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Ethics and mediation: A balancing act for attorneys

True advocacy in mediation requires not aggression but ethics -- competence, diligence, civility and integrity are what make an attorney both effective and honorable.

By Anne Lawlor Goyette

Attorneys who represent their clients in mediation may be motivated to do whatever it takes to get a desired outcome. They may try to cut corners or withhold problematic information. They may seek to disparage the other side in order to raise their client's standing.

But good advocacy should never be about abandoning all traces of civility. Just the opposite. "Zealous representation does not equate with an 'attack dog' or 'scorched earth' approach; nor does it mean lack of civility." (*Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1537)

Civility, courtesy and cooperation are not only compatible with vigorous advocacy; they are essential to it. "[C]ivility is a professional requirement of the practice of law, not a mere matter of good manners." (*Young v. Hartford* (2024) 106 Cal. App.5th 730, 742.)

Effective advocacy isn't just about legal strategy; it's also about ethical leadership. Counsel's duty when advocating for clients in mediation should include adherence to the highest ethical standards. The California Rules of Professional Conduct set the framework for balancing these obligations.

Four core ethical duties are essential to every attorney's role in civil mediation: providing competent representation, acting with diligence, maintaining clear and effective client communication and engaging with honesty and integrity. This article examines the first two duties; a later column will explore the latter two.

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Mediation raises the ethical stakes

In mediation, the ethical demands on attorneys are magnified by the special protections afforded by the process. Mediation is confidential, designed to foster candor and explore resolution. Because confidentiality protections are robust, they may shield attorney conduct from later scrutiny – even if that conduct raises ethical concerns. Preserving mediation confidentiality can, at times, even override disciplinary consequences for counsel's actions during mediation. (See *Cassel v. Superior Court* (2011) 51 Cal.4th 113.)

Ethical practice during mediation should never be about what an attorney can get away with. It should instead be about what he or she chooses to do when no one is watching. As one attorney wisely put it: A golfer who moves the ball when no one is looking is untrustworthy, both on and off the green. Likewise, a lawyer or negotiator who doesn't play by the rules puts his or her reputation – and that of the profession – at risk.

When attorneys come into mediation prepared, principled and professional, they not only increase the chances of reaching a favorable resolution, they also reinforce their reputation as trusted advocates and credible negotiators. These ethical duties do not end once negotiations begin; they continue through settlement and final resolution.

Competent representation

Lawyers have an ethical duty to provide competent representation to their clients. "A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence." (California Rules of Professional Conduct (CRPC) Rule 1.1(a).)

Competent representation requires the "learning and skill... reasonably necessary to perform" the legal service. (CRPC Rule 1.1(b).) This includes the "preparation reasonably necessary" to effectively carry out the legal service. (ABA Model Rule 1.1.)

Settlement agreements often raise complex issues, including the resolution of medical or governmental liens, tax consequences, bankruptcy or the approval process for minors. If such issues fall outside the attorney's expertise, he or she may still meet competency requirements by acquiring sufficient learning and skill before performing the assignment or by referring the matter to another lawyer who is qualified to handle it. (CRPC Rule 1.1(c).)

Diligence

In addition to being competent, lawyers must act with reasonable diligence to advance their clients' interests. "A lawyer shall not intentionally, repeatedly, recklessly, or with gross negligence fail to act with reasonable diligence in representing a client." "Reasonable diligence" means that "a lawyer acts with commitment and dedication to the interests of the client, and does not neglect, disregard or unduly delay a legal matter entrusted to them." (CRPC Rule 1.3.)

Diligent representation includes early and clear communication with clients about ADR options. Lawyers should advise clients early on about the availability of mediation and begin outlining a thoughtful resolution strategy.

Attorneys should never delay resolution for personal gain. Purposefully postponing settlement to increase billable hours or trigger a higher contingency fee structure – especially in cases involving minors – is unprofessional and unethical. (CRPC 3.2; Business and Professions Code Section 6128(b).)

Preparation is critical

Most civil disputes settle rather than go to trial. A 2008 study published in the Journal of Empirical Legal Studies found that plaintiffs who rejected their final settlement offer and went to trial made the wrong decision 61% of the time and on average recovered $43,000 less than the last offer. Defendants made the wrong decision to go to trial roughly 24% of the time, with an average loss of $1.14 million more than the last pretrial offer.

Notably, preparation was identified as one of the top factors influencing successful outcomes in mediation. The following have been identified as best practices for preparing competently and diligently for mediation.

Key evidence – It is important that counsel fully understands the key evidence in the case before negotiation begins. Walking into a mediation without a solid grasp of the facts can not only damage credibility but may also harm the client's settlement prospects.

In personal injury matters, this means carefully reviewing the medical records from treating physicians, determining if the client has pre-existing conditions or prior related injuries, and checking that treating doctors' diagnoses and opinions support the client's claims. The attorney should ask if an Independent Medical Examination (IME) will assist in moving settlement discussions forward and whether any significant medical liens may affect net recovery.

In commercial cases, counsel should review relevant contract documents and assess key provisions such as indemnity clauses, attorney fees provisions, force majeure language, insurance requirements and payment and performance terms. He or she should confirm that the client performed the work or services described in the contract. Discovering the client's role or obligations for the first time during mediation undermines credibility, not only with opposing counsel and the mediator but also with the client.

The "empty chair" – A common but avoidable mediation pitfall is proceeding without all necessary parties at the table. If a key party is absent, others may try to shift blame or reduce their contribution by pointing to that "empty chair" as the responsible party.

Counsel should engage all essential stakeholders and assess the financial viability of the parties early in the process. It is important to understand whether they have the resources to fund a settlement, if they can afford to litigate through trial and if they will be able to satisfy a judgment. This evaluation will help the attorney gauge whether a realistic settlement can be achieved and how best to structure negotiations.

The insurance picture – Insurance coverage often plays a decisive role in settlement dynamics, especially in large or multi-party cases. Counsel should request and review applicable insurance policies and identify all defending carriers who may fund any settlement. It is not unusual for a single carrier to defend multiple parties in a complex case, a scenario that may impact settlement dynamics.

Analyze potential coverage issues such as time-on-risk disputes, exhaustion of policy limits, self-insured retention, consent clauses and policy exclusions.

If a case has not been filed or an insurance disclosure is not required, be strategic about sharing coverage details, especially in pre-litigation contexts. If limits are modest, disclosure might create urgency and encourage quick resolution. On the other hand, if coverage is extensive, disclosure could inadvertently inflate settlement expectations. If you lack expertise in insurance coverage law, consider bringing in coverage counsel.

You may not resolve the myriad of insurance issues before mediation. However, understanding the insurance landscape will allow you to incorporate it into your resolution strategy.

Be prepared. To obtain a successful settlement, opposing counsel and the mediator must believe that an attorney is competent and the client's case is strong. Without diligent file preparation, that attorney risks damaging the client's chance of a successful settlement. Knowing the case, involving the right parties and understanding the funding and insurance landscapes are critical to successful negotiations.

Conclusion

Ethical settlement practice requires more than just securing a favorable outcome in mediation. It demands preparation, professionalism and principled advocacy. From the first client meeting to the final signature on a settlement agreement, an attorney must adhere to the highest ethical standards. These include competent representation of clients and diligence in every aspect of the attorney's professional conduct.

Attorneys who uphold their values, even when no one is watching, not only protect their clients; they strengthen their reputations as trusted and effective negotiators.

Anne Lawlor Goyette *is a neutral at Signature Resolution.*

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