Mediation Ethics

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1. PRE-MEDIATION CONSULTATIONS:

Pre-mediation ex parte communications between the mediator and counsel are permissible. **Evidence Code §1115(c)** defines "mediation consultation" as a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

Evidence Code §1119(c) provides that all communications in the course of a mediation or mediation consultation shall remain confidential. Pursuant to sections (a) and (b) of section 1119, no evidence of anything said or admissions made, orally or in writing, is admissible or subject to discovery; disclosure of such evidence shall not be compelled.

Discussion:

Pre-mediation discussions are both acceptable and often very helpful. They are not considered unethical ex parte communications as is evident in the Evidence Code sections cited above which contemplate such communications and actually protect the confidentiality of such communications.

Such communications provide an opportunity to educate the mediator about the case, discuss potential problems that may arise, client control issues, problems with opposing counsel or clients, status of discovery, previous settlement discussions, issues regarding attendance of key decisions makers at the mediation, etc.

2. MEDIATOR ETHICAL STANDARDS

On June 30, 2006, the Judicial Council announced a major reorganization of the California Rules of Court. The reorganization becomes effective January 1, 2007. The following is a discussion of some of those rules applicable to mediation ethics in **Court-annexed** mediation.

(New) Rule 3.853 (Former Rule) 1620.3
(Voluntary participation and self-determination)

A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. For this purpose a mediator must:

(1) Inform the parties, at or before the outset of the first mediation session, that any resolution of the dispute in mediation requires a voluntary agreement of the parties:

(2) Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and

(3) Refrain from coercing any party to make a decision or to continue to participate in the mediation.

Discussion:

As mediation has become an integral part of the litigation process, the public has become more educated about the process and about the voluntary nature of the settlements reached during the process. However, ethical issues are raised where an overzealous mediator, under the guise of "tenacity" forces the nature and extent of the parties' participation in the process. Issues are often raised about the efficacy of a joint versus private mediation session. Under these ethical standards, counsel and mediators alike need to be aware of the "fine line" between tenacity and coercion when it comes to parties' participation in the process and the ultimate outcome of the mediation.

(New) Rule 3.854 (Former) Rule 1620.4
(Confidentiality)

(a) Compliance with confidentiality law

A mediator must, at all times, comply with the applicable law concerning confidentiality.

(b) Informing participants of confidentiality

At or before the outset of the first mediation session a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings.

(c) Confidentiality of separate communications; caucuses

If, after all the parties have agreed to participate in the mediation process and the mediator has agreed to mediate the case, a mediator speaks separately with one or more participants out of the presence of the other participants, the mediator must first discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants. Except as required by law, a mediator must not disclose information revealed in confidence during such separate communications unless authorized to do so by the participant or participants who revealed the information.

(d) Use of confidential information

A mediator must not use information that is acquired in confidence in the course of a mediation outside the mediation or for personal gain.

Mediation Confidentiality is governed by Evidence Code sections 703.5; 1115-1128 (see below). *See also:* Foxgate Homeowners Association, Inc. v. Bramalea California, Inc. (2001) 26 Cal.4th 1 (Supreme Court held there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports; while a party may do so, a mediator may not report to the court about the conduct of the participants in a mediation session.) *See also:* Rojas v. Superior Court (2004) 33 Cal.4th 407 (Supreme Court upheld the absolute confidentiality of evidence prepared for the purpose of mediation, rejecting the Court of Appeal's determination that confidentiality operates like the work-product privilege.)

Discussion:

An important issue is the manner in which the mediator treats confidential information obtained during a private session or caucus. Some mediators indicate that all information received is "fair game"; i.e. not considered confidential unless the lawyer advises the mediator otherwise. In that setting, the burden is placed by the mediator on the attorneys. Other mediators assume all information obtained in private sessions is confidential and they ask what information may be shared with opposing counsel. Here the burden is on the mediator to inquire. The key is to be pro-active and ask the mediator which method he or she employs, or to direct the mediator how you will proceed during the dissemination of confidential information during the private session.

(New) Rule 3.855 (Former) Rule 1620.5

Impartiality, conflicts of interest, disclosure and withdrawal

(a) Impartiality

A mediator must maintain impartiality toward all participants in the mediation process at all times.

(b) Disclosure of matters potentially affecting impartiality

This subsection provides that a mediator must make reasonable efforts to stay informed about situations that could raise questions about his or her impartiality including past, present and expected interests involving relationships and affiliations of a personal, professional or financial nature; and any grounds pertaining to judicial disqualification pursuant to C.C.P. section 170.1.

This section also discusses the mediator's continuing obligation to disclose such conflicts as soon as practicable and if possible, prior to the first mediation session.

Subsections (c) through (f)

These sections address how the mediator is to proceed or withdraw based upon the responses made by the parties after disclosures have been made.

Discussion:
Most mediators have provisions in their confidentiality agreements disclosing potential conflicts, but those are often not presented until the day of the mediation. During pre-mediation consultations/inquiries, counsel should consider a pro-active approach to ascertaining any potential conflicts. While mediations do not involve decision making by the mediator, there is always a possibility that a mediator may become, or appear to become impartial during the process. Usually this is an evaluative mediation approach that may be misinterpreted as impartiality. However, counsel always has the ability to discuss concerns they or their clients have about the mediator's impartiality. And, pursuant to these sections, a mediator must withdraw upon objection by a party.

(New) Rule 3.857 (Former) Rule 1620.7
Quality of mediation process
(a) Diligence
Mediators are required to advance the mediation in a timely manner and keep the time period scheduled for mediation free from other commitments.
(b) Procedural fairness
The mediator must employ a balanced process where each party is provided an opportunity to participate and make uncoerced decisions, although the mediator is not obligated to ensure substantive "fairness" of any agreements reached.
(c) Explanation of process
At or before the commencement of the mediation the mediator must explain the nature of the proceedings, procedures used and the roles of everyone involved in the process.
(d) Representation and other professional services
The mediator must advise the parties he or she will not be representing any party in the process nor provide any professional services other than as a professional mediator.
(e) Recommending other services
Mediators may recommend the use of other services in connection with a mediation provided any related personal and/or financial interests be disclosed.
(f) Nonparticipants' interests
Mediators may discuss the interests of others not participating in the mediation who may be affected by agreements reached.
(g) Combining mediation with other ADR processes
Mediators must exercise caution in combining mediation with other ADR processes and may only do so with the informed consent of the parties. Complete disclosure regarding the differences in the processes is required.
(h) Settlement agreements
Mediators may present possible settlement options and terms for discussion and may assist in preparing settlement agreements, provided he or she limits such

assistance to stating the agreed upon terms of the agreement reached by the parties.

(i) Discretionary termination and withdrawal

The mediator may suspend or terminate the mediation when reasonably required including situations in which the mediation is being used to further illegal conduct; a participant is unable to participate meaningfully in the process; or if the continuation of the process would cause significant harm to any participant or third party.

(j) Manner of withdrawal

Suspension or termination of, or withdrawal from a mediation must occur without the mediator violating confidentiality and with the least possible harm to the participants.

Discussion:

This section addresses the requirement that the mediator fully inform the participants about the process and duties and obligations of all involved. Although these duties belong to the mediator, counsel should be aware of them and ensure that their clients understand the nature and extent of their role in the process. With respect to the combining of ADR processes with mediation, there are some neutrals that provide "med-arb" services which essentially involve a mediation which, if no settlement is reached, provides the mediator with the authority to make a binding determination as would an arbitrator. This is a very delicate area which should involve significant disclosure, understanding and preferably written acknowledgment prior to its employment.

3. CALIFORNIA RULES OF PROFESSIONAL CONDUCT

RULE 3-110. (Failing to act competently)

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion:

Given the prolific nature of mediation in our legal system, legal "competence" should include knowledge of the mediation process. Counsel should be skilled in the representation of clients during the mediation process and understand the difference between advocacy in the courtroom and appropriate representation and exchange of information during a mediation. Preparing the client, preparing and providing timely and effective briefs, attending the mediation with appropriate

evidence, discovery responses, witness statements, proposed jury instructions, etc. could all be considered necessary to comply with the competence requirements set forth in this Rule.

RULE 3-200. PROHIBITED OBJECTIVES OF EMPLOYMENT

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

(A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

Discussion:

This section arguably creates a continuous obligation of realistic case assessment by the lawyer throughout the litigation process, including during the course of a mediation. In essence, lawyers must constantly assess their clients' litigation objectives and ensure that the advocated positions are legally sound and without malice. Counsel should re-evaluate their positions based upon information acquired from opposing counsel and the mediator during the mediation.

RULE 3-510. COMMUNICATION OF SETTLEMENT OFFER

(A) A member shall promptly communicate to the member's client:

(1) All terms and conditions of any 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.

(B) As used in this rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

Discussion:

Any oral offers of settlement made to the client in a civil matter should also be communicated if they are "significant" for the purposes of rule 3-500. This rule may have implications during significant non-written settlement discussions during the mediation.

RULE 3-700. TERMINATION OF EMPLOYMENT

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

Discussion:

It may be improper to refuse to attend a scheduled mediation prior to withdrawal if it could result in foreseeable prejudice to the rights of the client.

RULE 5-100. THREATENING CRIMINAL, ADMINISTRATIVE, OR DISCIPLINARY CHARGES

(A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(B) As used in paragraph (A) of this rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Discussion:

Notwithstanding the confidential nature of communications made during the mediation as referenced above, a violation of Rule 5-100 would likely be considered a breach of the rules of professional conduct by the attorney making the threats.

4. ENDING THE MEDIATION

Pursuant to Evidence Code section 1125(a)(5), for purposes of mediation confidentiality, a mediation ends if there is no communication between the mediator and any of the parties relating to the dispute for a period of ten (10) calendar days. This provision may be extended or shortened by agreement. (**Some Confidentiality Agreements provide for a waiver of this provision to enable ongoing settlement discussions after a mediation session ends).**

Evidence Code section 1126 provides that mediation confidentiality survives after the mediation ends.

5. ATTORNEY'S FEES

Evidence Code section 1127 provides for an award of reasonable attorney's fees and costs to the mediator whose testimony has been compelled by subpoena and the court determines that the testimony or writing sought is inadmissible.

6. REFERENCING MEDIATION AT TRIAL

Evidence Code section 1128 considers reference to a "mediation" during a trial to be an irregularity for purposes of CCP §657 (The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:
1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial).