



# The mediation advocate

## BALANCING ETHICS AND CONFIDENTIALITY IN MEDIATION

Not all disputes are resolved by litigation, nor should they be. Indeed, more cases are resolved by settlement than by trial. (E.g., Court Review: The Journal of the American Judges Association, 42:3-4 (2006), pp. 34-39 John Barkai, Elizabeth Kent, Pamela Martin, A Profile of Settlement (2006); Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. Rev. 485, 502 (1985) ["Over 90% of all cases (both civil and criminal) are currently settled."].)

There are many reasons for this, not least of which are the economic, emotional and institutional tolls of litigation. As Abraham Lincoln urged lawyers 170 years ago: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough. Never stir up litigation. A worse man can scarcely be found than one who does this." (2 *Collected Works of Abraham Lincoln*, Fragment: Notes for a Law Lecture (circa 1850).)

Thus, while advocacy is often associated with brilliant appellate arguments and winning trial strategies, a lawyer should have more than those arrows in his or her quiver. As mediation has become an increasingly popular alternative method of dispute resolution, effective lawyers have honed their ability to fashion creative negotiated resolutions to their clients' disputes. Because negotiation is not a zero-sum game, to effectively negotiate settlements, lawyers must guide the negotiations to arrive at the best possible resolution for their clients.

To be effective, in addition to developing negotiation skills, mediation advocates must be cognizant of the ethical rules applicable to their mediation

practices. Additionally, they must have a thorough understanding of the confidentiality and privilege protections accorded mediation communications. Unlike proceedings in a public forum, in California, mediations take place under a nearly absolute cloak of confidentiality. The tension between mediation ethics and this confidentiality scheme can create ethical and tactical dilemmas for counsel.

As in litigation, mediation advocates have ethical duties to both the client and third parties, as well as a general responsibility to act in good faith.

### The duties of competency and communication with the client

Although there is currently no particular rule contained in the California Rules of Professional Conduct requiring lawyers to inform themselves of mediation and other forms of alternative dispute resolution, the general requirements of Rule 1.1 would suggest that a litigator should learn about alternatives to resolution of disputes through litigation in the courts. Rule 1.1(a) of the California Rules of Professional Conduct provides: "A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence." The duty of competence requires lawyers "to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably\* necessary for the performance of such service."

Given that mediation may provide a desirable alternative means of resolving disputes, learning to mediate effectively is not only a practical requirement. Arguably, a litigator is ethically obligated to gain the "learning and skill" necessary to perform effectively in the mediation context.

Additionally, Rule 1.4(b) requires a lawyer to explain "a matter to the extent reasonably\* necessary to permit the client to make informed decisions regarding

the representation." At least one commentator has suggested that this duty of communication with clients, coupled with the duty of competency, would require the lawyer to provide adequate explanation of the various alternative methods of dispute resolution, including mediation as an alternative to litigation. (See Diane Karpman, Professional Responsibility Ethics-Rule Aficionados and ADR, 22 County Bar Update no. 11 (L.A. County Bar Association, Dec. 2002) ["a mandatory rule requiring information regarding ADR would seem unnecessary since a lawyer already has obligations of communication and a duty of competency. It is already tucked within the folds of the 'penumbra' of good lawyering."].)

Additionally, the California State Bar expressly encourages such counseling in its Attorney Guidelines of Civility and Professionalism. Section 13 provides: "An attorney should raise and explore with the client and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in every matter as soon as possible and, when appropriate, during the course of litigation."

This may be especially true in the post-pandemic world, when courts will have a significant backlog and resolution through litigation will take even longer than it has in the past.

### The duty to communicate settlement offers to the client

Rule 1.4.1 of the California Rules of Professional Conduct mandates: "(a) A lawyer shall promptly communicate to the lawyer's client: (1) all terms and conditions of a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and (2) all amounts, terms, and conditions of any written\* offer of settlement made to the client in all other matters."

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Thus, in California, all written settlement offers must be conveyed to the client. Additionally, the commentary to Rule 1.4.1 notes that an oral offer of settlement should be communicated to the client if it constitutes a “significant development.” This comment is bolstered by the mandate in section 6068(m) of the California Business and Professions Code that a lawyer should “keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.”

There are few circumstances in which an oral settlement communication, if serious, would not be a “significant development.” Moreover, conveying oral settlement communications between the parties is fundamental to the fluidity of the negotiations during mediation. Such settlement communications are “significant developments” in the mediation process of which the client must be informed.

Furthermore, section 18 of the California State Bar’s Attorney Guidelines of Civility and Professionalism provides: “An attorney should negotiate and conclude written agreements . . . with informed authority of the client.” A client cannot give “informed authority” without knowing of all settlement offers and demands, oral or otherwise.

Significantly, Rule 1.4.1 requires promptness as well. To comply with this aspect of the rule, counsel should move swiftly to communicate settlement offers to the client.

### Duties to others

The duties of candor and truthfulness are at the core of the advocate’s duties to third parties in mediations, just as in other contexts. In this vein, Rule 4.1 of the California Rules of Professional Conduct provides: “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person;\* or (b) 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, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e)(1) or rule 1.6.”

Similarly, California Business and Professions Code section 6068(d) imposes on attorneys the duty “[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.” Section 6128(a) goes further and makes it a misdemeanor for an attorney to engage in “any deceit or collusion” or to “consent[] to any deceit or collusion, with intent to deceive the court or any party.”

While there is no rule expressly requiring a lawyer to act in “good faith” toward third parties, the duties of candor and truthfulness outlined above are fundamental pillars of good faith. Additionally, other rules governing the lawyer’s ethical duties provide further support for such a notion. California Business and Professions Code section 6068(c) imposes on attorneys the duty to “counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.” In essence, this rule exhorts lawyers to operate within the bounds of good faith by limiting their advocacy to matters that are, in their assessment, “legal or just,” even while zealously pursuing the interests of their clients.

### California’s mediation confidentiality

California’s mediation confidentiality provisions are detailed and expansive, more so than those of many other jurisdictions. For example, the only comparable rule in the Federal Rules of Evidence, Rule 408, provides that statements made in the course of settlement negotiations are inadmissible in limited circumstances – i.e., when offered “to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction.” (Compare California

Evidence Code section 1152(a), excluding both settlement offers and “any conduct or statements made in the negotiation thereof” when offered to prove the settlement offeror’s liability.)

### The California Evidence Code

To begin, the testimony of neutrals regarding arbitrations or mediations can be introduced in subsequent civil proceedings only in very limited circumstances. California Evidence Code section 703.5 provides:

“[N]o arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.”

Beyond this, the California Evidence Code also contains broad protections specifically applicable to mediations. Under these protections, like all participants, mediation advocates are obligated to maintain the confidentiality of communications occurring during the mediation session, as well as in preparation for and pursuant to the mediation. (Pursuant to California Evidence Code section 1117, section 1119 does not apply to settlement conferences set under California Rule of Court 3.1380. Thus, mandatory settlement conferences are not governed by the same confidentiality rules.)

California Evidence Code section 1119 provides the expansive architecture of California’s privilege and confidentiality rules pertaining to mediations as follows:

“Except as otherwise provided in this chapter: (a) No evidence of anything said or any admission made for the purpose of, in the course of, or

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pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. (b) No writing, as defined in Section 250, 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, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.”

Section 1119 applies not just to neutrals, but also to all participants in a mediation, and it covers both evidence of “anything said or admission made” and writings. Moreover, its rules regarding admissibility and use in legal proceedings apply beyond the course of the mediation proceeding or consultation itself and encompass materials and statements “made for the purpose of . . . or pursuant to, a mediation or mediation consultation.”

Except as otherwise provided in the same chapter of the Evidence Code, nothing falling within this broad ambit is admissible, subject to discovery or subject to being compelled in “any arbitration, administrative adjudication, civil action, or other noncriminal proceeding.”

In subsection (c), section 1119 further mandates that communications between participants during a mediation (or mediation consultation) are protected from disclosure even outside legal proceedings – again, except as provided in the referenced Evidence Code chapter. These statutory exceptions contain detailed and specific requirements.

Sections 1118 and 1124 lay out the requirements for creating an oral

agreement excepted from section 1119. Under section 1118, the oral agreement must be: (1) “recorded by court reporter or [other] ‘reliable means’; (2) recited by its terms on the record in the presence of the parties to the agreement and the mediator, with the parties expressing on the record their agreement to the terms; (3) agreed by the parties, on the record, to be ‘enforceable or binding, or words to that effect’; and (4) ‘reduced to writing and . . . signed by the parties within 72 hours after it is recorded.’”

Under section 1124, an oral agreement may be admissible if it meets these specified requirements. Alternatively, if the first two requirements and the fourth requirement of section 1118 are met, an oral agreement may be admissible, but only if all the parties agree to its disclosure (either in writing or per the requirements in section 1118) or if the agreement is being “used to show fraud, duress, or illegality that is relevant to an issue in dispute.” Otherwise, all oral agreements are confidential, privileged and therefore inadmissible in the broad range of proceedings specified in section 1119.

Even written settlement agreements are inadmissible and protected from disclosure, if prepared “in the course of, or pursuant to, a mediation,” unless the agreement is signed by the settling parties and meets one of the requirements of section 1123: “(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect. (b) The agreement provides that it is enforceable or binding or words to that effect. (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure. (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.”

Of course, a party cannot extend section 1119’s confidentiality rules to evidence that is otherwise admissible or discoverable simply by introducing it in a mediation or mediation consultation. (California Evidence Code section 1120.) However, pursuant to section 1122, an

effective waiver of inadmissibility and protection from disclosure for other communications or writings must either be expressly stated in writing or meet the requirements of section 1118 (unless it pertains to an attorney’s compliance with the attorney disclosure requirements of section 1129, discussed below, and does not disclose any confidential information from the mediation).

Further, unless all parties to a mediation (both participants and mediator(s)) effectively agree otherwise, section 1121 bars a “mediator [or] anyone else” from submitting to “a court or other adjudicative body . . . any report, assessment, evaluation, recommendation, or finding . . . by the mediator concerning a mediation” (except a report mandated by law and stating only whether an agreement was reached).

Section 1126 makes clear that mediation confidentiality and privilege continue to apply after a mediation ends: “Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential . . . before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.”

### Strict statutory construction by the California courts

As the Supreme Court of California recognized in *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, “the unambiguous language of the mediation confidentiality statutes” and the California Law Revision Commission’s comments “demonstrate that the Legislature intended to apply confidentiality broadly and to limit any exceptions to confidentiality to narrowly prescribed statutory exemptions.” (*Id.* at p. 580.)

In keeping with this intent, California courts have very strictly hewed to the detailed structure of the statutory scheme. Time and again, the courts have narrowly construed the statutory exceptions to the confidentiality established in section 1119 and refused to create further exceptions by judicial fiat.

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For example, in *Simmons, supra*, the court refused to create an implied waiver by conduct exception to section 1119. (*Id.* at p. 588 [refusing to enforce oral agreement where parties did not strictly follow statutory provisions for establishing admissibility of oral agreements].) (See also *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 365 [refusing to create “in issue” exception to mediation privilege where party specifically relied upon confidential mediation communications in declaration submitted to court and then sought to invoke privilege].)

Similarly, in *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, the Supreme Court of California assessed whether language in an informal term sheet stating that “[a]ny and all disputes subject to JAMS arbitration rules” was sufficient to meet the admissibility requirements of section 1123(b). The court answered this question in the negative.

[A] settlement agreement must include a statement that it is “enforceable” or “binding,” or a declaration in other terms with the same meaning. The statute leaves room for various formulations. However, arbitration clauses, forum selection clauses, choice of law provisions, terms contemplating remedies for breach and similar commonly employed enforcement provisions typically negotiated in settlement discussions do not qualify an agreement for admission under section 1123(b). (*Id.* at pp. 199-200.)

Even the limited exception for data and documents predating the mediation contained in section 1120 has been narrowly construed. In *Rojas v. Superior Court* (2004) 33 Cal.4th 407, the Supreme Court of California concluded that photographs, videotapes, witness statements and “raw test data” were covered by the mediation-confidentiality provisions of section 1119 to the extent that they were “prepared for the purpose of, in the course of, or pursuant to, [the] mediation” of the underlying action. (*Id.* at pp. 422-23.) Extending the express exception created in section 1120 to raw

materials prepared for use in a mediation would be an impermissible creation of a judicial exception to the statute and might unduly dampen interest in mediation. (*Id.* at p. 424.)

In *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155, the California Court of Appeal recognized an exception not specified in the statute, but only for a matter of constitutional significance. There, counsel for a minor in a juvenile proceeding wanted to question a mediator regarding prior inconsistent statements made by a mediation witness. The court held that “the confidentiality provision of section 1119 must yield if it conflicts with the minors’ constitutional right to effective impeachment of an adverse witness in this juvenile delinquency proceeding.” (*Id.* at p. 165.)

In *Foxgate Homeowners’ Ass’n v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, the Supreme Court of California approved *Rinaker’s* holding as “consistent with our past recognition and that of the United States Supreme Court that due process entitles juveniles to some of the basic constitutional rights accorded adults, including the right to confrontation and cross-examination.” (*Id.* at p. 16.) However, the court refused to extend this exception to bad faith conduct at a mediation. (*Ibid.* [bad faith mediation tactics created “no comparable supervening due-process-based right to use evidence of statements and events at the mediation session”].)

#### **Cassel**

This strict adherence to the statute was further tested in *Cassel v. Superior Court* (2011) 51 Cal.4th 113. There, the court refused to allow evidence in a malpractice action of private attorney-client discussions immediately preceding, and during, the mediation concerning settlement. (*Id.* at p. 138.) Rather, the court concluded that “such attorney-client communications, like any other communications, were confidential, and therefore were neither discoverable nor admissible – even for purposes of proving a claim of legal malpractice – insofar

as they were ‘for the purpose of, in the course of, or pursuant to, a mediation . . . .’” (*Ibid.*)

In reaching this conclusion, the court expressly rejected the notion that application of the mediation confidentiality statutes to legal malpractice actions might implicate due process concerns warranting “an exception on constitutional grounds.” (*Id.* at p. 135.) In the absence of such constitutional concerns, the court reaffirmed, “as in *Foxgate, Rojas, Fair*, and *Simmons*, the plain language of the mediation confidentiality statutes controls our result.” (*Id.* at p. 128.)

Yet, *Cassel* clearly troubled the court. The majority opinion stated, “We express no view about whether the statutory language, thus applied, ideally balances the competing concerns or represents the soundest public policy.” (*Id.* at p. 136.) In his concurring opinion, Justice Chin noted that he was “not completely satisfied that the Legislature has fully considered whether attorneys should be shielded from accountability in this way.” (*Id.* at p. 139.)

The majority went on to suggest the following: “Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client’s civil claims of malpractice against his or her attorneys.” (*Id.* at p. 128.)

Seven years after the *Cassel* decision, an amendment to the statutory scheme, California Evidence Code section 1129, was enacted. It took effect on January 1, 2019. Except in class and representative actions, section 1129 requires an attorney to provide his or her client with full disclosure of mediation confidentiality and obtain the client’s informed written consent to the mediation, preferably before the client has agreed to mediate and, if the client agreed to mediate before retaining counsel, as soon as possible after counsel is engaged.

Notably, the Mediation Disclosure Notification and Acknowledgment in

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section 1129 includes the following admonition to clients: “This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.”

Thus, while some may still question whether section 1129 “ideally balances the competing concerns or represents the soundest public policy,” it appears that the Legislature continues to favor confidentiality over punishing improper behavior in mediations.

#### **What about mediation ethics now?**

The Legislature’s emphasis on confidentiality may be seen as giving short shrift to ethical behavior in mediation. One might argue that, absent the ability to bring unethical advocacy to the court’s attention, the temptation to act outside ethical norms will prove too great. As the decisions above suggest, there undoubtedly will be some who yield

to that temptation. For this reason, in mediations, as in other proceedings, it is essential for counsel to be on the lookout for unethical behavior. If such behavior becomes excessive or abusive of the process, the mediation can be terminated.

However, even without fear of judicial condemnation, most advocates still hold themselves to a high ethical standard. As pioneering Harvard Law School professor Derrick Bell put it, “All ethical people strive to choose ‘right’ over ‘easy’ when confronted by situations that force them to choose one or the other.” A person who chooses “easy” over “right,” still has to live with his or her own internal judgment regarding the integrity (or lack thereof) in having made that decision.

Moreover, seriously unethical lawyer behavior appears to be the exception rather than the rule, even in mediations, where confidentiality is paramount. There may be another reason for this. In the end, a lawyer’s reputation for ethical and honest behavior is a significant factor in how other lawyers interact with him or her. A lawyer’s ability to litigate, negotiate and mediate effectively depends in part on maintaining a strong reputation for

ethical behavior. The legal community is relatively small, and there is still a sense that one’s word is one’s bond.

Thus, being candid and acting in good faith may be seen as fundamental not only to ethics but to effective advocacy. By contrast, unethical conduct will eventually tarnish a lawyer’s reputation, earning him or her both a lack of respect and a lack of trust. For this reason, ethical behavior in mediations, as in other professional circumstances, ultimately serves both the advocate’s and his or her clients’ best interests.

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