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Pandemic "time-out"

ETHICAL ISSUES IN VIRTUAL MEDIATION; ZOOM DOES NOT GIVE YOU LICENSE TO CHUCK YOUR ETHICAL OBLIGATIONS TO CLIENTS, OPPOSING COUNSEL OR THE MEDIATOR

I frequently describe mediation as a "time-out" from the litigation process. Mediation is an opportunity for the litigants to take a pause, discuss the case frankly with a third-party neutral, and achieve a resolution without having to endure the ongoing pain of a litigation and, ultimately, a trial or arbitration. Although it is a time-out from the normal rigors of litigation, the lawyers must remember that mediation is not a time-out from their ethical obligations to their clients and to each other.

The COVID-19 crisis has thrown us abruptly into a virtual universe, where lawyers no longer have the luxury of sitting with their clients in the same room, or even in the same city, while mediating disputes. Virtual mediations have become the norm, and it is likely that we will be practicing law for many years into the future with virtual platforms as the preferred mode of meeting, so long as COVID-19 and other pandemics remain part of our reality.

Misbehaving on Zoom

Since spring 2020, I have exclusively conducted mediations by Zoom. My mediator colleagues and I have noted that many mediation participants behave in ways in which they never would have behaved had they been in the more formal environment of a conference room, both for the good and for the bad. Some parties and lawyers attempt to lurk behind a turned-off video feed. We have seen lawyers using drugs and drinking alcohol, parties seeming inebriated, parties lying on their beds throughout the mediation day, parties disappearing from the mediation session, parties participating in mediation from their hospital beds, and hidden "participants" to the mediation suddenly emerging onscreen at various times during our virtual mediation sessions.

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In this article, I identify some of California's ethical rules and aspirations, and I address some of the ways in which lawyers and mediators can be mindful to avoid violating their ethical obligations when zealously representing their clients in pursuing a resolution in mediation.

Mediators' ethical obligations

So far, mediators' ethical obligations in California are only aspirational. In August and September of 2005, the American Arbitration Association and the American Bar Association adopted and approved the Model Standards of Conduct for Mediators ("Model Standards"), which revised the original 1994 standards. These standards, "unless and until adopted by a court or other regulatory authority do not have the force of law." Nevertheless, mediators should beware that the Model Standards "might be viewed as establishing a standard of care for mediators."

The California Rules of Court were amended with the adoption of minimum standards of conduct for mediators in *court-connected* mediation programs in civil cases in 2007. These rules are "intended to guide the conduct of mediators…, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process." At the same time, the rules point out that they do not establish a ceiling on good practice or discourage anyone from educating on best practices, they do not create a basis for challenging a settlement agreement reached in connection with a mediation, and they do not create a basis for a civil action against a mediator. (Rules of Court, rule 3.850, et seq.)

Party self-determination

The first standard of the Model Standards is party self-determination. (Model Stds. of Conduct for Mediators, Std. I.) The parties come together voluntarily, without coercion, and with the ability to make free and informed choices as to the process and the outcome of the mediation. (*Ibid*.) A mediator should advise the parties of the importance of consulting other professionals, i.e., their attorneys, to help them make informed choices. Practically speaking, this means that I, the mediator, must ensure that, although I am an experienced attorney by training, the parties and lawyers fully understand that I do not intend to give legal advice to them, and the parties should look to their respective lawyers for advice as to how to negotiate and resolve their case. Even if a mediator has worked with the lawyer-clients in the past on numerous occasions, or even if the mediator knows that the lawyer-clients are well-versed in the rules and methods of mediation, the mediator must take the time to advise the lawyers' clients that they should look to their lawyers for legal advice to assist them in making an informed, good decision, rather than relying on the mediator, who is there only to assist the parties in getting to "yes."

Standard I(B) of the Model Standards states, "[a] mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others." The danger of violating this standard arises frequently and plays out in subtle ways in the daily lives of mediators. For example, there are frequent opportunities for a mediator to see the imminence of a specific result in the middle of a mediation session, which could lead some mediators to push for that result. The reasoning for pushing a certain result can be perfectly ethical or it can violate the aspiration of party self-determination.

For example, some parties may inform the mediator that it is essential that the mediation be concluded within a certain short time frame or for a specific amount of money. With that input from the parties, the mediator can use her "clairvoyance" to shorten the process. If the goal is merely to please a repeat lawyer-client, or to please a lawyer-client who has promised to speak well of the mediator in an online forum, then a mediator may well violate this rule of party self-determination. "Cutting to the chase" in mediation can seem to be a satisfying tactic of the impatient lawyer, but it frequently results in a mediator taking control out of the hands of the parties and their attorneys in the process, which is antithetical to the self-determinative aspirations of mediation.

Impartiality

Standard II of the Model Standards requires mediators to show impartiality. They should not demonstrate any favoritism, bias, or prejudice. Further, a mediator should not accept or give gifts, favors, loans, or other items of value that might raise a question as to their perceived impartiality. (*Id*. at Std. II(B)(2).) Mediators may accept or give de minimus gifts or incidental items or services to facilitate a mediation or respect cultural norms so long as these do not raise questions as to the mediator's impartiality. (*Id*. at Std. II(B)(3).) Under these standards, mediators should not pay for potential clients' meals, and they should not send holiday or birthday gifts. If they receive any gifts from any lawyer-clients, they should give them away or return them to the sender with a polite declining note. If a mediator finds that the mediator is not able to conduct a mediation in an impartial manner, then the mediator must withdraw from mediating the dispute.

During my career of litigating disputes, I have often heard colleagues impugn the ethics of mediators based on certain law firms' penchant for employing those mediators. Simply because a mediator is a favorite of a firm you dislike does not mean the mediator is dishonest, biased, or not suited to help you settle your dispute. The truth is, at least in the employment law field, there are "go to" mediators who everyone knows are adept in resolving cases. It will be inevitable that a firm that specializes in employment law will use some of the same mediators repeatedly. I recommend a reassessment of such situations with this food for thought: If your opposing counsel proposes a mediator, this means they are

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likely to take the mediator seriously and feel more compelled to resolve the case for fair value.

Conflicts of interest

Model Standard III requires that mediators must avoid conflicts of interest. The subject matter of a dispute, as well as the identity of the parties and their attorneys, may raise a conflict and question of a mediator's impartiality. (*Id*. at Std. III(A).) The mediator must make a reasonable inquiry to determine whether there are any conflicts, and the mediator must disclose any conflicts as soon as they are reasonably known. If all parties to the mediation agree to waive the conflicts, the mediator may proceed to mediate the dispute (*Id*. at Std. III(D).) Subsequent to a mediation, "a mediator must not establish a relationship with any of the participants in any matter that could raise questions about the integrity of the mediation" (*Id*. at Std. III(F).)

Lawyers are required to be ethical in virtual mediation

Mediating virtually does not somehow relieve lawyers of the obligation to abide by the ethical rules of our legal profession. All of the California Rules of Professional Conduct ("Rules") that apply to us in litigation apply to us in a Zoom mediation. In the mediation context, the Rules I see implicated most frequently are Rules 1.4 through 1.6, 3.10, and 4.1.

Rule 1.4 requires lawyers to "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation" and "keep the client reasonably informed about significant developments relating to the representation." (Rules Prof. Conduct, rule 1.4, subds. (a)(2), (a)(3).) The Rules also require lawyers to explain matters to the client to permit *the client* to make an informed decision. The lawyer must promptly communicate all terms and conditions of any offer of settlement if it is a "significant development" in the representation. (Rules Prof. Conduct, rule 1.4.1, subds. (a), (b), and comment.)

Rule 1.5 disallows a lawyer from making an agreement for, or charging, an unconscionable fee. Rule 1.5, subdivisions (b)(1) through (b)(13) set forth the factors to consider in determining whether a lawyer is charging an unconscionable fee, including,

> the amount of the fee in proportion to the value of the services performed; the relative sophistication of the lawyer and the client; the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; …the amount involved and the results obtained; …the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer or lawyers performing the services; …the time and labor required; and whether the client gave informed consent to the fee.

Rule 1.6 and section 6068, subdivision (e)(1) of the Business and Professions Code impose confidentiality on lawyers and requires them to maintain inviolate the confidences of their clients.

Rule 3.10 disallows a lawyer to threaten criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. Rule 4.1 prohibits a lawyer from making a knowingly false statement of material fact or law to a third person.

Avoid violating the Rules of Professional Conduct in Zoom mediations

Provide reasonable consultation to your client

The pandemic dictates that lawyers cannot meet with clients in person prior to a mediation session. As a result, it is imperative that lawyers carefully plan for the mediation with their clients to prepare them properly for the virtual session. This is the *reasonable consultation* prong of lawyers' ethical best practices. Lawyers should schedule a Zoom meeting *by video* with clients for a date well in advance of the mediation session to discuss the process, explain how the negotiation might proceed, and advise the client on how to behave during the mediation session. It is also important to ensure that your client knows how to use the Zoom platform, has access to technology that will allow the client to meaningfully participate in the Zoom session, and is familiar with how to be admitted to the meeting, how to agree to accept "breakout room" invitations, how to turn on and off their audio and video, how to comport themselves during the session, and how to leave the session. As you are reading this, if you do not know how to do these things yourself, you have an ethical obligation to get educated on the technologies that are in mainstream use among your colleagues in the legal profession.

Because often lawyers are not present with their clients in person during the Zoom mediation, they have to make extra efforts to *keep the client reasonably informed about significant developments* during the mediation day. Especially for those lawyers who like to meet with the mediator separately from their clients by going to a separate break-out room or texting or speaking on the phone with the mediator, it is imperative that the lawyer speak with the client by phone, e-mail, or text promptly upon hearing new information from the mediator throughout the mediation session. After all, it is the client, not the lawyer, who must make an informed decision on how to resolve the case.

Obviously, drinking alcohol or ingesting drugs during a mediation will impact a lawyer's ability to provide reliable advice and reasonable consultation to a client. It is best to avoid substance abuse, and it is certainly a best practice to avoid all substances during the mediation session. The same is true for your clients. Strongly advise them against imbibing in alcohol or other inebriating substances throughout the mediation. Among other things, substance use has a negative impact on a client's ability to give informed consent to the terms of a settlement if the parties reach a deal at mediation. It can also have an impact on parties' and attorneys' ability to behave in

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a dignified and professional way, which can be detrimental to your ends.

Ensure conscionability of the attorney's fee

The ethics and conscionability of the lawyer's fee can pose an issue in mediation, especially when cases are settled prior to the lawyers having expended much effort in pursuing the client's claims or defenses. It is imperative that plaintiffs' counsel ensure that their fees charged are not unconscionable given the totality of the circumstances involved in each client's case. Now that many of us are performing all work tasks remotely, all lawyers involved in the representation should track their hours and the specifics of the work completed for the client so that they can justify the fee charged. Even when the fee agreement calls for a contingent fee in a personal injury dispute, where there is no opportunity to make a petition for fees after prevailing at trial or arbitration, a well-documented representation in a billing statement or billing software can go a long way to quell any suggestion that the lawyer's fee is unconscionable. It also helps lawyers explain the fee breakdown to a client in the course of a mediation as the parties are arriving at a final number for settlement.

Employment mediations and truthfullness

In virtual mediations, as with mediation in person, there is an obligation of truthfulness in representations of the law and facts of the case. A time when this is seen frequently in the employment defendant's room is when the mediator asks whether insurance coverage exists, whether there is a reservation of rights, and the limits of liability on the insurance coverage for the dispute. Defense counsel has an obligation to answer truthfully.

Difficult questions in the plaintiff's room in an employment case include whether the plaintiff is currently working following an alleged wrongful termination, the plaintiff's current rate of pay, their date of hire at the new job, and whether they have sought any psychiatric treatment (counseling, medication) for the wrongs alleged in the lawsuit. All of these facts go to mitigation of damages and are highly relevant. Legal ethics require plaintiff's counsel to tell the truth here. Truthful answers indicating that the plaintiff obtained a job promptly and for a similar or higher wage than at the original job about which the parties' dispute arises can have a devastating impact on the value of the plaintiff's economic damages. A response that the plaintiff has not taken any psychotropic medicines and has not sought any psychiatric treatment can put a significant dent in the defendant's perceived value of the emotional distress losses. Despite that these facts may demonstrate weakness in the case, the plaintiff's counsel is obligated to disclose them.

Civility is ethical and makes sense in mediation

Civility is an aspirational part of California's ethics rules. Numerous courts in California provide civility guidelines to litigants, and the oath for new attorneys in California requires that lawyers treat opposing counsel with "dignity, courtesy, and integrity." The Los Angeles Superior Court's Guidelines for Civility in litigation state that "[n]either written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue." They also require that counsel behave in a courteous manner, both in writing and orally. The Civility Guidelines of the Orange County Superior Court explain that "[u]ncivil or unprofessional conduct not only disserves the individual involved, it demeans the profession as a whole and our system of justice." Further, local bar associations require lawyers to conduct themselves in a professional and civil manner at all times when engaged in bar activities.

It is good practice to take these civility rules seriously when interacting with the mediator as well as your opposing counsel. Besides being the right thing to do, courteous behavior establishes your professionalism and engenders confidence in your abilities in the mediator's mind. It will allow the mediator to share their belief with your opposing counsel that you are professional, competent, and ready to strike a fair deal. Remember that it is not just your client who needs to convince the mediator of the client's veracity and the righteousness of the case. Ideally, your conduct should have the same positive impact on the mediator's perception of your client's case.

Promising confidentiality in multi-state mediation may be impossible

In addition to the allure of a "time-out" from the rigors of litigation, mediation is also appealing and effective because it is normally a confidential process. Mediators cannot and will not ever testify for or against the parties in their litigation, and you may not subpoena mediator's records or have the mediator testify in your proceeding. This is the law in California. (Evid. Code, § 1119.)

In a national dispute, however, this promise of mediation confidentiality might not hold true. For example, this may happen where the case is mediated in a federal court or arbitrated dispute between parties from different states with different mediation confidentiality rules. Even if the mediation agreement states that California law applies to the mediation and any dispute about it, a foreign state's court might not enforce this choice of law provision and require testimony or production of information in that foreign state's proceeding. This will vitiate the confidentiality that mediators have promised to uphold.

As this example demonstrates, although conducting virtual mediations for parties outside of the state of California seems appealing at first blush, mediators and interstate litigants should beware of the unlikely, but possible, result of breach of confidentiality. Unless and until there is a uniform code concerning confidentiality of the mediation process

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throughout the United States, we must tread carefully when dealing with multi-party, multi-state disputes. (See *Larson v. Larson* (D. Wyoming, April 27, 2017) [order that Wyoming choice of law rule applied to a Colorado-based mediation, and allowed discovery of PowerPoint presentation used in a mediation session among diverse parties].)

Lawyers have a duty of confidentiality to their clients, but Zoom mediation from our homes, especially during the COVID-19 stay-at-home orders, makes keeping client confidences much more difficult than when we work from our offices.

First of all, to the extent that lawyers' clients are participating in a mediation with their relatives and other household members in close proximity, the attorney-client privilege may be vitiated. Secondly, if the platform from which the parties mediate can be compromised, then confidentiality may be impossible. Further, clients sometimes are unaware of the need for a private place from which to conduct their mediation sessions.

It is at once amusing and alarming to see lawyers' and parties' children and other household members in the background and foreground in a Zoom mediation. Likewise, if the mediator has non-staff people in close proximity in the mediator's home, the mediation confidentiality is destroyed. Mediators as well as lawyers must be vigilant to ensure that confidentiality is maintained. To the extent it is not, all parties must be apprised of this fact so that they can make an informed decision on whether to proceed with the mediation in light of these risks to confidentiality.

Where a party wishes to have a friend or relative present for support, a solution is to formalize their presences in the mediation and obtain their commitment to the confidentiality of the process. Lawyers should discuss confidentiality of the process with their clients prior to the mediation session so that issues around confidentiality can be resolved in a timely manner.

Conclusion

Although we should not leave our ethics at the door of a mediation session, if lawyers do fail to abide by the rules of ethics in mediation, it appears that they remain insulated from liability. The public policy of encouraging candor being necessary for a successful mediation remains paramount in this state. So far, the California Supreme Court has refused to invade the confidentiality of the process, even in instances where a party to mediation has sued an attorney for malpractice and conflict of interest in the proceeding. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113.) Nevertheless, may you continue to represent your clients with civil, ethical advocacy in all of your mediation sessions.

After a 26-year litigation career, Gail Glick became a full-time neutral mediator and arbitrator with Judicate West *in 2020. She mediates employment, PI, business, and lemon law disputes throughout California. Gail is a former Chair of LACBA's Labor and Employment Law Section and a Fellow of the College of Labor and Employment Lawyers. She received her J.D. from Loyola Law School and her B.A., cum laude, from Amherst College.*