

## Justice Marie L. Garibaldi American Inn of Court

May 9, 2024, Generative AI in ADR

Excerpts of Relevant Ethics Rules and Mediator and Arbitrator Standards of Conduct

### RPC 1.1 Competence

A lawyer shall not:

- (a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.
- (b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

Official Comment [8] to MRPC 1.1: To maintain the requisite knowledge and skill, **a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

### RPC 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (1) disclosures that are impliedly authorized in order to carry out the representation, (2) disclosures of information that is generally known, and (3) as stated in paragraphs (b), (c), and (d).
- (b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:
  - (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another; or
  - (2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.
- (c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.
- (d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;
  - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or
  - (3) to prevent the client from causing death or substantial bodily harm to himself or herself;
  - (4) to comply with other law; or
  - (5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership, or resulting from the sale of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. Any information so disclosed may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest.
- (e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).
- (f) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

### **RPC 3.3 Candor Toward the Tribunal**

- (a) A lawyer shall not knowingly:
- (1) make a false statement of material fact or law to a tribunal;
  - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;
  - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
  - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or

- (5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

**RPC 4.1 Truthfulness in Statements to Others**

- (a) In representing a client a lawyer shall not knowingly:
  - (1) make a false statement of material fact or law to a third person; or
  - (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
  - (3) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

**Mediator Standard of Conduct:**

**Mediator Standard V: Confidentiality**

**To protect the integrity of the mediation, a mediator shall not disclose any information obtained during the mediation unless the parties expressly consent to such disclosure, or unless disclosure is required by applicable rules or law. A mediator shall not otherwise communicate any information to the court about the mediation, except: 1) whether the case has been resolved in whole or in part; or 2) whether the parties or attorneys appeared at a scheduled mediation.**

Consistent with Rule 1:40-4, a mediator shall:

Preserve and maintain the confidentiality of all mediation proceedings and advise the parties of the Rule's provisions;

- B. Prior to the commencement of mediation, reach agreement with the parties concerning the limits and bounds of confidentiality and non-disclosure;
- C. Conduct the mediation so as to provide the parties with the greatest protection of confidentiality afforded by court rule and mutually agreed to by the parties;
- D. Maintain confidentiality in the storage and disposal of all records and remove all identifying information when such information is used for research, training, or statistical compilations, except minimum identifiers necessary to link research documents; and
- E. Not use confidential information obtained in a mediation outside the mediation process.

**Arbitrator Standards of Conduct**

**CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.**

- A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.
- B. . . . .
- C. . . . .
- D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.
- E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.
- F. . . . .
- G. . . . .
- H. . . . .
- I. . . . .

**CANON V. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.**

- A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.
- B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

- C. An arbitrator should not delegate the duty to decide to any other person.
- D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

**CANON VI. AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.**

- A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.
- C. . . . .
- D. . . . .