ISBA Advisory Opinion No. 99-04 generally states that the rules against fraud and concealment of evidence trump the client’s request for confidentiality.
Although the approach of counsel depends on the circumstances of each particular situation, under ISBA Opinion 99-04, counsel must request that the client cure the fraud. If the client refuses to cure, counsel is advised to (1) withdraw from the representation and (2) disclose the correct information to the tribunal. This ISBA ruling, issued in the context of litigation, should be applied to ADR tribunal proceedings. See also Utah State Bar Ethics Advisory Opinion Committee Opinion No. 00-06, also holding that Model Rule 1.6 is trumped by honesty rule.

The ABA’s Ethics 2000 Commission has also recommended changes to Model Rule 3.3 regarding a lawyer’s duty of candor to tribunals, including giving lawyers leeway to disclose, and even requiring disclosure of, confidences to prevent or rectify a client’s fraud. Similarly, §§67 and 120 of the RESTATEMENT OF THE LAW THIRD: THE LAW GOVERNING LAWYERS (American Law Institute, 2000), permits, but does not require, a lawyer to reveal confidential client information to prevent or rectify a client fraud. Comment (b) to §67 notes that more than 40 jurisdictions permit lawyers to disclose client confidences in those circumstances.


Counsel has a duty to the neutral, opposing parties, and the system of justice to participate in good faith in an ADR proceeding. Rules such as those governing Illinois mandatory arbitration specifically require good-faith participation. S.Ct. Rule 91(b). Failure to participate in good faith can cause a party to forfeit rights to avoid the award. Goldman v. Dhillon, 307 Ill.App.3d 169, 717 N.E.2d 474, 240 Ill.Dec. 381 (1st Dist. 1999). “Good faith” is deemed to mean “subject[ing] the plaintiff’s case to the type of adversarial testing that would be expected at trial.” 717 N.E.2d at 476. There is a growing body of case law on that good-faith rule, as well as the risks of not following it. Hill v. Joseph Behr & Sons, Inc., 293 Ill.App.3d 814, 688 N.E.2d 1226, 228 Ill.Dec. 249 (2d Dist. 1997).

The dispute resolution procedures of some of the self-regulatory organizations and ADR providers touch on the good-faith participation of the parties. For example, the NFA Arbitration Code prohibits counsel’s “dilatory, disruptive or contumacious conduct” (NFA Code §7(a)), and even empower the arbitration panel to take appropriate adverse action, “including the entry of an award or the dismissal of a claim” for violations (NFA Code §9(f)). The NASD Mediation Rules sets as a “ground rule” that the parties will attempt “in good faith” to negotiate a settlement. Mediation Rule 10406(f). In the absence of a rule, it is up to the neutral to ensure that the proceedings are balanced and fair. Moreover, the risk of an adverse arbitration award is thought to be enough of a force in binding arbitration (unlike the Illinois mandatory arbitration awards that can be rejected) to ensure good-faith participation.

There is no similar outcome threat in mediation that commands good-faith participation. Instead, the parties to mediation must individually commit themselves to the process for it to work. The cost to the client and the time, effort, and counsel’s costs to prepare for and participate in a mediation, plus the desire to end the dispute, are the primary incentives for good-faith participation in mediation. The threat of court sanctions is also real. Nick v. Morgan’s Foods Inc., 99 F.Supp.2d 1056 (E.D.Mo. 2000) (counsel and client sanctioned for bad-faith participation); Roberts v. Rose, 37 S.W.3d 31 (Tx.App.-San Antonio 2000) (attorney sanctioned for client failure to attend mediation). But even then, one party may improperly use the
mediation as an opportunity for informal discovery or to test the limits of the other side’s willingness to settle. In that case, uncooperative counsel can hurt his or her reputation in the legal community. In the end, all of the ethical codes and standards of conduct distill to a lawyer’s reputation. Of course, none of the codes or standards use the word “reputation,” but the legal community soon learns about each lawyer’s ethical compass.


The term “neutral” derives from old Middle English phrase “not either of two.” It is the separation from both sides of the dispute that empowers the arbitrator or mediator.

The ethical rules and standards of conduct relevant to neutrals apply to more than just the ADR hearing itself. They have consequences before and after the proceeding. Indeed, an attorney acting as a neutral must be mindful of the rules and standards from the moment of first contact by the parties to long after the closure of proceedings.


When acting as a neutral, the duty to the client is replaced by the duty to the public (i.e., the non-client parties), the process, and the system of justice. There is a dizzying array of rules, standards, and procedures applicable to an attorney who wishes to be an arbitrator or mediator. Such regulations exist in legislation, guidelines issued by self-regulatory organizations, codes promulgated by private dispute resolution organizations (such as the AAA and the Association for Conflict Resolution), and other sources. Once again, however, these different rules may be subject to or altered by the agreements of the parties, and such agreements generally will supersede the guidelines. Although they often are not used, judicial codes promulgated by state Supreme Courts could also provide instruction. For example, an arbitrator for the Illinois Mandatory Arbitration Program is subject to “disqualification” on the grounds of the Illinois Code of Judicial Conduct. S.Ct. Rule 87(c). It is beyond the scope of this chapter to analyze, compare, and contrast all of the different rules, in effect and proposed, from the multiple sources. The landscape is changing most dramatically in the area of neutral ethics, and the consequent uncertainty carries with it certain risks.

Nonetheless, there are at least a few threads or features common to these standards, with the most obvious themes addressing bias and prejudice. Related to the concept of neutral impartiality, and established to deal with it, are the standards of full disclosure and party consent. See, for example, AAA Code of Ethics for Arbitrators in Commercial Disputes (AAA Code), Canon II, AAA Commercial Rule R-19; NASD Rule 10312 (arbitration) and 10404 (mediation); NFA Rule 3-1(b); Chicago International Dispute Resolution Association (CIDRA) Mediation Rules (art. 9) and Arbitration Rules (art. 11); NCCUSL’s Revised Uniform Arbitration Act (RUAA §12); Article III of the Model Standards of Conduct for Mediators (Model Standards) promulgated by the American Bar Association, the AAA, and SPIDR. These Model Standards are set forth in John W. Cooley, MEDIATION ADVOCACY, Appendix I (National Institute for Trial Advocacy, 1996). There are seemingly endless “close questions” concerning whether an arbitrator or mediator should decline a position as a neutral.
Examples of situations in which a neutral must make a decision regarding his or her participation include the following: (1) an arbitrator is asked to be on a panel in which the arbitrator had some successful but mildly contentious business dealings with one of the corporate parties six years prior to the case at hand; (2) during a mediation, the mediator realizes that the principal of one of the parties is the father of a boy who injured the mediator’s son during a little league game two season ago. The neutral’s options are (1) to act as the neutral without disclosure; (2) to decline or withdraw from the position as neutral; and (3) to express a willingness to act, but disclose the conflict and act only if neither party objects to that conflict. There are few bright lines for these close issues, and the attorney’s threshold question is to determine which of the approaches above is the most appropriate for the situation. The author’s experience is that full disclosure, coupled with an explanation of why the connection will not prevent an independent and fair handling of the dispute, is the best solution. It is also the method recommended by the various ADR organizations. In large and dynamic legal communities, as well as close-knit and intimate ones, the most experienced and popular neutrals will frequently find that they have previously dealt with the law firm representing one of the parties or, for example, have some bar association connection with counsel representing the other side. Declining the appointment or disclosing the connection will maintain the highest ethical standards and enhance the neutral’s reputation in the ADR community. It will also foster the parties’ confidence in the decision or result regardless of whether the neutral is asked to resign.

Another vital ethical component for a would-be neutral is honesty in advertising. An honest self-promotion covers (1) marketing one’s capabilities to act as an arbitrator or mediator because of familiarity with the process and procedures or expertise in the subject matter of the dispute (if the parties desire that); and (2) accurate disclosure of fees and costs to be charged at all stages of the proceeding. The Model Standards address this important topic in three sections. Article IV of the Model Standards regarding “competence” states that a mediator shall mediate “only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties.” The formerly proposed Illinois Mediator Certification Act (a copy of which is available online at www.isba.org/sections/adr/4-99a.htm.) provided in §16(c) that the certified mediator “shall mediate only in those cases where the mediator possesses sufficient knowledge and expertise to be effective.” Article VII of the Model Standards concerning advertising and solicitation states that “a mediator shall be truthful in advertising a solicitation for mediation.” Finally, Article VIII of the Model Standards provision regarding fees states that “a mediator shall fully disclose and explain the basis of compensation, fees, and charges to the parties.”

B. [6.16] The Applicable Rules and Standards During the ADR Proceeding

During the ADR proceeding, although the sources of rules and standards are essentially the same, the focus is instead on fairness and impartiality. With respect to fairness, there is a subtle difference between the fairness sought in arbitration and the fairness sought in mediation. For both, the process must be fair, but there is a slightly different goal of fairness of the outcome. In arbitration, in which an award must be rendered, fairness and impartiality mean that the neutral must conduct the hearing and decide the matters evenhandedly, justly, and without outside pressure or influence. AAA Code, Canons IV and V.
In mediation, however, when the parties have the power to decide the outcome, it is not the mediator's job to reach an outcome that the mediator believes is fair. Rather, the mediator must abide by the resolution chosen by the parties, unless, of course, the mediator perceives that there is some illegality, fraud, or misdealing. The fairness in mediation instead focuses on the process. Article VI of the Model Standards balances these competing demands by stating that "a mediator shall conduct a mediation fairly, diligently, and in a manner consistent with the principles of self-determination by the parties." That standard focuses on a "quality process" and "procedural fairness," and Article VI recognizes that "the parties decide when and under what conditions they will reach an agreement or terminate a mediation." Ensuring mediation fairness may be even more difficult when the mediator is asked to evaluate the dispute, not merely facilitate settlement. Indeed, the Model Standards contemplate only facilitative mediation (Model Standards, art. I and VI), and caution that "a mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions." See comments to Article VI of the Model Standards. Consistent with that, the ABA Ethics 2000 Commission has urged adoption of a new Model Rule 2.4 requiring lawyer neutrals to inform unrepresented parties that the neutral does not represent them and cannot offer legal advice.

Conducting both arbitrations and mediations fairly and diligently requires firm and effective management skills. Words such as "evenhanded," "patient and courteous" and "balanced communications" capture the essence of fairness and diligence in the proceeding. See AAA Code, Canons III and IV.

Of course, the rules regarding conflicts, bias, and disclosure continue throughout the ADR proceeding. During an arbitration chaired by this author, one of the parties brought in an expert on the last day of the hearing. The expert had previously testified in many securities cases. After the expert's credentials were elicited, and I clearly did not recognize him, I inquired whether the expert was familiar with my law firm and whether he had ever acted as an expert in any case in which my firm had appeared. Although he knew of my firm, he had not been involved in any of our cases, and thus there was no bias issue to discuss. Maintaining the integrity of the arbitration and mediation, as well as reducing the risk of later challenge, requires that the rules and standards constantly be revisited as required by the circumstances.


Ethical obligations do not necessarily end when the arbitration award is entered or the mediation agreement is signed. As the AAA Code of Ethics for Arbitrators in Commercial Disputes states, "certain ethical obligations continue even after the decision in the case has been given to the parties." AAA Code, Canon I(H). The AAA Code also states that "after an arbitration award has been made, it is not proper for an arbitrator to assist in post-arbitral proceedings, except as required by law." AAA Code, Canon VI(C). The Model Standards for mediation, addressing conflicts of interest, also state that "the need to protect against conflicts of interest also governs conducts that occurs during and after the mediation." Model Standards, art. III. Also, "the mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship on an unrelated matter under circumstances that would raise legitimate questions about the integrity of the mediation process." Id. See also ABA Ethics 2000
Commission proposed Rule 1.12, providing that a lawyer/mediator shall not represent another person whose interests are materially adverse to the interests of a former party to the mediation that addressed the same or a substantially related matter. On the other hand, the formerly proposed Illinois Mediator Certification Act had precluded such representation only “prior to the conclusion of the mediation.” Proposed Mediator Certification Act §16(b)(3).

Post-ADR proceeding contacts or dealings raise serious questions of appearance of impropriety, if not outright conflict. As the AAA Canons state: “For a reasonable period after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create an appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest.” AAA Code, Canon I(D). The difficult question, of course, is how much time should elapse between the ADR proceeding and the later dealings among parties. It may be unreasonable to expect a neutral, who also might be a practicing attorney, to forever avoid a business or professional relationship with one of the parties to the dispute. But if the later contact occurs too close to the ADR proceeding, it might appear that the later professional opportunity arose as a result of a favorable proceeding. Subsequent relationships cannot be initiated too close to the “zone” of the ADR proceedings as to imply a reward to the neutral for actions taken in the ADR proceeding. Obviously, there are no absolute time parameters applicable to all ADR proceedings. It depends on the type of proceeding, the neutral’s role, the outcome of it, and the nature of the later relationship. For example, there would be less appearance of impropriety if the losing party to an arbitration, rather than the winning side, entered into an attorney-client relationship with the arbitrator immediately after the award was confirmed. Note, however, that the Illinois Supreme Court has rejected the “appearance of impropriety” as a basis to disqualify counsel. *Schwartz v. Cortelloni*, 177 Ill.2d 166, 685 N.E.2d 871, 226 Ill.Dec. 416 (1997). For a discussion of confidentiality after the ADR proceeding, see §7.47 in Chapter 7 of this book.

D. [6.18] The Risks of Non-Neutrality

The potential costs to the parties can increase dramatically, and the efficacy of ADR and the goal of justice can be compromised, if the process is not fair and impartial. For example, arbitration awards under both the Federal Arbitration Act, 9 U.S.C. §10, and the Uniform Arbitration Act, 710 ILCS 5/12, can be vacated based on bias or prejudice of the arbitrator. Although there is no similar statutory counterpart with respect to a mediator’s bias or prejudice, a collateral attack on the settlement agreement could arise as a result of perceived impartiality. Indeed, the NCCUSL’s proposed revisions to the Uniform Arbitration Act contain a “presumption of evident partiality” if a known and substantial relationship with a party is not disclosed. The parties then may have to re-arbitrate or re-mediate a case, or be thrust back into a full-scale litigation. Accordingly, a neutral must disclose any possible bias or prejudice as soon as it arises, even if it is during the heart of the ADR proceeding. At least such disclosure will give the parties the opportunity to consider and waive the possible conflict before any decision is made by the neutral or settlement is reached by the parties. Even if the parties do not waive the conflict following a disclosure and decide to redo the ADR proceeding, they still will avoid incurring the additional costs and delay to complete the tainted arbitration or mediation. Thus, the neutral should not feel pressured to conclude the ADR proceeding in the face of a genuine issue of non-neutrality. A completed but tainted conclusion is not what the parties want from a neutral.
Party-appointed arbitrators raise more complex ethical quandaries for both the neutrals and parties. In those situations, each party (assuming a two-party dispute) may appoint one arbitrator of a three-person panel. AAA Commercial Rule R-15. The third arbitrator is typically agreed on by the two party-appointed arbitrators or, failing that agreement, is appointed by an independent institution or individual. The ethics code of the AAA has a separate Canon addressing this issue, which clearly cautions that “there are also many types of tripartite arbitration in which it has been a practice that the two arbitrators appointed by the parties are not considered to be neutral and are expected to observe many but not all of the same ethical standards as the neutral third arbitrator.” AAA Code, Canon VII. Indeed, under Canon VII, the party-appointed arbitrators are actually called “nonneutral arbitrators.” In contrast, the CIDRA Arbitration Rules require all arbitrators, even those who are party-appointed, to “be and remain independent” and impartial. CIDRA Arbitration Rules, art. 11.

Thus, contract provisions that provide for party-appointed arbitrators, unless otherwise agreed, can invite non-neutrality into the process. Non-neutrality could include, for example, a predisposition of the non-neutral arbitrator toward the appointing party (AAA Code, Canon VII (E)); the absence of full disclosure of new interests or additional relationships with the party (compare AAA Code, Canon VII(A)(2) with Canon VII(B)); only limited disclosure of the details of any such interest or relationship (AAA Code, Canon VII(B)(1)); the non requirement of withdrawal even if requested to do so by the opposing party (AAA Code, Canon VII(B)(2)); certain permitted communications by the non-neutral arbitrator and the appointing party (AAA Code, Canon VII(C)); and the lack of disclosure of the content (as opposed to the event) of a communications between the non-neutral arbitrator and the appointing party. AAA Code, Canon VII C(2), VII C(3). Notwithstanding the applicable canons and tradition behind party-appointed arbitrators, party-appointed arbitrators may still be held to the same standards of neutrality that apply to non-party-appointed arbitrators. Metropolitan Property & Casualty Insurance Co. v. J. C. Penny Casualty Insurance Co., 780 F.Supp. 885, 892 – 893 (D.Con. 1991) (party arbitrator must still “decide all matters justly, exercising independent judgment,” and “act in good faith and with integrity and fairness.”

E. [6.19] Neutral Liability and Immunity

Like the myriad of rules and proposals regarding confidentiality, there is no uniformity regarding arbitrator or mediator liability and immunity. With respect to arbitration, the AAA Commercial Dispute Resolution Procedures provide some comfort from liability issues:

Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules. AAA Commercial Rule R-50(d).

The CIDRA Rules similarly limit arbitrator liability, and even provide indemnity, except in cases of willful misconduct. CIDRA Arbitration Rules, art. 43. Also, paralleling the common law immunity for judges, arbitrators are accorded the same level of immunity under the 1998 Alternative Dispute Resolution Act, 28 U.S.C. §655(c), and the NCCUSL’s Revised Uniform Arbitration Act (RUAA §14). However, the Illinois mandatory arbitration rules do not provide for such immunity. S.Ct. Rules 86 – 94; 735 ILCS 5/2-1001A – 1009A. See also Tameri v. Conrad, 552 F.2d 778 (7th Cir. 1977), and cases cited therein, upholding arbitrator immunity; Grane v. Grane, 143 Ill.App.3d 979, 493 N.E.2d 1112, 98 Ill.Dec. 91 (2d Dist. 1986), upholding immunity.
With respect to mediation, the AAA Commercial Rules and NASD Rules similarly provide some protection for mediation and mediators. AAA Commercial Rule M-15; NASD Rule 10405. The Bankruptcy Rules also require the parties “to release, indemnify and hold harmless” the mediator except for intentional violations of the rules. Bankruptcy Rule 1008. Similarly, draft enabling legislation for an Illinois court-annexed mediation program states: “A person who has been certified by a judicial circuit for appointment as a mediator pursuant to this act shall have immunity for actions as a mediator in a court-ordered mediation in that circuit in the same manner and to the same extent as a judge.” §5/2-1005B. The Illinois Supreme Court has adopted Rule 96, permitting each judicial circuit to implement its own mediation program with rules that must address immunity. Rule 96(b)(2)(ix). The formerly proposed Illinois Mediator Certification Act also provides a certified mediator with “immunity in the same manner and to the same extent as a judge having jurisdiction in the State of Illinois.” Proposed Mediator Certification Act §12. The CIRDA Rules also exclude mediator liability unless there was willful misconduct. CIRDA Rules, art. 30. However, the Model Standards do not address mediator liability. The Model Standards are intended to create mediator obligations and duties, not necessarily to shelter or protect mediators. Thus, a variety of claims have been raised against mediators, including breach of neutrality and conflict of interest.

Accordingly, neutrals are increasingly including provisions in their arbitration and mediation agreements that provide for indemnity and/or immunity. Also, given the uncertainty and lack of uniformity, neutrals should check their insurance policies to determine whether and to what extent they are covered in their capacity as an arbitrator or mediator.