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A Lawyer, A Mediator and an Arbitrator Walk into a Bar... Ethical Dilemmas in ADR

Hon. Robert B. Freedman (Ret.)

Thursday night, 6:15 p.m. The fog is rolling in after a warm day in the big city. Larry Litigious, new to Big Law civil litigation after a prestigious clerkship and a couple of years in the AG's office juggling criminal appeals, wanders into Resolution Taverna, a bar in the canyon of high rises near his firm's office. He is there for a brief respite before returning to bill another few hours working on a brief for a mediation that will follow in a few days.

His eyes adjust to the dim light - the seats at the bar are all occupied. Larry heads toward the only empty booth along the wall, sighs, and slumps down into it. He is worn out with worry about the upcoming mediation. Larry was only going to be second chair, but now the partner in charge is stranded out of state and is not going to be able to attend in person. As he sits down, in short succession two other people enter, scan for seats and start walking in the direction of Larry's booth. While Larry knows who the other two are, they have never been introduced in a social setting. One is Justice Portia Tezzla, recently retired after a distinguished career on the Court of Appeal and now (according to inescapable ads in nearly every issue of the print and online legal press), affiliated with a well-known private dispute resolution service. The other new patron is Judge Atticus, retired from the Unified Courts of Alameda and Modoc Counties (Consolidated pursuant to the Judicial Budget Emergency Relief Act of 2008), also now serving as an arbitrator and mediator.

Hon. Ignazio Ruvolo (Ret.)

"It looks like we'll need to go someplace else," Justice Tezzla says glumly surveying the full house. Larry, seizing this improbable opportunity, stands and offers to have them join him in sharing the booth. They both agree and shift into the banquette.

Larry, plagued by conscience, tells them that he has somewhat of an ulterior motive in that he is aware of their work in the neutral community and could, frankly, use some advice in connection with his upcoming mediation. A waiter approaches, takes their order -- three lemonades (this is a work of fiction, sort of) and a plate of sardines -- and departs.

Justice Tezzla begins - "This is somewhat new to me as well, but let's cover the basics. Have you complied with the new requirements for informing your client about the mediation process including the confidential aspects of mediation, and have you obtained your client's written agreement to proceed with mediation on those terms?" A chill runs down Larry's spine. "Written confirmation… did you say written confirmation?" Judge Atticus interjects – "Yes Larry, it's brand-new Senate Bill 954 enacting Evidence Code Section 1129;

it became effective on January 1, 2019. The statute requires attorneys representing a party in mediation to provide printed disclosures of the confidentiality restrictions related to mediation and obtain the client's signature." The lemonade and sardines arrive and Larry takes a gulp, if only to buy time to think. "Actually, I didn't know about this and don't know if the partner on the case did before he left on his trip. Is it too late?"

Judge Atticus responds, "There's still time, but be sure you obtain the form specified in the statute and obtain the client's signature, if she is, in fact, agreeable. The good news is that the language of the form is actually provided in the statute so, you don't need to create the form on your own. If the client is not amenable . . . well that's another matter."

Judge Atticus continues, "And here's some even better, news - when, I mean, if, you end up in a State Bar disciplinary proceeding…." Larry, gasping, exclaims "how is a State Bar disciplinary proceeding good luck…?" Judge Atticus, sensing the potential for cardiac arrest, puts a calming hand on Larry's shoulder and patiently explains that Evidence Code Section 1122(a)(3) contains an express exception to the mediation confidentiality rule to allow the attorney to offer the client's signed disclosure confirmation in a disciplinary proceeding to establish compliance with Section 1129.

"Oh, by the way, if it's a class action, the written acknowledgement by the client, or in this case, the clients or class, is not required--certainly a practical exception." (Evidence Code 1129(a))

"And Larry, these consent forms are by no means merely a formality," adds Justice Tezzla. "The Evidence Code has strict provisions protecting confidentiality during and after the mediation. And the Supreme Court has weighed in and confirmed there is no 'good cause' exception to these statutes." (*Rojas v Superior Court* (2007) 33 Cal.4th 407). The two look at Judge Atticus for affirmation.

"Yes indeed," he answers. "Nothing said in connection with the mediation is later admissible in an arbitration or civil action. And this includes writings made for use in the mediation (Evidence Code section 1119(b)-(c). Even the mediator is deemed incompetent to testify in any subsequent civil proceeding as to virtually anything that is said or happens during the mediation, except in connection with contempt proceedings, criminal conduct, investigations by the State Bar or the Commission on Judicial Performance, or motions to disqualify under CCP 170.1." (Evidence Code section 703.5). "There's also an exception for certain family law mediations," reminds Justice Tezzla.

Larry is impressed by the breadth of these statements. "Everything is confidential, no matter what?" he asks, testing the extent of the statements. "Oh, like the mediator's incompetence to testify statute, there are exceptions to the confidentiality of statements and writings," cautions Justice Tezzla. "For example, the parties can certainly expressly waive this confidentiality protection, and a statement or writing made outside the mediation is not deemed confidential just because they might be repeated or used during the mediation." (Evidence Code section 1122(a)). Judge Atticus expands the exceptions: "there are procedural exceptions as well. For example, any written agreement to mediate or a tolling agreement that is made as part of the mediation process is admissible, as are declarations used for asset disclosures in Family Court, even if they were initially prepared for a mediation." (Evidence Code section 1120).

Justice Tezzla, sensing Larry's angst at these seemingly endless revelations, remarks "You know Larry, attorneys representing clients in mediation and arbitration aren't alone in having ethical responsibilities in these proceedings. Mediators and arbitrators have obligations as well. Most mediators and arbitrators are members of the State Bar and must comply with applicable Rules of Professional Conduct."

"I haven't really thought about that, and it makes sense" Larry acknowledges, "but I am not sure how this works, in mediation or in arbitration. What should I know?"

"Here are the basics" Justice Tezzla explains, "California Rules of Professional Conduct, Rule 2.4(a) provides that a lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients to resolve a dispute. This includes service as an arbitrator, mediator or other capacity. Rule 2.4(b) requires the lawyer serving as a third party neutral to inform unrepresented parties that the lawyer is not representing the unrepresented party and where it is or should be evident that the party does not understand the neutral lawyer's role, the difference must be explained." Larry was now

taking notes on a napkin.

The waiter returned and inquired after another round of lemonade. Larry responded, "Yes and please make mine a double." Judge Atticus and Justice Tezzla each nod in agreement. The Justice adds "May we also have another platter of sardines and, if you don't mind, ask the cook if she can provide a side of this tartar sauce," handing her business card with the recipe on the back to the waiter who, apparently unfazed by the request, replies "No problem, be right back."

"So, Larry", asks Judge Atticus, "do you want to ask us anything about how participants should conduct themselves before, during or after the mediation?" Larry looks around to make sure no one is close enough to overhear, "Yes, please, any guidance would be very much appreciated…maybe something like your top 10 suggestions…"

"Portia," Judge Atticus suggests, why don't you start and I'll chime in."

Justice Tezzla begins, "Well, some basics about communications with neutrals, this is governed by Rule 3.5 of the Rules of Professional Conduct - there are no limitations on so-called 'ex-parte communications' with mediators as there are with judges or other decision makers. Arbitrators, like judges, are decision makers so the limitations apply except in the special situation of so-called 'party selected non-neutral arbitrators.' "

Interjecting, Judge Atticus observes, "But remember there is an important distinction between the freedom to communicate confidentially with a mediator and the obligation to speak truthfully. You want to be sure you avoid making the mediator complicit in making a false representation to the adverse party."

Justice Tezzla, pulls out another business card and passes it to Larry, who scanning the back expects to see a recipe for tartar sauce. Instead, printed on the back are citations to California Rules of Professional Conduct, Rule 4.1 - "Truthfulness in Statements to Others" and Business & Professions Code Sections 6068(d) and 6128 prohibiting, inter alia, knowingly making false statements.

Judge Atticus, seeing Larry's puzzled look, continues. "We now have new Rule of Professional Conduct 4.1 which requires attorneys to be truthful when making statements of material fact or law to another person. This includes not failing to disclose a fact that is necessary to avoid assisting the client in committing fraud or a crime. You know, no 'half-truths'."

"Here an example – let's say defense counsel in a joint session with the mediator and plaintiff's counsel responds to a question about insurance policy limits and says, 'I believe we have $500,000.' But later in a separate session with the mediator, counsel reveals the primary and excess limits are actually $3,000,000. It is clear defense counsel has violated Rule 4.1. But, if defense counsel also refuses to allow the mediator to tell plaintiff the true insurance limits, what does the mediator have to do?"

Justice Tezzla - seeing Larry spread his hands palm up in bafflement, steps in. "The mediator should not, cannot, be a party to this kind of deceit. The mediator can and should encourage counsel to gracefully correct the misimpression, but if counsel persists, the mediation should be terminated. The task for the mediator then becomes how to terminate the mediation in a way that does not reveal the misrepresentation by defense counsel."

"Here's another twist on candor challenges that comes up in mediation," notes Judge Atticus. "Plaintiff's counsel tells the mediator that she has authority to settle the case for, let's say $200,000 and doesn't intend to take a dollar less," when she knows her client has authorized a 'walk away' only if the offer is less than $150,000." Larry muses ".. isn't that just 'horse trading' — the bargaining that goes on in any negotiation?"

"That's right, Larry. Take a look at Comment Two under the rule. It specifically says that expressions of what is an acceptable settlement amount for a claim are usually not considered to be false statements of fact." "Okay - I think I get it," says Larry, "mediations are way less formal than the courtroom, but there are rules."

Larry interjects, "Let me ask you this - my case that's going to mediation is pretty complicated. Even if the parties agree on the monetary amount of a settlement, they will still have some ongoing obligations to meet in order for all conditions of the settlement agreement to be met. Can we agree that if a future dispute arises over these contingencies the parties will resolve that dispute by binding arbitration with the mediator serving

as the arbitrator? Is it okay for me to discuss this with the mediator in one of our separate sessions?" Larry adds, "Or maybe I could propose either of you to be the arbitrator?"

"In either case, before you include the identity of the potential arbitrator in the settlement agreement itself, whoever that arbitrator may be will have to make certain disclosures that he or she did not have to make while serving as a mediator," Justice Tezzla explains. "My goodness, these disclosure obligations are right at the top of my 'to do' list whenever I am told that the parties intend to use me as an arbitrator."

"And boy, are those disclosures long, detailed, and specific," chimed in Judge Atticus. "California Code of Civil Procedure 1281.9 requires that arbitrators disclose any ground specified in section 170.1 which are applicable to judges, and also to comply with Ethics Standards for Arbitrators enacted by the Judicial Council at the direction of the Legislature."

"Uh, uh, uh," says Justice Tezzla somewhat sarcastically as she wags her finger at Atticus. "Don't forget the added disclosures if the arbitration is considered to be a 'consumer' arbitration under the Judicial Council's definition. In those cases the arbitrator cannot accept any other arbitration assignment involving the same clients, lawyers or law firms without disclosing the offer and getting a waiver from those involved in the already pending consumer arbitration."

Taking a cue, Judge Atticus passes his card to Larry, and continues. "There are some case type specifics that you might want to keep in mind. Without giving us any information protected by the attorney-client privilege, does your case involve any issues of alleged workplace sexual harassment?"

Larry, eyes wide, exclaims – "Yes it does!...what do I need to know? Do you have this stuff written down on the back of on your cards?"

Justice Tezzla, dipping the remaining sardine in tartar sauce, responds – "I don't have a large enough card", "but note these on your bar napkin 'research memorandum'. Two sets of new statutory authority, effective January 1, 2019, affect the ability to limit disclosures in these kinds of cases. SB 820 adds Section 1001 to the Code of Civil Procedure, precluding provisions in settlement agreements preventing disclosure of claims in a settlement agreement or a civil or administrative action pertaining to a variety of acts of sexual assault, sexual harassment, discrimination and retaliation based on sex. However, the new statute does not prevent settlement agreements from shielding the identity or the claimant or the financial terms of the settlement, with exceptions when a governmental agency or public official is a party. In addition, SB 1300, adds Government Code Section 12964.5, making it an unlawful employment practice, for an employer to condition employment or compensation upon signing releases or agreeing to certain non-disclosure and/or non-disparagement provisions.

"Yikes", exclaims Larry- "how am I ever going to get my case settled if one of the parties insists on confidentiality?"

Judge Atticus responds, "All hope is not lost, because Government Code Section 12964.5(c) expressly provides that these prohibitions do not apply to a negotiated settlement agreement to resolve such a claim that has been filed in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process, provided the claimant has counsel or been given an opportunity to retain counsel.

Justice Tezzla, sensing that all will agree, observes "I think this is about all the lemonade, sardines and law that we can take in at one time. Larry, best wishes in resolving your case and maybe next time we meet we'll have some case law applying these new statutes to discuss."

Hon. Ignazio J. Ruvolo (Ret.) is a full-time neutral at JAMS. He was presiding justice of the California First District Court of Appeal, Division Four from 2006 until his retirement in 2018. He was appointed as an associate justice in Division Two in 1996. Prior to that, he served on the Contra Costa Superior Court.

Hon. Robert B. Freedman (Ret.) is a full-time neutral at JAMS. He was a Judge of the Alameda County Superior Court for 21 years before joining JAMS, serving over time as Assistant Presiding Judge and Judge in the Complex Department.