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Supporting the Lawyer's Complex Role in Mediation

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Mediation offers many benefits to clients, providing them an efficient, effective means of resolving their legal disputes. One reason mediation works is that it supports the complexities of the attorney-client relationship and helps lawyers satisfy their dual duties to both advocate for and advise clients about risks and benefits of settlement. When the mediation parties and their lawyers clearly understand the lawyer's role and duties to the client during mediation, they can work more effectively with the mediator and fully utilize the mediation process.

Washington's Rules of Professional Conduct, revised in September 2006, provide lawyers clear direction to consider social, emotional and economic consequences of litigation, as well as alternatives to litigation such as mediation. In fact, when a legal matter "is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."¹

Multiple Roles for the Lawyer

The Preamble to the RPCs describes multiple roles for a lawyer representing a client: advisor, advocate, negotiator and evaluator. These roles may seem in conflict with each other. As an "advisor," the lawyer

"provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." As an "advocate," the lawyer "conscientiously and ardently asserts the client's position under the rules of the adversary system." As a "negotiator," the lawyer "seeks a result advantageous to the client but consistent with the requirements of honest dealings with others."²

A lawyer acts in all three of these roles in mediation. In both mediation and litigation, the lawyer is helping the client by advocating and asserting the client's position. In mediation and in settlement negotiations, the lawyer takes on the negotiator role, to seek a result advantageous to the client, and as an advisor, to explain practical implications of a client's legal rights and obligations.

Lawyers Must Give Candid, Straightforward Advice

The RPCs specify the duties expected of lawyers in their role as advisors.

"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 the client's situation."³

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Focus: Tacoma WAMS

By: Diane McGaha, WAMS Director



As many clients know, Washington Arbitration & Mediation Service was founded in Seattle and maintained offices in Seattle and Spokane for many years. But in 1992, when the Spokane office closed and Diane McGaha was recruited back to WAMS as the Managing Attorney (after 3 years in private practice), the decision was made to open a satellite office in Tacoma.

The rationale for a Pierce County office was simple: Diane would only leave her law practice and return to the world of ADR administration if WAMS would allow her to open a Tacoma office.

The first WAMS office in Tacoma opened in 1992 in the old Norton Clapp Law Center in downtown Tacoma. The location was chosen because WAMS had historically collaborated with the University of Puget Sound law school (also in that building at the time) to allow students to observe hearings,

participate in training opportunities and provide mentors and judges for negotiation competitions. With the sale and pending move of the law school to Seattle University, WAMS relocated from downtown to the Old Town area.

For ten years, the Tacoma WAMS office enjoyed a view of Commencement Bay and the Ruston Way waterfront, but WAMS eventually outgrew the space and relocated to the Proctor District. Although the convenience of Starbucks downstairs was a definite positive aspect to the Proctor location, ongoing problems with parking, security and the HVAC system required another move.

As of October 1, 2008, Tacoma WAMS has been located in the Port of Tacoma office building, formerly known as the World Trade Center and now the Fabulich Center. Ample parking, easy access from I-5 and close proximity to Pick-Quick burgers and Fife City Bar & Grill (two of the best eating establishments in the Puget Sound area) were important factors in the relocation decision. The new WAMS office offers free wi-fi to clients and has 7 conference rooms available, with an additional 3 rooms available in the building if needed.





...WAMS Buzzz

The WAMS staff and mediators were asked to support Food Drives at the end of 2008 in lieu of the traditional holiday party. One such effort was spearheaded by WAMS Lemon Law Director/Case Administrator Alisa Bacon, who collaborated with her grandmother on Vashon Island to provide holiday food items donated by WAMS to the Vashon-Maury Community Food Bank. Thanks to WAMS, Alisa and her grandmother, over 250 families served by the

Vashon Food Bank will have special holiday food baskets this year.

In other news, Melody Malloy married Sam Brenden on August 9, 2008. Congratulations! She has also transitioned to working full-time in the Seattle WAMS office.

Mark Zimmerly accepted a position as a Case Manager at the Salvation Army's William Booth Center. He is working full-time in their transitional program for homeless men. Best of luck!

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These non-legal factors are part of the lawyer's assessment and advice because pure legal advice, in a vacuum, fails to fully meet the client's needs. As described in Comment 2 to Rule 2.1 "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant."

The rules encourage client need-centered guidance and "candid" advice. Comment 1 to Rule 2.1 reminds lawyers of the standards they are expected to meet and of the importance of honest, straightforward advice, even when it is difficult to give. This comment provides: "Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

The comments acknowledge this is not always easy. The duty to advocate and assert the client's interests complicates the advisory role even more. By providing broad advice, including consideration of moral, economic, social and political factors, lawyers can strike the balance and fulfill the duties to clients

expected by the rules — both to assert the client's interests through advocacy and also to give honest and candid advice.

Settlement Is a Client Decision

While the lawyer works to both advocate and advise the client toward resolution of a legal dispute, under Rule 1.2(a) the lawyer must be mindful of the fact that decisions concerning the objectives of the representation, the means to pursue the objectives, and the ultimate decision regarding settlement of a legal dispute, are client decisions.

The lawyer's role is to advise the client regarding the possible objectives of representation, the potential means to pursue the objectives and the pros and cons of particular settlement options. Fulfilling these duties to the client is a complex task. The lawyer must remember that the client is the decision maker under Rule 1.2(a), but also remember to give the client complete, broad advice pursuant to Rule 2.1.

Mediation: An Ideal Forum

Advising the client about mediation as a means of pursuing the client's legal objectives is not only encouraged by the RPCs, it is a way for the lawyer to

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strike the balance between giving advice, advocating for the client and listening to the client. Mediation supports these complex communication tasks for the lawyer. A professional mediator helps the lawyer give the client advice and yet abide by the client's decisions regarding the objectives and means of the representation and the client's ultimate decision regarding settlement.

The RPCs provide lawyers with ethical guidance for fulfilling the complex roles of both advocating for and advising a client. More than establishing ethical duties, the rules help promote resolution of legal disputes — the ultimate purpose of litigation — by defining the lawyer's role as both advisor and advocate.

Perhaps mediation has become the paramount method of dispute resolution not just due to economic pressures and crowded court dockets, but because it best supports the tensions in the litigation process between lawyers' dual roles as advocates and advisors. Following the ethical guidance of the rules when considering, preparing for and participating in mediation helps lawyers fulfill their duties to their clients and effectively resolve their clients' legal disputes.

1 Comment 5 to Rule 2.1.

2 Preamble [2].

3 Rule 2.1.

Kathleen Wareham has been a panel member of WAMS since 2004. She mediates disputes, utilizing more than 20 years of legal experience in negligence, personal injury, civil rights, wrongful death, and complex probate, guardianship and trust matters. This article draws on material from Ms. Wareham's chapter on "Washington Mediation Ethics" that will appear in the update to the Washington Legal Ethics Deskbook (Wash. St. Bar Assoc.) scheduled for release in January 2009.



HARRY GOLDMAN

“Mr. Goldman did a good job in bringing the sides together, was observant and keyed right into the significant facts and failures of each side.”

-WAMS client

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