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Ethics and mediation: Communication, honesty and strategic preparation

Effective mediation representation requires attorneys to uphold four core ethical duties including competence, diligence, clear communication and honesty throughout every stage of the process from initial client consultation through post-settlement obligations.

By Anne Lawlor Goyette

In a prior column on mediation ethics, I identified four core duties that are essential for attorneys in civil mediation. They are providing competent representation, acting with diligence, maintaining clear and effective client communication and engaging with honesty and integrity.

The first column addressed competence and diligence. This installment examines counsel's ethical obligations concerning communication and honesty in the mediation context. These duties shape how attorneys prepare for mediation, advise their clients and conduct themselves during settlement negotiations.

Communication

Integral to competent and diligent representation is the lawyer's duty to communicate reasonably with the client. An attorney must promptly inform clients of crucial decisions, consult with them on the means to achieve their objectives, update them on significant developments, promptly respond to their reasonable requests and explain any limitations on the representation.

All written settlement offers must be conveyed promptly to clients. An attorney may delay communicating information only if the client might reasonably be expected to react in a way that could cause harm to him or herself or others,



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and the communication obligation is subject to "any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law." CRPC Rule 1.4. Clear communication ensures clients can make informed decisions by being kept in the loop and understanding the process and its limitations.

Unsurprisingly, lack of communication is the single biggest complaint made to the California State Bar. In mediation, while the process may be more abbreviated, communication might be even more critical than when parties go to trial.

Cases are often resolved within a single day, with multiple strategic and financial decisions occurring throughout the negotiations.

Except where mediation is contractually required or court ordered, the decision to participate in mediation belongs to the client. Once that decision is made, counsel's role is to foster a trusted, collaborative relationship that enables informed and deliberate decision making at every stage. This requires early, candid and ongoing communication well before the parties sit down with a mediator.

Identify client goals

Effective mediation advocacy starts with understanding the client's objectives. While financial recovery often drives settlement discussions, clients frequently have additional or alternative goals. These may include timing concerns, preservation of business or personal relationships, reputational considerations or the desire for acknowledgment rather than monetary relief. Some clients seek closure through a formal apology, a retraction or a symbolic gesture that validates their experience.

Client goals are not static. As litigation progresses, mounting costs, emotional strain and uncertainty may cause even the most resolute client to reassess priorities. Regular communication allows counsel to recalibrate strategy in a manner that remains aligned with the client's evolving interests and risk tolerance.

Evaluate alternatives to settlement

Clients confronting complex and emotionally charged disputes should realize their options and risks so they can give informed consent to important decisions.

Counsel should explore the client's best alternatives to a negotiated agreement. What are the realistic consequences if the case does not settle? Will litigation disrupt business opportunities or damage relationships? Is trial likely to trigger extensive post trial motions or appeals? Can a judgment be collected? Will the opposing party pursue a published decision for strategic or reputational reasons?

Equally important is understanding the opponent's alternatives to settlement. Evaluating both sides' leverage, incentives and risks promotes a realistic assessment of settlement value and helps avoid positions that are principled but impractical.

Clarify the mediation process

Before mediation commences, parties need to understand how the process works. Counsel should explain confidentiality protections, the mediator's role and the structure of the session. In mediation, it will not be a judge or jury making the final decision; the parties themselves control the outcome. Meaningful participation and informed decisions depend upon the client's ability to understand the process and evaluate developments as they occur.

California lawyers representing clients in mediation are required to provide a written disclosure of the confidentiality restrictions that apply to mediation and obtain the clients' signed acknowledgement that they have read and understood those restrictions. (Evidence Code Section 1129.) The standalone document must be in the client's preferred language and signed by both attorney and client. Best practice is to present it with the engagement agreement and provide the client with a fully executed copy. Failure to comply may have disciplinary consequences.

Counsel should also explain that the mediator is impartial, represents no party, imposes no rulings and provides no legal advice. The mediator's role is to facilitate communication and negotiation by identifying issues, addressing obstacles to resolution, exploring opportunities for compromise and advancing settlement efforts.

Most mediations begin with a joint session in which the mediator explains the ground rules and, if requested by counsel, invites opening statements. Clients should understand that opening statements are often advocacy driven and may provoke emotional reactions. While joint sessions may offer a valuable opportunity for direct communication with decisionmakers, many parties elect to forgo opening statements and proceed directly to private caucuses to preserve momentum and minimize conflict.

Counsel further should advise clients on the practical and strategic differences between in-person and virtual mediation. In-person sessions allow for observation of non-verbal cues and informal rapport building. Virtual mediations offer efficiency, lower costs and scheduling flexibility. Lawyers should consider the nature of the specific dispute, particularly whether it is emotionally charged or factually complex, when guiding clients on the appropriate format.

Attorneys must also promptly convey to the clients in writing all written settlement offers and significant oral offers. They must operate within boundaries set by the client and keep confidential the limits of their settlement authority. Final settlement authority rests with the client alone. (CRPC Rules 1.2, 1.4, 1.4.1; *Nehad v. Mukasey* (9th Cir. 2008) 535 F.3d 962, 970; ABA Ethical Guidelines for Settlement Negotiations 3.2.1.)

When a lawyer represents multiple clients, an aggregate settlement requires informed, written consent from each client after full disclosure of all material terms, including the total settlement amount, each client's specific share and the allocation of fees and costs. This does not apply to class actions subject to court approval. Careful planning, such as individual offers or neutral allocation mechanisms, can help avoid conflicts of interest. (CRPC Rule 1.8.7, ABA Formal Op. No. 06-438.)

Honesty and good faith

Lawyers also have an ethical obligation to act honestly and in good faith in their dealings with parties and mediators. They commit professional misconduct if they engage in dishonesty, fraud, deceit and intentional misrepresentation. (CRPC Rule 8.4(c).) According to Business & Professions Code Section 6068(d), an attorney must "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

When representing a client "a lawyer shall not knowingly make a false statement of material fact or law to a third person or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited" by law. CRPC 4.1. A lawyer may face discipline, including disbarment or suspension for committing "any act involving moral turpitude, dishonesty or corruption" (Business & Professions Code Section 6106.)

All contracts, including an agreement to mediate, include an implied covenant of good faith and fair dealing. Participants in the mediation process must act honestly and refrain from conduct that unfairly deprives another party of the benefits of the process. (CACI No. 325.)

Prepare for mediation in good faith

When mediating disputes, parties and counsel should act in good faith, not misusing the process for delay or "free discovery." (CRPC Rule 1.3(b), Cal. Attorney Guidelines of Civility §§ 13(e), 18(c).) Working with the mediator, an attorney can establish a framework for promoting productive negotiations and avoiding misunderstandings.

It starts with clarifying expectations: What is the scope of the mediation, who will attend, how will information be exchanged and will mediation briefs be shared or submitted confidentially?

In order to be meaningful, settlement discussions require sufficient information, but parties can agree to streamline discovery or exchange key materials under confidentiality protections. If financial hardship is asserted, limited verification, such as a verified financial statement, can be enough to move negotiations forward.

In complex matters, expert consultations can also assist the process, helping to demystify technical issues, generate creative resolution options and narrow disputes. Expert medical evaluations, repair proposals or joint appraisals can bring clarity to settlement discussions, causing decisionmakers to reassess litigation risk.

Early mediator engagement can be invaluable. A mediator might assist in identifying obstacles, managing difficult personalities, addressing emotional triggers and framing non-monetary settlement terms, such as apologies or acknowledgments.

Communicate honestly

Once a mediation is underway, lawyers should promptly disclose significant developments affecting the process, such as the unavailability of a key decisionmaker, newly discovered information that materially alters case evaluation, significant insurance developments or material shifts in financial circumstances. Sandbagging an opponent at mediation with this type of information undermines trust and jeopardizes resolution.

Although negotiation permits advocacy and strategic positioning, attorneys must not knowingly make false statements of material fact or law or fail to disclose material facts when disclosure is necessary to prevent fraud or criminal conduct, unless prohibited by privilege. (CRPC Rule 4.1.)

Whether a statement is one of fact depends on the circumstances. During negotiations, "certain types of statements ordinarily are not taken as statements of material fact." (Cal. State Bar Formal Opn. No. 2015-194.) General expressions of opinion, negotiation posture or subjective valuation are typically regarded as permissible puffery. Nevertheless, excessive posturing may erode credibility and impair effective advocacy.

Honesty does not require full transparency. Counsel generally has no obligation to volunteer damaging information absent a legal duty to disclose. Certain facts, however, are inherently material and must be disclosed. A client's death, for example, must be disclosed promptly, particularly if settlement discussions are ongoing. If a client insists on concealing a material fact, counsel must advise against it and consider withdrawal if the client persists. (CRPC Rule 1.16.)

After mediation

Ethical obligations continue after negotiations have concluded. Attorneys must competently handle settlement related issues such as liens, tax consequences, bankruptcy implications and court approval requirements. (CRPC Rule 1.1(c).) They must be diligent and not delay resolution for personal gain or strategic manipulation of fees. (CRPC Rule 3.2; Business & Professions Code Section 6128(b).) Finally, lawyers should exercise caution when encountering mistakes in settlement agreements. Knowingly exploiting an opponent's obvious mistake may cross ethical boundaries and undermine the integrity of the mediation process. (Cal. State Bar Formal Opn. No. 2013-189.)

Conclusion

Ethical mediation practice requires more than achieving a favorable result. It demands preparation, professionalism and principled advocacy grounded in competence, diligence, clear communication and honesty. From the first client conversation through the execution of the settlement agreement, these duties remain constant.

Attorneys who uphold these standards throughout the mediation process protect their clients' interests. They also reinforce their standing as credible, trustworthy and effective advocates even when no one is watching.

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