ETHICS IN MEDIATION AND ARBITRATION

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As court dockets have become more congested, there has been a greater focus on mediation, arbitration, and related ADR processes to resolve cases. Proponents argue that ADR allows for faster, more economical resolution of cases. The merits of ADR will not be weighed in this article. An examination of ethical issues will be undertaken, as ADR is now an integral part of the legal community and attorneys should be aware of problems that may arise.

***General Ethical Considerations in Providing Legal Advice*:** Is there an affirmative duty upon a lawyer to explain and detail ADR to a client? What if the lawyer does not advise a client concerning availability of ADR?

Rule 2.1 of the Colorado Rules of Professional Conduct reads as follows:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to a client's situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

Though the word "should" is used, rather than shall, the clear intent of the rule is to have lawyers advise their clients of ADR options. The comment to the rule reads, in part, as follows:

> The last sentence of Rule 2.1 addresses the issue of alternative dispute resolution ("ADR"). Common forms of ADR include arbitration, mediation, and negotiations. Depending upon the circumstances, it may be appropriate for the lawyer to discuss with the client factors such as cost, speed, effects on existing relationships, confidentiality and privacy, scope of relief, statutes of limitation, and relevant procedural rules and statutes.

One commentator has argued that a competent lawyer is duty bound to advise clients concerning ADR alternatives. Arnold, "Professional Responsibility in ADR," SB41 ALI-ABA 527. The argument could be made that failure to advise of ADR options is reflective of a less than competent attorney.

Is there an ethical violation in Colorado if an attorney does not advise a client as to ADR options? A violation of the last sentence of Rule 2.1 probably cannot lead to disciplinary action in and of itself. The question then is whether a change to "shall" in Rule 2.1 would create a different result.

***Arbitration*:** Arbitration has been touted as a cheaper, more efficient alternative to litigation in courts. The pros and cons of arbitration will not be debated in this section, but there are ethical considerations that must be examined.

Arbitration provides substantial freedom for the parties. The parties could include an arbitration clause in a contract stating that any arbitrator would be bound by an existing code of ethics. Various codes of ethics do exist that could be incorporated as an integral part of the arbitration agreement. *See Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, National Academy of Arbitrators, American Arbitration Association, and Federal Mediation and Conciliation Service, May 29, 1985.

There has been some discussion concerning regulation of ADR, but no ethical code exists statutorily at this time in this state. See Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts among Dispute Professionals*, UCLA Law Review, August, 1997. Since arbitration can be conducted by non-lawyers, any code would have to cover all who conduct arbitration.

Colorado has a strong public policy toward arbitration. The 1975 version of the Uniform Arbitration Act did not provide statutory ethical guidelines for arbitrators or parties. An attack on an arbitration award under the 1975 version UAA was limited. The General Assembly provided, in part, that an award may be vacated by a court where:

> (I) The award was procured by corruption, fraud, or other undue means;
> (II) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; or
> (III) The arbitrators exceeded their powers.

Major ethical violations might possibly be encompassed in these grounds, but an *ex parte* communication may be insufficient to allow the vacation of an award. If the parties include an ethical code in their arbitration clause or agreement, then violation of that code might rise to the level that would allow vacation of the award. This would still be a difficult task, as it is not easy to convince a court to set aside an award. *Giraldi v. Morrell*, 892 P.2d 422 (Colo.App. 1994)(not evident that arbitrator refused to apply law agreed upon by the parties).

The standard in Colorado that must be met is very high before a court may set aside an arbitration award. In *McNaughton & Rogers v. Besser*, 932 P.2d 819 (Colo.App. 1996), the Colorado Court of Appeals was presented with an issue of arbitrator partiality. The court held, in part, as follows:

> In summary, arbitrators have a duty to disclose any potential conflict which would constitute evident partiality - that is, a relationship which would persuade a reasonable person that the arbitrator is likely to be partial to one side in the dispute. (citation omitted) Evident partiality has been found when a reasonable person would have to conclude that an arbitrator would be predisposed to favor one party to the arbitration. (citations omitted). Some facts indicating bias include pecuniary interest, familial relationship, and the existence of an adversarial or sympathetic relationship.

Id. at 822. The court refused to set aside the arbitration award even though one of the arbitrators (not the neutral) knew members of the law firm that was a party. *See also Nasca v. State Farm Automobile Insurance Company*, 12 P.3d 346 (Colo. App. 2000); *BFN-Greeley, LLC v. Adair Group, Inc*., 141 P.3d 937(Colo.App.2006)(must be showing of causal connection between improper conduct and award).

The 2004 Version of the Uniform Arbitration Act: The Uniform Arbitration Act (UAA) enacted in 2004 applies to contracts entered into after August 4, 2004 and provides some statutory bases for challenging an arbitrator who is to be a neutral.

> (2) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator if the agreement requires the arbitrator to be neutral.

C.R.S. § 13-22-211(2). This provision prohibits an individual from serving as a neutral if there is a direct interest in the outcome of the arbitration.

The UAA further requires disclosure by individuals who are to be appointed as arbitrators.

> **13-22-212. Disclosure by Arbitrator**
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> (1) Before accepting an appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:
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> (a) A financial or personal interest in the outcome of the arbitration proceeding; and
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> (b) A current or previous relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.
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> (2) An arbitrator shall have a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment that a reasonable person would consider likely to affect the impartiality of the arbitrator.
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> (3) If an arbitrator discloses a fact required to be disclosed by subsection (1) or (2) of this section and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under 13-22-223(1)(b) for vacating an award made by an arbitrator.
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> (4) If the arbitrator does not disclose a fact as required by subsection (1) or (2) of this section, upon timely objection by a party, the court may vacate an award under section 13-22-223(1)(b).
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> (5) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party shall be presumed to act

with evident partiality under section 13-22-223(1)(b).
(6) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under section 13-22-223(1)(b).

This provision of the UAA applies to party appointed arbitrators and disclosure is thus not just limited to a neutral arbitrator. The importance of inquiring concerning information that may form the basis for a disqualification is no less important under the 2004 version of the UAA.

Representative Cases from Other Jurisdictions: The FAA provides a limited basis upon which an award may be set aside. *Merit Ins. Co. v. Leatherby Ins. Co*., 714 F.2d 673 (7th Cir. 1983) (relationship of arbitrator to a corporate officer at a different business fourteen years earlier was insufficient to allow vacation of award).

Partiality for a party-designated arbitrator can be exceeded in certain instances. *Metropolitan Prop. and Casualty Ins. Co. v. J. C. Penney Casualty Ins. Co.,* 780 F.Supp. 885 (D.Conn. 1991). A neutral arbitrator has a duty to fully disclose matters which might evidence partiality. *Burlington Northern Railroad Co. v. TUCO,* 960 S.W.2d 629 (Tex. 1997).

General Considerations: It is important to examine ethical issues in arbitration in the same way that one would in litigation. Ask the arbitrator if there is any conflict individually or with members of their firm, if involved in the practice of law. Ask if the arbitrator owns stock in a company, if that company is a party or the insurer of a party. Ask the arbitrator if he or she will adhere to a code of conduct. If in doubt, do not agree to have the individual act as the arbitrator or the neutral.

***Mediation*:** The Colorado statutory basis for mediation is found in the "Dispute Resolution Act." *C.R.S. §13-22-301 et seq.* This act establishes the Office of Dispute Resolution in the judicial department. A provision of this act provides confidentiality to all mediators, not just those within the Office of Dispute Resolution. *C.R.S. § 13-22-307.*

Case Law: There is some case law that has been published that provides guidance for ethical issues in mediation. In *Poly Software Int'l., Inc. v. Su*, 880 F.Supp. 1487 (D.Utah 1995), motions were filed to disqualify counsel who were representing parties in a copyright action. One attorney had acted previously as a mediator in a companion case. The attorney was representing one of the parties in litigation. The court found that a mediator is an attorney who meets with the parties to explore settlement of the case. *Id*. at 1493. The court held, in part:

> Where a mediator has received confidential information in the course of mediation, that mediator should not thereafter represent anyone in connection with the same or substantially related matter unless all parties to the mediation proceeding consent after disclosure.

Id. at 1494. The key was receipt of confidential information, and the court disqualified the former mediator.

In *Cho v. Superior Court*, 39 Cal.App.4th 113, 45 Cal.Rptr.2d 863 (1995), the California Court of Appeals held that a former judge and his law firm were disqualified from representing a litigant in a case where the former judge had received *ex parte* information as part of court settlement conferences. In *State v. Tolias*, 135 Wash. 133, 954 P.2d 907 (1998), the Washington Supreme Court affirmed a conviction where the prosecutor had previously acted as a "mediator" in a criminal matter. Though the court was troubled by the allegations, it held that insufficient evidence had been presented to warrant disqualification of the entire prosecutor's office. In *McKenzie Const. v. St. Croix Storage Corp*., 961 F.Supp. 857 (D.V.I. 1997), an attorney who had served as a mediator prior to joining the law firm was disqualified from litigation. This disqualification extended to the attorney's firm.

The Colorado Court of Appeals has ruled that a district judge who acts as a settlement judge cannot thereafter act on the merits of the case or a related case. *Tripp v. Borchard*, 29 P.3d 345 (Colo.App. 2001). In that case, an attorney was sued for malpractice. His case was assigned to a district judge who had conducted a settlement conference in the underlying litigation that led to the malpractice case. The court held that the district judge should have disqualified himself because he had learned confidential information through the settlement process.

Codes: There are established codes for the conduct of mediators. One has become a court rule as it relates to court-appointed mediators. *Proposed Standards for Professional Conduct for Certified and Court-Appointed Mediators*, 604 So.2d 764 (Fla. 1992). Other codes have been drafted and voluntary. See Alison Smiley, *Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation*, Georgetown Journal of Legal Ethics, Summer, 1993.

Codes have dealt with issues that might seem to be straightforward ethical issues: conflicts of interest; independence of the mediator; and confidentiality. One would hope that all mediators, be they lawyers or non-lawyers, would avoid matters where conflicts of interest and lack of independence would prevail.

Compliance Issues: There are limitations to mediation and arbitration. Many lawyers have reservations concerning mediation, as settlement conferences often do not work and are costly to clients. More courts are ordering settlement conferences, even when the parties and counsel may believe the case is not ripe for such a conference.

Failure to appear or participate in a settlement conference can lead to disciplinary problems. *People v. Proffitt*, 854 P.2d 787 (Colo. 1993)(attorney failed to comply with mediation orders, along with many other disciplinary charges); but *see*, *Pearson v. Dist. Ct.*, *Eighteenth Jud.Dist*., 924 P.2d 512 (Colo. 1996)(trial court erred in directing mediation in post-dissolution dispute where domestic violence claim had been raised); *Halaby, McCrea & Cross v. Hoffman*, 831 P.2d 902 (Colo. 1992)(inappropriate for trial court to impose sanctions merely because settlement judge did not believe authority granted to defense attorneys was sufficient). Orders setting settlement conferences or mediation must be adhered to, regardless of whether such conferences end in futility.