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ABA Opinion 518: A Reaffirmation of Established Ethics Rule; Not a Constraint on Effective Lawyer-Mediators

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The American Bar Association recently issued Formal Opinion 518 addressing the ethical obligations of lawyers serving as third-party neutral mediators. While the Model Rules of Professional Conduct have long included provisions governing lawyer-mediators, Opinion 518 interprets those existing rules to address, and even prohibit, certain mediation practices. But, contrary to concerns voiced by some critics, nothing in Opinion 518 impairs or constrains an ethical lawyer-mediator's ability to help parties reach a fair settlement. In particular, the opinion does not prevent the use of a mediator's proposal. Opinion 518 sensibly reinforces existing ethical protections for mediation participants, but it should cause no alarm for experienced lawyer-mediators.

Courtesy photo

Steven M. Greenspan of Greenspan Mediation Services/FedArb.

Summary of Formal Opinion 518

Opinion 518 rests squarely on established ethical principles.

First, it relies on Model Rule 2.4, which imposes two core duties on a lawyer-mediator: to inform unrepresented parties that the lawyer does not represent them, and when the lawyer knows or reasonably should know that a party misunderstands the lawyer's role, to explain the distinction between serving as a neutral and serving as a client's advocate. Interpreting Rule 2.4, Opinion 518 cautions that "unless the parties are sophisticated consumers of mediation

services, it is prudent" not only to disclose the absence of representation, but also to ensure the parties understand what that means.

Second, Opinion 518 reiterates that Rule 8.4(c) prohibits conduct involving "dishonesty, fraud, deceit, and misrepresentation" and emphasizes that the rule applies to lawyers serving as mediators, even though language of the rule doesn't expressly refer to lawyers serving as third-party neutrals.

Applying these principles, the opinion instructs that a lawyer-mediator has an ethical duty not to:

- engage in "dishonesty, fraud, deceit, or misrepresentation" in communications with the parties;
- make "misleading statements about the strengths or weakness of a party's case"; or
- state or imply that a proposed settlement is in a party's "best interest."

Opinion 518 offers several examples illustrating these prohibitions. It observes, unsurprisingly, that a lawyer-mediator—unlike an advocate representing a negotiating party—may not engage in exaggeration or "puffery," or make immaterial false statements to influence a party's decision-making. Nor can they "give credence to statements [made by opposing parties or their counsel] that the lawyer-mediator knows to be false." Similarly, a lawyer-mediator may not assert that "this is the best offer the other side will make" unless the mediator reasonably believes that statement to be true.

Opinion 518 also declares that the lawyer-mediator "should not state that the lawyer-mediator is acting to achieve a party's best interest." At the same time, Opinion 518 confirms that a mediator may offer an opinion about how a tribunal is likely to rule on an issue, while cautioning that the mediator "should not state or imply that settlement is in a party's best interest because" an anticipated adverse ruling in anticipated.

None of these restrictions should surprise or concern an experienced, neutral and ethical lawyer-mediator.

Will Opinion 518 Affect the Effectiveness of Lawyer-Mediators?

The short answer is no. Opinion 518 reflects a logical and restrained application of existing ethical rules. Nothing in the opinion prevents a careful and ethical lawyer-mediator from assisting parties in reaching settlement—including, where appropriate, through a mediator's proposal.

A mediator's proposal typically is used only when negotiations have reached an impasse. It presents a specific settlement term—usually just a dollar amount—to both sides, with the understanding that the proposal succeeds only if both parties accept it. If either party declines, there is no deal, and neither party learns the other's response. Importantly, a mediator should not offer such a proposal unless all parties and counsel expressly agree to the process, usually as a last resort.

In complex matters involving sophisticated parties and experienced counsel, mediator's proposals are used sparingly. One reason is the risk that a party may anchor to the mediator's number, making further, future negotiation difficult absent changed circumstances. Nonetheless, some lawyer-mediators have expressed concern that Opinion 518 effectively

foreclosures the use of mediator's proposals by prohibiting any suggestion that could be construed as implying the proposed settlement is in a party's best interest.

That concern is misplaced. Opinion 518 makes no reference to mediator's proposals, and nothing about the practice inherently violates the mediator's duty of neutrality or honesty. A settlement proposed by the mediator, offered only at the joint request of experienced counsel, does not imply favoritism or advocacy or abandon neutrality. It reflects the mediator's candid assessment of a reasonable resolution within the range already established by the parties' negotiations. Such a proposal is not—and need not be—a mechanical midpoint; the parties surely do not need a mediator to do the math. Rather, it is a mediator's informed, but expressly subjective, judgment, shaped by experience and an assessment of multiple factors.

Nor does a properly framed mediator's proposal imply that the proposal is in any party's "best interest." Sophisticated counsel do not reasonably draw that inference, nor would they welcome it. Determining a client's best interest is exclusively the lawyer's role, informed by considerations often well beyond case merits, including risk tolerance, precedent concerns, personal and business objectives, and broader strategic factors. An effective lawyer-mediator respects that boundary, offering perspective and insight without supplanting counsel's judgment. When experienced legal counsel for each party jointly request a mediator's settlement proposal they are not delegating their ethical obligations. Ultimately, it is the lawyer's duty to determine what they believe to be in their client's best interest. A mediator's proposal is another (albeit important) input into that determination, no different than a mediator's expressed view as to how a judge might rule on a pretrial motion or how a jury might resolve a contested issue of fact or assess the credibility of a witness. The evaluation of how all of these many inputs impact the "best interest" determination always resides squarely with the lawyer and his client.

Mediator's proposals are not appropriate in every case and are rarely used in complex matters with experienced counsel, but they remain a legitimate and sometimes valuable tool—and nothing in Opinion 518 prohibits their careful and ethical use.

Steven M. Greenspan *of Greenspan Mediation Services/FedArb, has participated in hundreds of mediations over his 40-year career. He evaluates cases based not only on the facts and the law, but also informed by his assessment of how effective the parties' arguments would be in a courtroom.*