

MEDIATION ETHICS FOR ADVOCATES

PRESENTER'S GUIDE

The purpose of this guide is to provide step-by-step instructions for you to follow as you deliver the course. It is meant to be “grab and go,” with power point slides and corresponding talking points for each slide. With that said, if you have questions about any of the materials or want to learn more, please don’t hesitate to reach out.

Step One

- Start on SLIDE ONE: Title Slide.
- Welcome attorneys to the CLE Course.

Step Two

- Move to SLIDE TWO: Introductions and Overview.
- Introduce yourself/yourselves.
- Provide an overview of the course.
 - In this one-hour course, we will:
 - Start by talking about the **role** of mediation advocates
 - Look at the **ethical considerations and tensions** for mediation advocates
 - Consider the role of **third party funders**
 - End with a **recap**, reference to **resources**, and **questions**

Step Three

- Move to SLIDE THREE: Starting point.
- Discuss the different roles and orientations of litigation counsel and mediation advocates:
 - Litigation counsel: zealously represent clients for trial
 - Mediation advocates: work with clients to achieve a resolution
- Highlight that this raises questions for attorneys representing clients in mediation regarding:
 - Use of adversarial litigation tactics in mediation
 - Ethics of doing so
- Point out that there is no clear ethical guidance for mediation advocates. With that said, the ABA Model Rules of Professional Conduct speak to duty of lawyers as negotiators. Rule 4.1:
 - Provides that the lawyer’s duty as a negotiator is to seek “a result advantageous to the client but consistent with the requirements of honest dealings with others.”

Step Four

- Move to SLIDE FOUR: Big Ethical Consideration #1: Confidentiality.
- Explain that confidentiality is a foundational component of mediation:

- It gives parties and their attorneys the space and confidence to share information about their case, including strengths and weaknesses, and settlement considerations.
- Point out that mediation confidentiality provisions typically provide:
 - That written and verbal mediation communications WON'T BE DISCLOSED – unless otherwise agreed to by parties or required by applicable law
- Note that mediation confidentiality is generally protected by courts as essential to mediation legitimacy and integrity.

Step Five

- Move to SLIDE FIVE: Big Ethical Consideration #2: Good Faith Participation in Mediation.
- Point out that there is no bright line definition.
- Highlight that good faith participation in mediation is often considered through the lens of bad faith participation.
- Explain that bad faith participation is described under the category of “you know it when you see it!”
- Provide a list of behaviors that fall into this category in the mediation context:
 - Using the mediation as a fishing expedition
 - Failing to bring a person with settlement authority to the mediation
 - Failing to bring relevant evidence and witnesses to the mediation
 - Failing to prepare
 - Using frivolous or obstructive tactics to thwart the process

Step Six

- Move to SLIDE SIX: Big Ethical Consideration #3: Candor and Truthfulness in Mediation.
- Highlight that Model Rules of Professional Conduct 4.1, Truthfulness in Statements to Others, applies to communications to and through mediators.
- Reference language from 4.1: In the course of representing a client, a lawyer shall not knowingly:
 - Make a false statement of material fact or law to a third person;
 - 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.
- Note the qualifying language – knowingly and material:
 - If an advocate is unaware that a statement is false OR
 - IF the false statement is not material
 - THEN Rule 4.1 does NOT apply.

Step Seven

- Move to SLIDE SEVEN: Tensions.
- Point out that there may be tension between good faith participation and candor and truthfulness in mediation – and confidentiality.
- Raise the question: how would one prove bad faith or misrepresentation of a material fact, for example, without breaching confidentiality?

Step Eight

- Move to SLIDE EIGHT: Good Faith and Confidentiality Mediation Hypothetical.
- Set the stage:
 - Big case
 - Plaintiff's attorney is prepared, brings 9 experts
 - Defendant's attorney shows up late, is uncooperative, brings no experts
 - Mediation cancelled because need defense experts
- Raise the question for discussion: *Should confidentiality be breached to prove bad faith?*
- Provide background on relevant case law:
 - This is what happened in *Foxgate Homeowners' Association Inc. V. Bramalea California Inc.*, 26 Cal 4th 1 (Cal.2001):
 - Plaintiff brought a motion for sanctions for defendant's bad faith tactics.
 - Trial court granted and Court of Appeals reversed.
 - CA Supreme Court affirmed: "...no exceptions to the confidentiality of mediation communications."
 - In *Rojas v. Superior Court* (2004) 33 Cal. 4th 407, 415-416 (2004):
 - The CA Supreme Court reaffirmed the public policy interest in maintaining confidentiality: "[C]onfidentiality...promote[s] a candid and informal exchange...(this) is achieved only if participants know that what is said in the mediation will not be used to their detriment through later court proceedings."
- Posit the question: What does this mean for mediation advocates?
 - Point out that this raises possibility that an advocate could take something otherwise discoverable, use it in mediation, and protect it behind cloak of confidentiality.

Step Nine

- Move to SLIDE NINE: Good Faith and Confidentiality.
- Point out that it is important to consider state and local laws and rules.
- Highlight *In re A.T. Reynolds & Sons*, 424 B.R. 76, 80-82 (Bankr. S.D.N.Y. 2010),
 - During mediation, Wells Fargo reportedly acted belligerently and attempted to wrest control of the process.
 - Mediator reported and Wells Fargo was sanctioned for bad faith.
 - No conflict with confidentiality: bankruptcy judge followed local rules, which "specifically provided that the 'mediator shall report any willful failure to attend or participate in good faith.'"
- Raise question about the impact of this on the mediation.
 - "Allowing parties to testify to mediation communications is an anathema to the mediation community. Allowing a mediator to testify is worse...Resort to mediator evidence should be avoided, unless necessary to resolve the legitimate issue of compliance with court duties. There is a strong interest in preserving mediation confidentiality and easing the burden on mediators." (Prof. Peter Thompson, Hamline)

- If choose, might also raise question about the impact of this on the mediator.
 - Wells Fargo said mediator “could be assured...that Wells Fargo would never agree to [his] acting as mediator in the future in which Wells Fargo might be a party.”

Step Ten

- Move to SLIDE TEN: Good Faith and Confidentiality.
- Point out that it is important to consider exceptions as well.
- In *Rinaker v. Superior Court*, 62 Cal. App. 4th 155 (Ct. App. 1998), the mediator required to testify.
 - Juveniles charged with vandalism (throwing rocks at car).
 - Victim filed a civil harassment action and during mediation, admitted that he had not actually seen who threw the rocks at his car.
 - At trial, victim testified to the contrary.
 - Minors sought to compel the mediator’s testimony to impeach the defendant’s testimony in the delinquency proceedings.
 - Trial court denied.
 - Court of Appeal reversed, holding that the confidentiality protections must yield when necessary to ensure the minors’ constitutional right to effective cross examination and impeachment of adverse witness.

Step Eleven

- Move to SLIDE ELEVEN: Candor and Truthfulness and Confidentiality.
- Note that while there are limitations imposed by the MRPC when negotiating, there is a tension between mediation confidentiality protections and false statements.
- Note that this raises questions around puffery, bluffing, and misrepresentation.

Step Twelve

- Move to SLIDE TWELVE: Candor and Truthfulness and Confidentiality – Puffery.
- Point out that while puffing is permitted, lying is not.
 - ABA Formal Opinion 06-439 provides that while there is a tendency to be loose with one’s comments during a negotiation to get an edge, the Rules require forthrightness when dealing with material facts.
- Provide hypothetical:
 - Mediation advocate tells mediator that to the best of his knowledge, insurance coverage was limited to \$200K, when documents in the file showed that the client had \$1 million in coverage.
- Raise the question for discussion: is this ethical?
- Reference the ABA Formal Opinion 93-370: “While...a certain amount of...puffery in settlement negotiations may be acceptable convention...a party’s actual bottom line or settlement authority given to an attorney is a material fact.”
- Point out, however, that even if the puffery is unethical, the mediation cloak of confidentiality may make it difficult to prove.

Step Thirteen

- Move to SLIDE THIRTEEN: Candor and Truthfulness and Confidentiality – Bluffing.
- Point out that bluffing is allowed by the rules, so long as it is not material.
- Emphasize that what is material depends on circumstances. Generally, the following do not fall in that category:
 - estimates of price or value
 - a party's intentions as to an acceptable settlement
 - existence of an undisclosed principal
- Provide hypothetical:
 - A mediation advocate tells a mediator, truthfully, that the authority to settle does not exceed \$100K but then adds, untruthfully, "I don't think that we are going to be able to reach anybody today to obtain additional authority."
- Raise the question for discussion: is this ethical?
- Reference Rule 4.1, Comment 2, which provides:
 - Whether a particular statement should be regarded as one of fact can depend on the circumstances.
 - Bluffing about settlement authority is a commonly used tactic that yields effective results, such as testing the opponent and establishing a settlement range. Because settlement authority is not something a party would otherwise be compelled to disclose, such conduct would be permitted.

Step Fourteen

- Move to SLIDE FOURTEEN: Candor and Truthfulness and Confidentiality: Misrepresentation.
- Point out that misrepresentation can occur if an attorney affirms a statement of another person that the attorney knows is false.
- Provide hypothetical:
 - Mediation advocate participating in a personal injury mediation without the client present settled the case without disclosing the client had died.
- Raise the question for discussion: is this ethical?
- Reference ABA Formal Opinion 95-397:
 - An attorney cannot conceal the fact that his personal injury client is dead when negotiating a settlement. Death is a material fact.

Step Fifteen

- Move to SLIDE FIFTEEN: Scope of Confidentiality Protection.
- Highlight that, particularly in some jurisdictions, the scope of confidentiality protection is broad.
- Reference California case: *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011):
 - Cassel agreed to settle his claims during mediation.
 - He then sued his attorneys for malpractice, asserting that they provided bad advice and were deceptive and coercive towards him during the mediation.

- CA Supreme Court: trial court properly granted motions in limine precluding Cassel from introducing any evidence which arose during the mediation.
- Cassel was left with no evidence to prove his case.

Step Sixteen

- Move to SLIDE SIXTEEN: Elephant in the Room: Third Party Funders.
- Explain that a third-party funder funds a party's participation in mediation in return for a share of the proceeds.
- Raise the question for discussion: how might this impact the mediation process? Point out:
 - May impact how the plaintiff values his/her case.
 - Value may increase because of "endorsement" of third party funder and/or because the settlement will immediately be reduced by payment to third party funder.
 - At the same time, third party funders may equalize the resources to pursue a case.
 - This may impact a defendant's assessment of what it will take to settle, knowing that the plaintiff will be able to finance a long fight, if needed.

Step Seventeen

- Move to SLIDE SEVENTEEN: Recap, Resources, and Questions
- Provide recap that the orientation of a mediation advocate is different than that of litigation counsel.
- Emphasize that preparation and research are important.
- Highlight the resources available, including:
 - Federal Rules
 - State Rules
 - Local/Court Rules
 - The Model Standards of Conduct
 - Rules of Professional Conduct
 - ABA Ethics Opinions
- Ask if there are any other questions.
- Thank everyone for joining you today!

YOU ARE FINISHED! GREAT JOB!