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# Ethical Considerations of Mediation

## I. Difficult Negotiations

In mediations, as in life, we will encounter difficult individuals and situations. There are usually reasons behind a person's difficult behavior and sometimes the issues being mediated are inherently difficult to resolve.

Identifying the difficult characters and issues is always important, but perhaps never more so than in the context of a mediation. Thus, the first step in dealing with difficult situations is to plan for them.

**a.** **Excessive Demand**: Demands do not settle cases. Ultimately, accepted offers resolve disputes. Make offers and consider double-bracketing to reduce the demand. The goal with excessive demands is to put the other party at risk. They can accept a reasonable settlement now or gamble that they will do better later. Moreover, it is always easy for a party to reject an offer of zero.

**b.** **Multiparty Litigation**: The selection of mediator and facility is critical. Mediators, like attorneys, have strengths and weaknesses. For instance, some very good mediators struggle with multiparty mediation. Here, the mediator must be able to control the parties and the process. The facility must also be able to accommodate multiple breakout rooms as private caucuses are necessary to maintain order. Finally, consider using a blind or double blind settlement negotiation.

**c.** **Coverage Issues**: It is important that all decision makers, which includes the insured and insurer, attend the mediation. Insurance coverage issues are sometimes best addressed in separate mediation sessions with the same mediator. The coverage issues can sometimes be used against the claimant in settlement discussions.

**d.** **Unreasonable Party/Client**: There can be unreasonableness on both sides of the table. These mediations may require that you ask the mediator for assistance in educating the unreasonable party/client as to the risks of not resolving the dispute. At times, you must think outside the box for creative solutions that will satisfy the unreasonable party/client.

**e.** **Unreasonable Attorney**: Do not combat attorneys who are uncooperative, irascible, rude, ruthless, condescending and untrustworthy as their conduct may be psychological power

play. Let counsel vent, grandstand and yell as winning and losing is a matter of perception. Let them feel like they are winning the battle because you could still win the war.

Sometimes unreasonableness can be caused by an attorney who is unprepared. Consider educating the attorney in a collaborative manner and be prepared to have a second mediation session after counsel has considered the information.

# II. Ethical Considerations

During mediations, the lack of authoritative figures and informal structure creates a non-threatening environment, which is useful to foster resolutions. However, this environment can entice parties to overlook ethical considerations. All attorneys, whether a party or mediator, are bound by the rules of ethics in the mediation process. In addition, some ethical violations apply to all participants as they can jeopardize any potential resolution. Generally, most ethical considerations fall into the following three categories: (1) truthfulness; (2) neutrality; and (3) confidentiality.

**a.** **Truthfulness**: The American Bar Association Rules of Professional Conduct Rule 4.1, states that "[A] lawyer shall not knowingly . . . make a false statement of material fact or law to a third person." Such principle applies to both litigation and negotiation settings. However Rule 4.1 acknowledges that whether a particular statement should be regarded as one of fact or one of generally accepted practices of negotiation depends on the circumstances.

A settlement agreement is a contract and once entered into is binding and conclusive. Therefore, when mediation produces a settlement agreement, it is subject to challenge in the same manner as other contracts. For instance, fraud and misrepresentation may negate a settlement agreement, while mere puffery and lies considered within the bounds of accepted conventions in negotiation should stand. Thus, if a party misleads and defrauds an opposing party in mediation, the opposing party may argue that the agreement is void or should be reformed

**(i) New York, Florida, and Illinois**

Numerous states have adopted some variation of the ABA Rules of Professional Conduct Rule 4.1, including New York, Florida, and Illinois. The Rules of Professional Conduct of these states apply to a lawyer's conduct in mediation. The Rules establish that a lawyer, in the course of representing a client, shall not knowingly make a false statement of fact or law to a third person. However, the Rules acknowledge that under generally accepted conventions in negotiation, estimates of price or value, a party's bottom line, and the existence of an undisclosed principal (except where nondisclosure of the principal would constitute fraud); do not ordinarily constitute statements of material fact.

**(ii) California**

California, unlike many states, has not adopted a variation of the ABA Model Rules of Professional Responsibility Rule 4.1, which states that "[A] lawyer shall not knowingly . . . make a false statement of material fact or law to a third person." However, although Rule 4.1 does not have legal force and effect in California, it may still serve to guide California courts regarding the appearance of an attorney's impropriety and truthfulness. See *Hetos Investments, Ltd. v. Kurtin*, 110 Cal.App.4th 36 (2003).

**(iii) Texas**

Though there are no specific requirements governing a lawyer's conduct in mediation in Texas, Texas has adopted a variation of Rule 4.1, which governs an attorney's duty of truthfulness to third parties in litigation as well as mediation. Furthermore, Texas has established the Texas Lawyer's Creed, which states:

"I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right."

**b. <u>Neutrality</u>:** The essence of effective mediation requires absolute neutrality from the mediator. More importantly, mediation requires that all parties perceive the neutrality. The process will fail if either party feels that the mediator has provided information or "favors" to the either side.

**(i) New York**

Individual mediation programs maintain ethical rules and standards for neutrality. These standards address issues including full disclosure of potential conflicts of interest, impartiality, and bias held by mediators. For instance, the standards of conduct for New York State Community Dispute Resolution Center Mediators details that a mediator shall avoid the appearance of a conflict of interest either by disclosing the conflict or withdrawing from the mediation. Additionally, there are specific rules addressing the neutrality of lawyers who serve as mediators. Under Rule 2.4, lawyers serving as mediators are required to inform unrepresented parties that they are not representing those parties and that they are serving as neutrals. Further, Rule 1.12 prohibits lawyers serving as mediators from negotiating for employment with any person involved as a party or counsel for a party in the dispute. Lawyers are also prohibited from representing a party in a matter in which the lawyer served as a mediator, absent the written consent of all parties.

**(ii) Florida**

Under the Florida Rules for Certified and Court-Appointed Mediators, a mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the mediator and a party to the mediation or the subject matter of the dispute appears to compromise the mediator's impartiality. After appropriate disclosure, the mediator may serve if all parties agree; however, if the conflict clearly impairs the mediator's impartiality, the mediator must withdraw from the mediation. Furthermore, if a mediator is a senior judge or a retired judge who has presided over a case involving any party, attorney, or law firm in the mediation, the mediator shall disclose such fact prior to mediation.

In addition to the ethical rules and standards of a mediator, a lawyer who is acting as a mediator must adhere to additional ethical obligations. The lawyer-mediator must take precautions to ensure that he or she does not end up representing one side in the course of the mediation by informing unrepresented parties that he or she does not represent them and explaining the role of the neutral third-party mediator. This ethical conflict of interest problem for the lawyer-mediator is a non-issue when all parties are represented by counsel.

**(iii) Illinois**

Under Illinois' Uniform Mediation Act, a mediator must make a reasonable inquiry of the known facts to determine whether a reasonable person would believe a mediator could act impartially under the circumstances. Factors to consider include financial and personal interest in the outcome of the mediation or relationship with a mediation party. If the mediator knows of such conflicts of interest, he or she must disclose such information and withdraw from the mediation unless the parties agree otherwise. In addition, where a lawyer acts as a mediator, the lawyer-mediator must inform unrepresented parties that the lawyer does not represent them and must explain the role of the third-party neutral mediator.

**(iv) California**

Mediation is defined in both the Code of Civil Procedure and the Evidence Code as a "process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." Code Civ. Proc., § 1775.1, subdivision (a); Evidence Code, § 1115. According to the Law Revision Commission comments to Chapter 2 of Division 9 of the Evidence Code concerning the mediation privilege, Evidence Code, §§ 1115–1128, "a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decision making neutral."

Code of Judicial Ethics, Canon 4F, prohibits a judge from performing judicial functions in a private capacity unless expressly authorized by law. The Advisory Committee Commentary notes that Canon 4F does not prohibit participation in settlement conferences performed as part of the judge's judicial duties. See *Travelers Cas. & Surety Co. v. Superior Court* 126 C.A.4th 1131, 1141, 24 C.R.3d 751 (2005) (judge appointed as settlement mediator improperly turned settlement mediation into fact-finding, coercive procedure in order to prevent insurer from declaring coverage forfeiture); on California Code of Judicial Ethics, *see* 2 *Cal. Proc.* (5th), *Courts,* §52 et seq.

In addition, a court may not appoint a person to conduct a settlement conference if the person is simultaneously serving as a mediator in the same action.

**(v) Texas**

It is the duty of the appointed third-party-neutral, as the mediator, to "encourage and assist the parties in reaching a settlement of their dispute but [the mediator] may not compel or coerce the parties to enter into a settlement agreement." Tex. Civ. Prac. & Rem. Code Ann. § 154.053(a) (Vernon 2005).

The Texas ADR Act provides that "[a] mediator may not impose his own judgment on the issues for that of the parties." *Id.* at § 154.023(b). Additionally, the mediator is to "encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement." *Id.* at § 154.053(a). Beyond this, the Act is silent on the methods to be used by a mediator in settling a case, and the Texas cases, with few exceptions, have not gone into this aspect of mediation. Although it can be argued that the language allows only the use of facilitative mediation, evaluative mediation seems to predominate as the method used by most mediators in Texas.

**c. <u>Confidentiality</u>**: In order for the mediator, the attorneys, and the clients to openly discuss the central issues, strengths, and the risks of litigation, the participants must be confident that the discussions cannot and will not be disclosed to others.

**(i) New York**

Unlike numerous states, New York has not adopted the Uniform Mediation Act. As a result, there is no statutory privilege in New York and courts in New York do not automatically treat statements made during mediation as confidential as a matter of public policy. 4A N.Y.Prac., Com. Litig. in New York State Courts § 60:15 (4th ed.). Therefore, parties that fail to account for the lack of confidentiality in mediation may find that their statements may be used as evidence against them at a later litigation proceeding. See *Hauzinger v. Hauzinger*, 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dep't 2007), *aff'd*, 10 N.Y.3d 923, 862 N.Y.S.2d 456, 892 N.E.2d 849 (2008).

Nonetheless, parties are free to execute confidentiality agreements that recognize that the mediation statements are communications in furtherance of negotiations and thus inadmissible to prove or disprove the amount of a disputed claim or for impeachment purposes. 4A N.Y.Prac., Com. Litig. in New York State Courts § 60:15 (4th ed.); Fed. R. Evid. 408; CPLR § 4547.

**(ii) Florida**

In Florida all mediation communications are confidential. Fla. Stat. Ann. § 44.405 (West). Mediation participants shall not disclose a communication made during mediation to a person other than another mediation participant or a participant's counsel. Furthermore, a mediation participant has a privilege to refuse to testify and even to prevent any other person from testifying regarding mediation communications. Fla. Stat. Ann. § 44.405 (West).

**(iii) Illinois**

Under Illinois law, mediation communications are confidential to the extent agreed upon by the parties, unless subject to the Open Meetings Act or the Freedom of Information Act. Illinois Uniform Mediation Act, (UMA), 710 ILCS 35/1. In addition, mediation communication is privileged and not subject to discovery or admissible in evidence in a proceeding unless waived. A mediation participant and a mediator may refuse to disclose mediation communication and prevent another person from disclosing communications made during mediation.

**(iv) California**

California statutes and case law hold that confidentiality is essential to effective mediation and generally bar disclosure of specified communications and writings associated with a mediation. *See* CCP § 1775.10; Ev.C. §§ 703.5, 1115 et seq., 1152; and *Garstang v. Sup.Ct.* 39 Cal.App.4th 526, 533-534, 46 CR2d 84, 88 (1995) —confidentiality also protected under constitutional right of privacy. "No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation … is admissible or subject to discovery …"; and "No writing … that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery." Ev.C. § 1119(a), (b).

All discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure by Evidence Code § 1119(a). *Cassel v. Sup.Ct.* 51 Cal.4th 113, 128, 119 CR3d 437, 449(2011) —law firm defending malpractice action could assert mediation confidentiality to prevent disclosure of allegedly

negligent advice given client before and during mediation (non-privileged in action between lawyer and client).

**(v) Texas**

In Texas the third-party-neutral mediator cannot, unless expressly authorized by the disclosing party, disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute. Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court. Tex. Civ. Prac. & Rem. Code Ann § 154.053(b), (c).

# IV. Hypothetical

**a.** The plaintiff, Freddie Farmworker, sued for personal injuries suffered when a tank of acid toppled on him while he was attempting to fertilize strawberry plants. Plaintiff suffered third-degree burns and filed a Workers' Compensation claim with his farm employer, Strawberry Fields. Plaintiff was out of work for 6 months, had skin graphs and severe permanent scarring. He does not speak English. The lawyer defending employer Strawberry Fields in the Workers' Compensation action was able to settle the claim for $30,000. No interpreter was present when the Compromise and Release was signed by Freddie Farmworker and the Workers' Compensation Judge. The Workers' Compensation insurer, WC Inc., subsequently filed a subrogation action seeking to recover the $30,000 paid against the tank manufacturer, AC Tanks, and the company providing the tank of acid, AcidFlow. AcidFlow and AC Tanks cross-complained against Strawberry Fields.

The parties agreed to mediation and considered Judge Fairness as the mediator. All parties and their counsel signed a confidentiality agreement before the mediation began. Counsel for AC Tanks told counsel for all parties that he did not know Judge Fairness. All parties agreed to use Judge Fairness. Unbeknownst to the parties, Judge Fairness and counsel for Strawberry Fields previously practiced in the same law firm 10 years ago. During the mediation, Judge Fairness insisted that AC Tanks had no exposure to liability and should be dismissed from the action.

At the mediation, counsel for AC Tanks provided a soils report for the first time that indicated the ground underneath the tank was unstable. The soils report was never produced in discovery. In addition, comments were made by the employer for Strawberry Fields that he referred Freddie Farmworker to his lawyer as a reward for being able to settle the Worker's Compensation claim so cheaply.

During the mediation, plaintiff was offered $15,000 to settle his personal injury claims. Plaintiff's counsel advised Freddie Farmworker to accept the settlement.

**b.** Former Employee is a 64 years old attorney, who worked at Small Law Firm for 27 years. Managing Partner at Small Law Firm terminated Former Employee for alleged insubordination after a series of written warnings and a probationary period as required by Small Firm's written employee manual. Former Employee sued for age discrimination and wrongful termination. The parties agreed to mediate this matter with Objective Mediator, an attorney who no longer practices law. Objective Mediator and Managing Partner of Small Firm are connected on LinkedIn. Managing Partner had endorsed Objective Mediator's skills on LinkedIn.

Former Employee's attorney instructed a paralegal to "friend" an employee of Small Firm on Facebook to see the employee's posts. The paralegal "friended" a current associate at Small Firm and gained access to the associate's "wall" and older posts. The paralegal learned through the associate's private postings that witnesses of the alleged insubordination exaggerated their accounts of what happened. Former Employee discloses this information to the mediator and how he learned of it. However, this information was not disclosed during discovery.

Former Employee is confident that he can prevail at trial based on lack of credible witnesses and hearsay testimony that the Managing Partner wanted to try to lower health care costs by terminating older attorneys. The Former Employee's attorney advises the Objective Mediator that he's losing client control but he thinks he can get his client to settle before trial as long as the client's increasingly unrealistic expectations of his claim's value are met.

The Small Firm attorney is experienced and prepared for the mediation with solid evidence of insubordination from Form Employee's personnel file. The Former Employee's attorney is a solo practitioner and has limited funds to retain experts and prepare the case for trial. After hours of mediating, Former Employee's attorney pushes his client to accept an incredibly low settlement to avoid retaining experts and to recover his attorneys' fees and costs. The mediation settles for an amount that a well-advised client would have rejected. Two days after the mediation, Objective Mediator read a posting on Small Firm's attorney's website boasting about the low settlement and suggesting that evidence from the personnel file was fabricated for the mediation.