Rule 9 – Ethical Standards

Hypothetical Case Scenarios ***with Commentary***

Scenario #1 - Conflict of Interest

The mediator knows the lawyer for one of the parties; the lawyer was a college classmate of the mediator, and they see each other yearly at college reunions.

Commentary: *The Conflict of Interest Rule 9(e)(i) states that "the neutral shall disclose to all parties participating in the process all actual or potential conflicts of interest, including but not limited to the following: (aa) any known current or past personal or professional relationship with any of the parties or their attorneys."*

In this case, the issue is whether the relationship described is a "personal or professional" relationship. Among the factors that might be relevant are the following: (a) do the conciliator and the classmate consider each others friends or were they friends in college; (b) has either of them referred business to the other, or do they have any kind of relationship; and (c) have they had contact with each other besides during reunions. Even if, after weighing such factors, disclosure seems unnecessary, the best course may be to err on the side of disclosure, so that the parties have the information they need in order to make an informed decision about whether they are comfortable with the mediator.

Scenario #2 - Confidentiality

The parties disagree about the meaning of the settlement agreement they worked out with the mediator, and counsel for Party A issues a deposition subpoena ordering the mediator to testify about the discussions in the mediation and to bring her notes from the mediation session. Party B opposes the testifying of the mediator.

Commentary: Rule 9(h) states that "A neutral shall maintain the confidentiality of all information disclosed during the courts of dispute resolution proceedings, subject only to the exceptions listed in this section." One of the exceptions is stated in Rule 9(h)(i): "unless disclosure is required by law or court rule."

In this case, it is counsel for one of the parties, not the court, which has issued the subpoena for the mediator's testimony. Therefore, there is no ruling from the court as to the propriety of the subpoena. If the attorney had the authority to issue the subpoena, the mediator still has the right (and possibly, under these Rules, the obligation) to see the guidance of the court in which the case is pending as to whether s/he must comply with the subpoena. (See Commentary to Rule 9(h)(v): "The provisions in this section concerning confidentiality govern the ethical obligation of the neutral but may not bar compelled disclosure of confidential communications, by means of subpoena or other court process.")

Scenario #3 - Withdrawal

In a business divorce case, Partner A discloses to the mediator that he is personally about to receive a substantial contract from one of the partnership's best clients, and that her partner (Partner B) does not know this; Partner B would balk at their 50/50 division of assets if he knew. Partner A insists that the mediator not disclose this information to her partner or she will quit the conciliation.

Commentary: The Withdrawal Rule 9(i)(ii) permits, but does not require, the neutral to withdraw when the neutral "believes that (aa) one or more of the parties is not acting in good faith; …(cc) continuing the dispute resolution process would give rise to an appearance of impropriety; … and (ee) continuing discussions would not be in the best interests of the parties"

In this case, Partner B will be disadvantaged by continuation of the mediation. In addition, the mediator's knowledge of the up-coming contract could give rise to an appearance of impropriety or be perceived as a failure to act in good faith (especially if the parties have agreed to exchange all relevant financial information.) It is worth noting that if the mediator decides to withdraw, s/he must do so in a manner that does not breach the confidentiality of Partner A's communications to the mediator. (See Rule 9(i)(i); "Withdrawal must be accomplished in a manner which, to the extent possible, does not prejudice the rights or jeopardize the safety of the parties.")

Scenario #4 - Impartiality

A consumer dispute with an insurance company over an alleged over-charge; the mediator is currently in a dispute with his insurance company over another issue (underpayment on a loss claim.) Disclose?

Commentary: Rule 9(b)(i) requires the neutral to be impartial "with respect to all of the parties and the subject matter of the dispute." This duty applies throughout the dispute resolution process. Among the issues in this care are: (a) whether the neutral, in spite of his personal dispute with his own insurance company, feels about to be impartial; (b) whether one of the parties, if s/he have been impartial, thus calling into question the integrity of the process; and (c) whether, even if the neutral concludes that he can be impartial, an objective person would find that decision to be reasonable under the circumstances of that case.

The Rules probably do not require the disqualification of the conciliator solely on the grounds that s/he has been involved in a dispute with an insurance company, but such factors as how recent the dispute was, how intense a dispute it was, how long it lasted, and the resulting impact (if any) on the mediator's views about insurance companies might be relevant to the question of whether the mediator should make a disclosure of some kind. When in doubt, the best course in such situations may be to err on the side of disclosure, so that the parties have the information they need in order to make an informed decision about whether they are comfortable with the mediator.

Scenario #5 - Confidentiality

In an unsafe-conditions case, the mediator learns in a private session that the tenant would be willing to vacate the premises in exchange for a payment of $1,000, but that is her bottom line; she asks the mediator to tell the landlord that she wants $1,500. The conciliator inadvertently discloses to the landlord that the tenant would be willing to leave if paid $1,000.

Commentary: The Confidentiality Rule 9 (h) does not provide guidance on the question of curing an inadvertent breach of confidentiality by the neutral.

Among the possible courses of action are (a) to say to the landlord that the conciliator mis-spoke when s/he communicated the $1,000 figure and that the correct figure was $1,500; (b) to explain to the tenant what happened and find out if there are any terms that the tenant would wish to make part of her proposal if the proposal were to stand at $1,000; or (c) to discuss the situation with the tenant and explore the options that the tenant may prefer as a way of rectifying the breach. Although not ethically required, an apology on the part of the conciliator would be in order.