AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 518** **October 15, 2025**

# A Lawyer's Duties to Avoid Misleading Communications When Acting as a Third-Party Neutral Mediator

*Rule 2.4 of the ABA Model Rules of Professional Conduct addresses a lawyer's duties when acting as a third-party neutral and defines third-party neutral as a lawyer who assists two or more persons – who are not clients of the lawyer – to reach a resolution of a dispute.*

*Under Rule 2.4(b), a lawyer acting as a third-party neutral must inform unrepresented parties that the lawyer-mediator does not represent them. Paragraph (b) also requires the lawyer-mediator to explain the difference between the lawyer-mediator's role as a third-party neutral and the role of a lawyer representing a client in a mediation when the lawyer knows or reasonably should know that the parties do not understand the mediation process. Therefore, in most instances, unless the parties are sophisticated consumers of mediation services, the lawyer-mediator should ensure that all persons involved in the mediation understand the role of the lawyer-mediator.*

*Although a lawyer is not subject to many of the Model Rules when acting as a third-party neutral mediator, a lawyer-mediator is subject to Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. A lawyer-mediator may not give credence to statements the lawyer-mediator knows to be false or personally make statements that the mediator knows to be false.*

## I. The Lawyer-Mediator's Duties under Model Rule 2.4 When Serving as Third-Party Neutral

The Preamble to the ABA Model Rules of Professional Conduct explains that lawyers play various roles in the legal system. Their usual role is to represent clients, but one alternative is to "serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter."[1] Rule 2.4, titled "Lawyer Serving as Third-Party Neutral," defines a third-party neutral as a lawyer who assists two or more persons "who are not clients of the lawyer" to reach a resolution of a dispute. This differs from the lawyer's role in circumstances in which the lawyer represents one or more clients.

Most provisions of the Model Rules address a lawyer's role in representing one or more clients. Some of these govern the client-lawyer relationship. *See, e.g.*, Rules 1.1 through 1.10, 1.13, 1.14, 1.16, 2.1, and 2.3. Other Model Rules address lawyers' interactions with the tribunal, other counsel, or third parties, but all in the context of representing a client. *See, e.g.*, Rules 3.1-3.9, 4.1-4.3. None of these Model Rules applies to a lawyer-mediator. Instead, Rules 1.12 and 2.4 specifically address lawyers serving as third-party neutrals. In addition, other Model Rules apply to lawyer-mediators

[1] ABA MODEL RULES OF PROF'L CONDUCT, Preamble [3].

simply because those Model Rules govern lawyers' conduct regardless of whether the lawyer is serving in a representational role. *See, e.g.*, Model Rules 8.1-8.4.

Paragraph (b) of Rule 2.4 imposes two duties on the lawyer-mediator: to "inform unrepresented parties that the lawyer is not representing them," and "[w]hen the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." Particularly when a party to a mediation is unrepresented, fulfilling these duties ensures that each party to the mediation understands that the lawyer-mediator is not representing the party, is not seeking to protect the party's best interests, as would a lawyer in a legal representation, and is not assuming the duties that a lawyer would ordinarily have to a client under the Model Rules.[2]

Comment [3] to Rule 2.4 explains that lawyers serving as neutrals "may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative." It notes that "[f]or some parties, particularly parties who frequently use dispute-resolution processes, this information [that the lawyer does not represent anyone in the matter] will be sufficient. For others, particularly those who are using the process for the first time, more information will be required." The Comment further advises:

> Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.[3]

Unless the parties are sophisticated consumers of mediation services, it is prudent for the lawyer-mediator not only to inform all parties that the lawyer-mediator does not represent them but also to afford them an opportunity to discuss what this means.

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[2] Mediation, like all alternative dispute resolution processes, is generally conducted subject to other rules and policies that may include state statutes, court rules, or procedures promulgated by the organization conducting the mediation. These other mediation rules will also inform the lawyer-mediator's obligations. *See, e.g.*, AMERICAN ARBITRATION ASSOCIATION, AMERICAN BAR ASSOCIATION & ASSOCIATION FOR CONFLICT RESOLUTION, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Sept. 2005), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf. For example, Standard III provides: "A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality."

[3] The requirement that a lawyer inform persons who are not clients about the lawyer's role in a matter is not unique to Rule 2.4(b). In other contexts, lawyers have similar obligations to avoid confusion about their role. For example, Rules 4.3, 5.7(a)(2), and 1.13(f) also address a lawyer's obligation to disclose to some persons with whom the lawyer is dealing that the lawyer will not owe that person the duties imposed by the Model Rules applicable to a lawyer who is representing a client.

## II. The Lawyer-Mediator's Duty to Avoid Statements that Imply that the Lawyer-Mediator is not Neutral but is Seeking to Achieve a Party's Best Interest

Under the Model Rules, a lawyer must act in the client's interest. Various provisions of the Model Rules give expression to that responsibility, however, that is not the role of a lawyer-mediator. The lawyer-mediator's role is to assist the parties in resolving their dispute, regardless of where the interest of a party may lie.

Once a lawyer-mediator explains the role of a neutral, as distinct from the role of a lawyer for one or more clients, the lawyer-mediator must not depart from that role. Specifically, the lawyer-mediator should be vigilant in conducting the mediation to avoid creating the impression that the lawyer-mediator will be providing the protections of the client-lawyer relationship. For example, if the lawyer-mediator explains that a mediator's confidentiality obligation under the applicable mediation rules,[4] the lawyer-mediator should ensure that the parties understand that the source of the obligation is not a client-lawyer relationship, and that the attorney-client privilege does not apply.

The obligation to avoid misleading the parties about the lawyer-mediator's role also means that, in conducting the mediation, the lawyer should not state that the lawyer-mediator is acting to achieve a party's best interest or that a proposed settlement is in a party's best interest. Otherwise, the party may rely on the lawyer-mediator's assurance, mistakenly believing that the lawyer-mediator is acting in the party's best interest as the party's lawyer.[5] The lawyer-mediator may, of course, provide truthful information that helps the parties to conclude for themselves, or even makes it obvious to them, whether a proposed resolution is in their best interest, given their objectives.

Likewise, if the give-and-take in a mediation includes a discussion of how the law applies to the parties' dispute, the lawyer-mediator should avoid communicating in a manner that might be taken as rendering legal advice, or otherwise suggesting to a mediation party that the lawyer-mediator's role is to protect or advance a party's legal interests or to help the party to attain a particular desired result. It is not misleading, however, to provide legal information or to discuss the parties' respective views of how a tribunal would resolve a legal or factual question.[6] A mediator may offer an opinion as to how a tribunal is likely to rule on an issue, but the lawyer-

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[4] *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 2. For a helpful discussion of the interaction of the Model Rules with other rules applicable to mediation (which other rules are beyond the scope of this opinion), *see* John M. Barkett, *Ethics in ADR – A Sampling of Issues*, 9 AM. J. MEDIATION 9 (2016).

[5] Similarly, the Committee recently discussed the responsibility of an organization's lawyer, when interacting with the organization's individual constituents, to avoid misunderstandings about the lawyer's role. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 514 (2025).

[6] For a discussion of the distinction between legal information and legal advice (and the advisability of accompanying legal information with a statement that the legal information is general in nature and not intended as a substitute for personal legal advice), *see* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457 (2010).

mediator should not state or imply that a settlement is in the party's best interest *because* a tribunal is likely to decide adversely to the party.[7]

If a party, particularly an unrepresented party, requests that the mediator provide legal advice, the mediator should again explain the mediator's role and advise the party to seek legal advice from counsel of their choice.

## III. The Lawyer-Mediator's Duty to Avoid Dishonesty, Fraud, Deceit, and Misrepresentation When Communicating with the Parties

The role of the mediator, like any third-party neutral, turns on being credibly neutral. To resolve disputes, the lawyer-mediator will be conveying information to the parties. The lawyer-mediator will often provide mediation-appropriate insights when conveying this information to help the parties evaluate whether to settle and, if so, on what terms.

At the same time, there are limits on what a lawyer-mediator may say to the parties to assist them in making this determination. Rule 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. This Model Rule applies not only when a lawyer represents a client but also to the lawyer's personal and professional conduct outside of the practice of law. Thus, notwithstanding the fact that they are not representing clients in the mediation, lawyer-mediators have an ethical duty under Rule 8.4(c) to avoid engaging in conduct that is dishonest, fraudulent, deceptive, or misleading.

This raises the question of whether a lawyer-mediator may engage in exaggeration or concealment of various kinds in an effort at persuasion. For lawyers representing parties in negotiations, untrue statements are not entirely forbidden. Rule 4.1 forbids a lawyer "[i]n the course of representing a client" from "making a false statement of material fact or law to a third person." However, Comment [2] to this rule recognizes that "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact." Among the examples are statements regarding "a party's intentions as to an acceptable settlement of a claim." ABA Formal Ethics Opinion 06-439,[8] which addresses a lawyer's obligation when representing a client in a mediation (but explicitly does not address the ethical duties of a lawyer-mediator, who does not represent any party), provides further examples as follows:

> [S]tatements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the

[7] If a mediator were to provide legal advice to a party in the mediation, the mediator would risk forming a client-lawyer relationship with that party (*see, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §14 (2001)). Doing so is incompatible with the mediator's role as a neutral.

[8] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006).

> negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

Lawyers representing negotiating parties have the same leeway to make immaterial false statements under Rule 8.4(c) as they have under Rule 4.1. (This is not to suggest that this Committee encourages doing so, but simply that the Model Rules do not forbid it.)

A lawyer-mediator does not have the same leeway as a lawyer negotiating for a client, however, because a lawyer-mediator does not represent a client in the mediation but serves as a third-party neutral under Rule 2.4. Therefore, neither Rule 4.1 nor the above-noted Comment to this rule applies to the lawyer-mediator.[9]

A mediator's statement may violate Rule 8.4(c) even if a similar statement by a lawyer representing a party in a negotiation or mediation would not, because the lawyer-mediator's statement may be taken as true and influence a party's decision. Rule 8.4(c) applies differently to lawyer-neutrals than to lawyer-advocates because their different roles create different expectations. False statements that would not be regarded as statements of "material fact" under Rule 4.1, or violate Rule 8.4(c), coming from a party's lawyer are likely to be taken at face value coming from a lawyer-mediator precisely because of the lawyer-mediator's role as a neutral.

Given the lawyer-mediator's neutrality, parties are likely to trust the lawyer-mediator to play it straight, and to not exaggerate or make false statements designed to lead the parties to an agreement. Framed differently, parties dealing with the opposing party or the opposing party's lawyer are expected to know that negotiating parties engage in "puffery" or exaggeration about certain matters, and to discount their assertions about such matters. But parties to a mediation, having been advised about the lawyer-mediator's neutral role, would have no similar reason to be on their guard when receiving communications from that individual.

Therefore, it follows that a lawyer-mediator must be both thoughtful and cautious in communicating information from one party to the other and in answering questions that may be asked about the information communicated or about the lawyer-mediator's views of the information. For example, a lawyer-mediator may not make a statement that the lawyer-mediator knows to be false that "this is the best offer the opposing party will make." The lawyer-mediator must be careful not to make misleading statements about the strength or weakness of a party's case. While a mediator may accurately convey statements from one party to another that may

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[9] ABA Formal Ethics Opinion 06-439 opined that lawyers who represent clients in a negotiation or caucused mediation may make "statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing'" without violating Model Rule 8.4's proscription on making false or misleading statements. Formal Opinion 06-439 at footnote 19 states, "This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c)." The footnote goes on to state "in our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client." The lawyer-mediator may communicate statements made by the parties or their counsel as long as the lawyer-mediator makes clear the origin of such statements and that the statements do not represent an opinion of the lawyer-mediator.

include falsehoods that are not regarded as false statements of "material fact" under Rule 4.1, the lawyer-mediator may not give credence to those statements if the mediator knows them to be false by suggesting that the lawyer-mediator credits them or by implying that the opposing party should do so. Similarly, the lawyer-mediator must be precise and avoid any inappropriate gloss in describing to one party the position that the other party is taking. For example, as noted, it is improper, if untrue, to state that "this is the best offer the opposing party will make."

## IV. Conclusion

A lawyer-mediator does not represent any party to a mediation. Under Rule 2.4, lawyer-mediators must explain their role to mediation parties who are not represented or who do not appear to understand the mediator's function and, where necessary, inform all parties of the difference between the role of a mediator and that of a lawyer representing a party. Based on the guidance in Comment [3], unless the parties are sophisticated consumers of mediation services, it is prudent for the lawyer-mediator not only to inform all parties that the lawyer-mediator does not represent them but also to afford them an opportunity to discuss what this means. In addition to other rules governing the duties of a mediator, the Model Rules require the lawyer-mediator to avoid communications that are dishonest, fraudulent, deceitful, or misrepresentative in violation of Rule 8.4(c).

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