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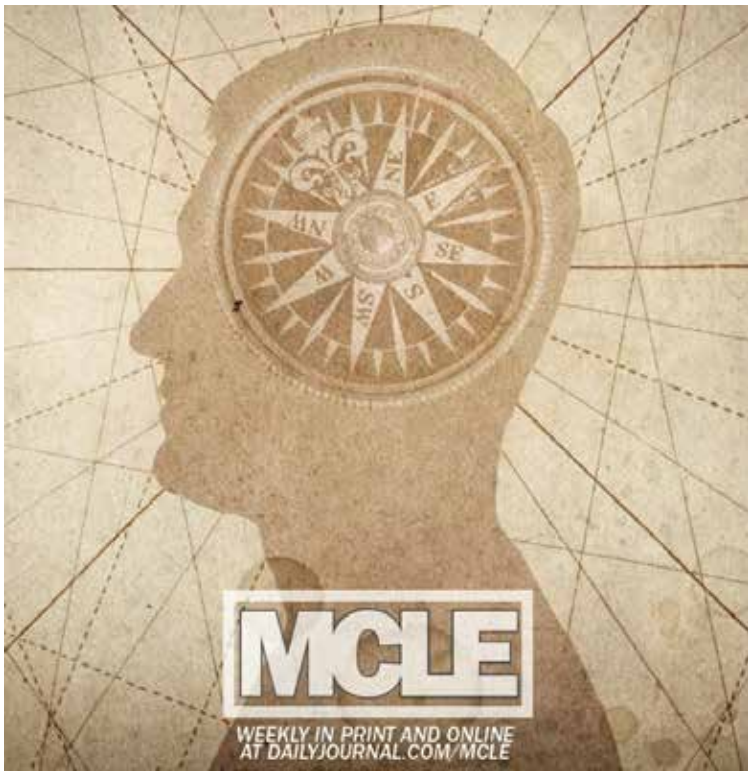
PERSPECTIVE

Why ethics matter in mediation

By Randa M. Trapp

Is the legal profession in fact a noble profession? Some may even wonder if it ever was one. When I started practicing law nearly 40 years ago, I truly believed it was. However, over the course of the last decade or so, our noble profession has been veering off course. As some would say, it is a sign of the times, but that should not be the case. Members of the legal community should be societal leaders and live up to the California attorney's oath, which contains the following language: "I will strive to conduct myself at all times with dignity, courtesy, and integrity." Which brings me to my topic: ethics in mediation.

There is a growing sense that lawyers and judges don't always conduct themselves with integrity. As a result, there has been a recent increase in articles, seminars and trainings on ethics in mediation. I recently joined my JAMS colleague Charles Dick on the circuit to present a program titled "Mediation Ethics for Advocates and Mediators." We have been asked to present to bar associations, law firms and law departments. It's not necessarily because Charles and I are particularly gifted and entertaining presenters. It is because lawyers and judges are feeling the negative effects of mediation without ethics. In other words, it is impacting their bottom line: Cases are not settling because of unethical behavior, which means clients are forced to spend more money on unnecessary, protracted mediation. So Charles and I are not only addressing mediator ethics, but also sharing our expertise on the subject from our experiences and extensive research. Unethical behavior is a growing concern, with lawyers skating close to and sometimes crossing the ethical line by doing everything from showing up to mediation unprepared to lying. It also confirms what our audiences have been experiencing in their practices and reminds the lawyers who are engaging in these types of behaviors that they are doing so at their own peril.



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There is a difference between being a courtroom advocate and mediation counsel. They are completely different roles with different skills and different rules. While being overbearing in depositions, burying your opponent with discovery requests, producing "millions" of documents in discovery and other scorched-earth tactics may work in litigation or a robust motion practice, such behavior is most often not helpful in mediation. In fact, it will derail a mediation faster than a snow cone melts in the desert.

Not only is a lawyer's role different in mediation than it is in litigation, but the goal also differs. In litigation, the goal is to win or minimize the damage to your client. When you pause litigation to mediate, however, the goal should be to resolve the matter. Mediation may not result in a "win," but it will surely result in minimizing the damage to your client. Both lawyer and client should approach mediation with a different mindset: It is not about winning or losing; it is about resolution. To get to resolution, there needs to be a clear understanding that neither party will get everything they want in mediation. Thus, both sides must be prepared to give up something, to compromise. Compromise is difficult and can be fraught with emotions, which can impede resolution. However, compromise gives your client an opportunity to participate in crafting the outcome, which can include closure. Studies show people are more apt to accept an outcome in which they had some level of control. The alternative, going to trial, is risky. Some liken it to a roll of the dice. It is difficult to predict what a judge or jury will do in trial. Even the best, most expensive jury consultants cannot guarantee an outcome. In mediation, you — or more specifically, your client — have some control over what happens. Having that control and input will likely give your client the closure and relief needed to move on feeling confident they were well served by the lawyer and the system.

The mediator also has a significant role in helping the parties reach resolution. A mediator needs to have as much information as possible to be effective. Additionally, a skilled mediator under-

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stands the psychology of conflict resolution. He or she will give the parties an opportunity to vent and reveal what is driving the conflict and preventing resolution. That process takes time, patience and excellent listening skills. Understanding the impediments to resolution, a skilled mediator can help the parties to gradually shift from focusing on impediments to engaging in developing creative solutions. In doing so, and at the appropriate time, the mediator will also help the parties understand what it means to walk away from a possible resolution. The mediator can provide the parties with a neutral view of the facts to assist them in determining whether compromising a bit more is a better option than marching off to trial. There is no question that some cases must be tried. However, when one looks at the statistic regarding settlement, it is likely your case is one that should settle. This message is often better received from the mediator than from counsel.

The Nuts and Bolts of Mediation

What is mediation? Section 1115(a) of the California Evidence Code defines mediation as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." It is a means by which the parties can avoid costly litigation by taking an offramp from the litigation highway to uncertainty and engaging in an expeditious, somewhat informal, much less expensive process to reach a client-directed resolution.

Let's face it: Litigation is no fun for your clients. It is slow, expensive and uncertain. After even a brief experience in the litigation process, most clients conclude they do not want to be involved in what can be a drawn-out and expensive process. Rather, they would prefer a faster, less expensive, less formal process where they can get results. For the individual, litigation is an intimidating process with rules and procedures that are not intuitive and where there is no control over the outcome. That feeling of helplessness can be bewildering even if your client believes they are completely in the right. For the business client, litigation can be a distraction from the business of making widgets and impact the bottom line, no matter how big or small the case. Nevertheless, time is a finite commodity that is better spent outside of court. Mediation is the perfect solution for those who are willing to participate in earnest. It works. It's cost-effective. And everyone feels like they've been heard, which is of particular importance these days.

Who is this neutral person? The neutral is just that — neutral. The neutral is usually a lawyer or a retired judge, but there is a growing number of subject matter experts who are entering the alternative dispute resolution space. Examples are insurance, financial and business professionals who have substantial experience in a given field. They make excellent neutrals, as they have actual hands-on experience.

A neutral person is one who does not have a relationship with any of the parties, counsel or subject of the dispute that would cause a reasonable person to believe the neutral would not be free from bias for or against any party, attorney, issue or entity involved in the dispute. This is important in that the parties and attorneys should feel comfortable sharing sensitive information with the neutral, who can then use that information where appropriate to facilitate resolution.

Neutrals have a bevy of ethical obligations including the big "C": confidentiality. Pursuant to California Evidence Code Section 1119, and with a few exceptions, all written and oral communications shared before or during the mediation process are inadmissible and not subject to discovery in any noncriminal proceeding. And, with very few exceptions, the mediator is deemed not competent to testify in any subsequent civil proceeding. Thus, the attorneys and clients are provided the space and confidence to share information about their case, both strengths and weaknesses, that can be used by the mediator to facilitate a settlement. The neutral is obliged to keep information learned from each side confidential unless the neutral is given explicit permission to use the information. To paraphrase an African proverb: "The cemetery is filled with people who kept secrets from their doctors." The same is true in mediation. If information is not shared with the mediator, and if the mediator is not given permission to use sensitive information in his or her discretion to assist the parties in reaching resolution, then the mediation is for naught.

Attorneys also have ethical obligations in mediation. Chief among them is their obligation of good-faith participation in mediation. There are countless examples of conduct that fails to meet this standard. For example, ethically challenged lawyers may use mediation as a fishing expedition, show up for a mediation with a client who is ill-informed as to why they are there and how mediation works, fail to bring the person who has full settlement authority to the mediation, and fail to bring key evidence to a mediation. In fact, some attorneys show up for mediation without bothering to learn what their client wants out of mediation, the strengths and weaknesses of their case, and, importantly, anything about the mediator. This happens most often when an attorney is hired on the eve of the mediation solely for the purpose of mediation. Nevertheless, the fact that the client failed to prepare for mediation does not absolve the unwary attorney.

The bottom line is good-faith participation is key to a successful mediation. Studies have shown that mediations have a higher rate of success when the lawyers and clients are prepared, realistic in terms of possible outcomes, and ethical; in other words, when they approach the mediation with the intent to participate in good faith with the goal of reaching an amicable resolution. It is a complete waste of time, resources and money to enter a mediation for reasons other than to resolve the matter.

Good-faith participation in mediation necessarily involves preparation for mediation. Preparation for mediation involves more than preparing your client for arbitration (Evidence Code Section 1129 printed disclosure and acknowledgment requirements) and drafting a brief. Developing a strategy for your client's case, and specifically for the mediation, is vital. An attorney who can succinctly convey to the mediator a well-thought-out, reasonable strategy that acknowledges not only the strengths but also the weaknesses of the case is more apt to have the mediator adopt and utilize key components of the strategy to move the case toward resolution. Otherwise, the mediator may be rendered less effective and reduced to a conduit conveying numbers, with no real basis to support the number or why the number should be accepted. The time and money invested in mediation are better spent when the parties are engaged in meaningful conversations as to how to resolve the matter rather than clumsy efforts to develop a strategy during mediation.

If the goal of mediation is to settle your case with your client feeling well-served throughout the process; with your integrity intact, which could lead to referrals from opposing counsel and possibly the opposing party; and with the mediator thinking that you were thoroughly prepared, a keen advocate, reasonable and ethical, then you have done your client, yourself and the legal profession a great service.