

Settlement: A Compass for Mediators in Difficult Situations



By Hon. Lee R. Bogdanoff (Ret.)

Private mediation has become a fixed feature of the litigation cycle, driven by crowded court dockets, the rising costs of trial, and encouragement from the judiciary. Ironically, even with instant communication tools, attorneys often engage in fewer direct discussions. It is not atypical for attorneys to appear at status conferences or evidentiary hearings without any prior dialogue with

opposing counsel, let alone settlement discussions. Mediation provides a platform for parties to engage in meaningful communication under the mediator's auspices, often resolving disputes that have persisted for years in just a day or two.¹ Even when a settlement is not reached during mediation, the process often lays the groundwork for resolution later. In this environment, the mediator plays a pivotal role not only as a neutral party but also as an architect of dialogue.

For mediation to thrive as a quasi-institutional feature of the litigation landscape, it is essential that mediators adhere to ethical principles. While private mediation ethics are not yet extensively codified in California, certain widely accepted ethical principles governing mediation appear in mediation literature:

1. **Impartiality, competence, and neutrality:** Mediators must be competent, remain unbiased, and not favor any party.²
2. **Confidentiality:** Mediation proceedings are protected from disclosure.³
3. **Self-determination:** Parties must retain control over their decisions without coercion,⁴ and mediators should refrain from providing legal advice.⁵
4. **Informed consent:** Parties should understand the mediation process and its implications.⁶

Despite the breadth of these guidelines, mediators frequently encounter situations in which it is unclear whether they should more actively involve

themselves with counsel and the parties to the mediation process or remain silent, even when counsel might present inaccurate or incomplete information or engage in potentially unethical conduct. These scenarios are not readily resolved by the principles listed above.

When ethical guidelines do not dictate the mediator's path, the goal of advancing settlement should serve as the mediator's compass. This approach dovetails with the common understanding of the mediator's primary role: to facilitate settlement.⁷ Indeed, that is the mediator's *raison d'être*. When in doubt, the mediator should take the action that makes settlement more likely. If intervention makes settlement more likely, it may be justified. If it would hinder settlement, restraint may be the better course. Of course, the settlement principle is not intended to override core ethical mandates such as confidentiality and neutrality but rather to supplement them in situations where guidance is lacking or ambiguous. What follows are relatively common scenarios and how the proposed approach would help address them.

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Lawyers sometimes make mistakes during mediation. For example, a mediator may realize that one side's counsel has misconstrued a key document or legal authority, leading the client to refuse to make concessions necessary to move the case toward settlement. Counsel may simply be mistaken or may be engaging in traditional advocacy. The mediator is not counsel for either party, but should the mediator step in and engage counsel in front of the client? It would be hard to find a mediator who would say no. Expressing views that move the parties toward a reasonable position, and thus toward settlement, is appropriate.

Alternatively, the opposite might occur, i.e., an expressed misunderstanding by counsel may lead a client to consider concessions in the mediation that the client otherwise would not make. In other words, counsel's mistake makes the prospect of settlement more likely. Should the mediator now stay silent? The earlier principles noted above offer no clear answer. While one might argue that the mediator should refrain from correcting counsel because the mediator is not a legal advisor, that same logic would discourage intervention in the first scenario, yet few would object to the

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mediator's speaking up when the misunderstanding blocks settlement. Why then should silence be the default when the mistake goes the other way?

Focusing on the mediator's core function of facilitating settlement provides a framework for the mediator to decide how to proceed. When there are no clear ethical rules, the mediator should ask: Will intervening increase or decrease the likelihood of settlement? The answer to that question should guide the decision. In applying this approach to the scenario presented, the mediator might conclude that counsel's mistake will eventually be discovered before finalizing the settlement, potentially jeopardizing it later in the process. Or the mediator might believe that correcting the error will build trust and prove helpful as negotiations unfold. These factors might justify intervention. On the other hand, if pointing out the error would harden the client's position and derail progress, silence may be the wiser path. What the mediator decides will depend on the circumstances, as applied to the underlying goal of promoting settlement.

Mediation often stretches late into the night or the early hours of the morning, increasing the risk of errors in documenting agreements. Suppose counsel for one side raises an issue during mediation, which all parties agree to address after settling monetary terms, only to fail to address it during final documentation. A similar but perhaps more common scenario arises when the mediator spots an ambiguity in the draft agreement that is not raised by counsel for both sides. Should the mediator raise the issue sua sponte in either situation? Counsel sometimes knowingly refrain from raising issues or clarifying ambiguities in the context of settlement negotiations, and the mediator's intervention might unravel a delicate settlement balance. Again, the mediator should be guided by the settlement principle. If the omission threatens the enforceability and durability of the agreement, the mediator may decide to flag it. If it does not, and raising it would jeopardize progress, it may be appropriate for the mediator to remain silent.

Counsel are expected to advocate for their client, sometimes to show their willingness to litigate. However, occasionally, counsel are more eager than their client to settle. For example, an attorney, in the mediator's presence, may overstate the weaknesses in the client's case, not by mistake, but instead to encourage settlement. The mediator believes the assessment is exaggerated and made solely to get the deal done. Should the mediator intervene?

If the situation were reversed and counsel painted an overly optimistic view, the mediator would present counterpoints to bring the party back to reality. Here, however, while counsel's "advocacy" promotes settlement, it is based on a potentially faulty foundation. Faced with this situation, the mediator may reasonably choose to intervene, but doing so cautiously, using a lighter touch. For example, the mediator could clarify that these are counsel's views, or the mediator could ask counsel and/or the client neutral questions to help the client independently assess the client's case.⁸ Another technique is to reframe the conversation in probabilistic rather than definitive terms by asking "What do you think the judge would make



of that argument?" to invite reflection without direct contradiction. The mediator must proceed carefully, though, as overly assertive engagement can damage trust and effectiveness, thus possibly jeopardizing the prospects of settlement. Even while advancing settlement, the mediator must guard against appearing to rescue one side or compromise neutrality.

A mediator often learns confidential information that has not been shared with the opposing side, such as a factual weakness or troubling admission. Confidentiality binds the mediator from disclosure outside the confines of the mediation,⁹ and disclosure to the opposing side during the mediation could only occur with the disclosing party's consent. Nevertheless, what if a mediator learns during the mediation that a party has committed serious discovery abuse, such as giving false deposition testimony or withholding documents, but that information has not been disclosed to the other side? In this instance, the mediator should first encourage the party to correct the representations made in the record within the mediation. However, if the party refuses, the mediator faces a dilemma. Disclosure by the mediator is barred absent the parties' consent, but would continuing the mediation risk making the mediator a de facto accomplice in deception? Terminating the mediation might give the appearance of taking sides or create a quagmire of its own, especially since the mediator will be asked to provide an explanation for the action. A more pragmatic course may be to continue the mediation, with the mediator being careful not to engage in any misrepresentations of her or his own while, at the appropriate time, reminding the parties that by settling they are foregoing the right to adjudicate the dispute, including facts that may be at the time unknown to them, particularly if the parties end up with a comprehensive settlement that includes broad waivers.¹⁰

The preceding scenarios all assume that each party is represented in the mediation, but that is not always the case. Unrepresented parties present challenges for mediators applying the settlement principle. The absence of counsel may heighten the risk that a party does not fully understand the legal consequences of a proposed resolution or may view the mediator as a substitute advisor. The principle of self-determination underpins mediation's legitimacy. For unrepresented parties, however, this principle can be fragile. Without counsel to vet proposals or explain

legal nuance, parties may defer to the mediator in ways that risk turning neutrality into unintentional influence. The mediator should explain to each unrepresented party that the mediator is not acting as counsel and that each should seek independent legal advice before signing any agreement negotiated during the mediation.¹¹ In these cases, the goal of promoting settlement may require slowing the process to protect its integrity. The settlement principle therefore must bow to the mediator's responsibility of ensuring that any agreement is not only reached but that it is done so knowingly and voluntarily.

Finally, it must be noted that the settlement principle, while a helpful guidepost, has inherent limitations, for example, the following scenario. Toward the end of a mediation, the plaintiff authorizes a \$40,000 settlement offer, and the defendant has previously indicated in confidence to the mediator a willingness to pay \$60,000. A purely facilitative mediator might simply convey the \$40,000 proposal, knowing that settlement is virtually assured. That same mediator would likely convey a \$60,000 offer if the roles were reversed. However, what if, instead, the mediator encourages one side to propose \$50,000, a number still within the other party's range, without disclosing what has been shared in confidence? The intent may be to help both parties reach a more favorable outcome than they would have been willing to accept as a baseline. The settlement principle suggests that mediators should take actions that make settlement more likely, but, in this instance, settlement is already within reach. The question then shifts from whether settlement can be reached to what kind of settlement should be achieved and how much discretion the mediator has in shaping it. This is not a bad problem for the mediator to face, but at this stage of the mediation the settlement principle offers limited guidance. The mediator's next step may depend on the mediator's understanding of her or his role once resolution is within sight. If the mediator adheres strictly to a facilitative model, however, the outcome may hinge on which party happens to authorize the last offer, which is a rather arbitrary way to conduct mediation. The final settlement number would be either \$60,000 or \$40,000 depending on whether the plaintiff or the defendant made the last move. In contrast, suggesting a midpoint may reflect an approach that seeks to achieve an outcome better than what both sides are prepared to accept, which is an appropriate goal of mediation that both parties would presumably embrace in advance.¹² This approach presumes that the mediator has clearly communicated her or his role and method at the outset of the mediation. Absent that framing, even a well-intentioned suggestion may raise concern among participants who might expect a strictly facilitative process. Ultimately, as this and the other scenarios illustrate, mediators must exercise judgment grounded in transparency, party autonomy, and the ethical norms that sustain the mediation process.

Private mediation is a vital tool for resolving disputes in a system burdened by delay, cost, and complexity. Ethical rules provide structure and boundaries, but they do not always offer meaningful guidance in difficult situations that mediators routinely encounter. A mediator faced with any of the above scenarios might feel ambivalent, regardless of the decision made, because, in many of these moments, there is no definitive right or wrong path. However, mediators can find direction by weighing the pros

and cons of each approach, remaining grounded in ethical principles, and asking a central question: Will this approach promote or inhibit settlement? Using that question as a compass is not a panacea, but it can help mediators navigate certain complex dilemmas that sometimes arise in gray areas during mediation.

Honorable Lee R. Bogdanoff (Ret.) is a mediator and arbitrator at JAMS handling bankruptcy, business and commercial, estate, probate, and trust matters. The author wishes to thank colleagues Honorable Glen M. Reiser (Ret.), for helping frame the article's underlying thesis, and Marlo Cohen, for editorial suggestions.

1. Jannik Linder, Mediation Statistics, Gitnux (Apr. 29, 2025), <https://gitnux.org/mediation-statistics>.
2. MODEL STANDARDS OF CONDUCT FOR MEDIATORS II, IV (2005); STANDARDS OF PRACTICE OF CALIFORNIA MEDIATORS II (1999). California Rule of Professional Conduct 2.4 contains disclosure rules when an attorney acts as a mediator. See also Foxgate Homeowners' Assn. v. Bramalea California, Inc., 26 Cal. 4th 1, 14-17 (2001).
3. EVID. CODE §§1119(a)-(c); see also Cassel v. Superior Ct., 51 Cal. 4th 113, 117-118 (2011).
4. MODEL STANDARDS OF CONDUCT FOR MEDIATORS I; CAL. R. CT. 3.853 (court-connected mediations).
5. JAMS MEDIATORS ETHICS GUIDELINES VI.
6. MODEL STANDARDS OF CONDUCT FOR MEDIATORS I.
7. See Travelers Casualty & Surety Co. v. Superior Ct., 126 Cal. App. 4th 1131, 1139 (2005) ("Although mediation takes many forms and has been defined in many ways, it is essentially a process where a neutral third party who has no authoritative decision-making power intervenes in a dispute to help the disputants voluntarily reach their own mutually acceptable agreement.").
8. A mediator has no obligation to ensure the "substantive fairness of an agreement reached by the parties." CAL. R. CT. 3.857(b) (court-connected mediation).
9. California law reinforces this through Evidence Code sections 1115-1128, which establish the confidentiality of mediation proceedings.
10. E.g., a waiver under CIV. CODE §1542.
11. JAMS MEDIATORS ETHICS GUIDELINES VI.
12. Frank E.A. Sander & Lucas Rozdeiczner, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 31 (2006) ("Since mediation is more likely to produce a Pareto efficient result than adjudication, it is more likely to be responsive to the needs of both parties to the dispute, often by avoiding the need to resolve disputed questions of fact and focusing instead on a forward-looking solution.")

*Originally published in Los Angeles Lawyer Magazine