

Date: Thu, 3 Apr 1997 06:27:27 -0400
To: susan_doherty@ce9.uscourts.gov
From: bniemic@fjc.gov (Bob Niemic)
Subject: Ethics Column
Cc:
Bcc:
X-Attachments:

The following text of my drafts may come to you on more than one e-mail message. I hope this is in a useful format. I find this method -- for e-mailing documents -- better than sending "attachments" by e-mail because attachments can't always be read by the recipient. But, even in the version I'm sending below, you'll have to indent the block quotes, add bolding, etc. if you want the text to look like the hard copy I sent you. If you would like a diskette, please let me know.

Ethical Standards for Mediators: Conflict of Interest

This column will appear periodically to keep mediators informed about ethical standards they should follow when serving in the mediation program. The topic in this issue is conflict of interest.

The general order governing the program requires an attorney mediator to determine promptly all conflicts or potential conflicts in the manner prescribed by the California Rules of Professional Conduct. A non-attorney mediator is to determine promptly all conflicts or potential conflicts in the same manner as a non-attorney would under the applicable rules pertaining to the non-attorney mediator's profession. G.O. 95-1 § 5.4.

In addition, section 5.4 of the general order provides that no mediator may serve in any matter in violation of the standards regarding judicial disqualification set forth in 28 U.S.C. § 455. Since section 455 was drafted for application to judges in court proceedings, its incorporation into the general order provides significant protection to parties in mediation. Substituting the word "mediator" for "justice, judge, or magistrate," section 455 as incorporated in the general order requires inter alia that:

(a) Any [mediator] shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) [Any mediator] shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the [mediator] or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter

in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the [mediator] to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the [mediator]'s knowledge likely to be a material witness in the proceeding.

(c) A [mediator] should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

. . . .

(e) No [mediator] shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 455.

Ethical Standards for Mediators: Conflict of Interest, Part 2

This column will appear periodically to keep mediators informed about ethical standards they should follow when serving in the mediation program. This is the second of two articles about conflict of interest.

The National Standards for Court-Connected Mediation Programs provide:

The mediator should refrain from entering or continuing in any dispute if he or she perceives that participation as a mediator would be a clear conflict of interest. The mediator also should disclose any circumstances that may create or give the appearance of a conflict of interest and any circumstances that may raise a question as to the mediator's impartiality.

The duty to disclose is a continuing obligation throughout the process. In addition, if a mediator has represented either party in any capacity, the mediator should disclose that representation. . . . A mediator should disclose any known, significant current or past personal or professional relationship with any party or attorney involved in the mediation and the mediator and parties should discuss on a case-by-case basis whether to continue.

National Standards for Court-Connected Mediation Programs, Standard 8.1.b. (The Center for Dispute Settlement and The Institute of Judicial Administration published these national standards, under a grant from the State Justice Institute, to assist courts in the design and operation of mediation programs).

Some subjects for disclosure include membership on a board of directors; work as an advocate or representative; consulting for a fee; stock ownership (other than mutual or trust arrangements); previous business contact; or other managerial, financial, or immediate family interest in a party. The mediator also should be aware that post-mediation professional or social relationships may compromise the mediator's continuation as a neutral third party in a matter.

Promptly after the mediator receives notice of appointment, the mediator should determine whether there is a basis for disqualification. This inquiry should include a search for conflicts of interest in the manner prescribed by the California Rules of Professional Conduct, and by the applicable rules pertaining to the mediator's profession for non-attorney mediators. If the mediator is not available to serve in a matter, the mediator should give notice as provided in section 7.2 of the general order. A party who believes the mediator has a conflict of interest should follow the procedures described in section 5.5 of the general order.

Consider the following hypothetical. The parties in a recently filed adversary proceeding were previously business partners in their own software venture. The AP involves claims that the defendant without permission incorporated plaintiff's software into defendant's new software product. When plaintiff and defendant were business partners, attorney Ruth Eagan represented them in prior litigation in which they were both on the same side. In the present matter, the parties request referral to mediation and they select Ms. Eagan as the mediator. The presiding judge signs the referral order. When she accepts the appointment as mediator, Ms. Eagan does not disclose to the court her prior representation of the parties. During the mediation, the plaintiff observes that Ms. Eagan had previously learned much more about the defendant and his then-planned product than the plaintiff had known. The plaintiff concludes that Ms. Eagan, without informing plaintiff, had been providing the defendant legal advice with respect to defendant's use of plaintiff's software at the time of the prior case. Plaintiff's counsel asks Ms. Eagan to withdraw as mediator.

Do the restrictions of 28 U.S.C. § 455 (made applicable to mediators by G.O. 95-1 § 5.4) or the California Rules of Professional Conduct require that Ms. Eagan withdraw? How about National Standard 8.1.b? Prior to accepting the appointment as mediator, Ms. Eagan should have made inquiry sufficient to determine whether there was a basis for disqualification or conflict of interest. If the plaintiff's speculation is correct and Ms. Eagan did develop a special relationship with the defendant in the prior matter, Ms. Eagan should never have accepted the appointment as the mediator. Even if there was no special relationship between Ms. Eagan and the defendant, Ms. Eagan should have disclosed to, and discussed with, the parties the nature of any potential conflict. Unless the parties waived the potential conflict after full disclosure and discussion, she should have withdrawn.

For more information on this subject, see Geoffrey C. Hazard, Jr., *When ADR is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues*, 12 *Alternatives to High Cost Litigation* 147 (1994). See also Carrie Menkel-Meadow, *Ancillary Practice and Conflicts of Interests: When Lawyer Ethics Rules Are Not Enough*, 13 *Alternatives to High Cost Litigation* 15 (1995); Carrie Menkel-Meadow, *Conflicts and Mediation Practice*, *Disp. Resol. Magazine*, Spring 1996, at 5.

Ethical Standards for Mediators: Confidentiality

This column will appear periodically to keep mediators informed about ethical standards they should follow when serving in the mediation program. The topic in this issue is confidentiality.

Compliance with the confidentiality rules is essential to maintaining the integrity of the mediation program. The general order on mediation states that - - unless all parties to the mediation, including the mediator, stipulate otherwise in writing -- no written or oral communication made or document presented during a mediation conference may be disclosed to anyone not involved in the mediation. The general order also requires the parties and the mediator to enter into a written confidentiality agreement. G.O. 95-1 § 6.1 and Exhibit "E." The general order, however, does not require the exclusion of any evidence otherwise discoverable merely because it was presented in the course of mediation conference. G.O. 95-1 § 6.2.

The National Standards for Court-Connected Mediation Programs provide:

[C]onfidentiality is required for the process to be effective. The assurance of confidentiality encourages parties to be candid and to participate fully in the process. A mediator's ability to draw out the parties' underlying interests and concerns may require discussion -- and sometimes admissions -- of facts that disputants would not otherwise concede.

National Standards for Court-Connected Mediation Programs, Standard 9.1, Commentary. Often parties are concerned about protecting private information, such as trademarks and trade secrets.

There may be instances, however, in which the mediator believes that confidentiality is in conflict with other mediator responsibilities. For example, during a mediation between former spouses, the mediator may hear an admission of child abuse and be mandated [by statute (??)] to report it despite a general pledge of confidentiality. Similarly, attorney mediators may feel obliged to report the unethical conduct of an attorney in the mediation to the bar association, particularly if the conduct in question had nothing to do with the negotiations between the parties.

What is important is that the parties understand at the outset what is and is not confidential. The mediator should fully inform the parties at the initial meeting of any limitations the mediator might place on confidentiality.

Consider the following hypothetical. The parties in an adversary proceeding just concluded a mediation process that did not result in settlement; however, at the end of the mediation the parties asked the mediator to give an assessment of the merits of the case, pursuant to § 6.4 of G.O. 95-1. During a Rule 7016 conference after the mediation was concluded, defendant's counsel gave the judge his views on what issues remain in the matter and, in the course of that presentation, summarized the mediator's assessment of the case. This disclosure was in violation of G.O. 95-1 § 6.1. Plaintiff's counsel states that his client has been severely prejudiced by the disclosure and asks for sanctions. Should the court impose sanctions?

Whether there should be sanctions against defendant's counsel and the severity of any sanction might depend on whether the mediator asked the parties to sign the confidentiality agreement that is required by the general order. In addition to requiring the confidentiality agreement, the mediator should have, at the outset of the mediation, explained the extent of the confidentiality rules. Depending on the severity of the offense, sanctions might include for example

oral admonishment, written reprimand, attorneys' fees, costs of the mediation process, or training on the mediation process. In any event, the judge should admonish defendant's counsel immediately upon his making the disclosure if it is clear that all parties and the mediator did not previously consent in writing to the disclosure.

For more information on this subject, see Carrie Menkel-Meadow, Professional Responsibility for Third-Party Neutrals, 11 Alternatives to High Cost Litigation 129, 131 (1993). See also Edward F. Sherman, Symposium on Civil Justice Reform, A Process Model And Agenda For Civil Justice Reforms In The States, 46 Stan. L. Rev. 1553, 1578-82 (1994).

Ethical Standards for Mediators: Ex Parte Communication

This column will appear periodically to keep mediators informed about ethical standards they should follow when serving in the mediation program. The topic in this issue is ex parte communication with a judge.

The general order on mediation states that -- unless all parties to the mediation, including the mediator, stipulate otherwise in writing -- no written or oral communication made or document presented during a mediation conference may be disclosed to anyone not involved in the mediation. G.O. 95-1 § 6.1. Further, section 8.1.b. of the general order prohibits the mediator from providing the judge with any details of the substance of the mediation conference.

Consider the following hypothetical. Ms. Jones who is serving as a mediator in one case appears before Judge John Maxwelllo as counsel in a status conference in another case. After the status conference, Ms. Jones asks the judge for a few minutes alone to discuss an evidentiary issue that has come up in her mediation matter. Are there any contexts in which it would be appropriate to discuss this ex parte?

In this situation the mediator should not have attempted to discuss the matter with the judge --even if the judge is not presiding over the matter in which the mediator serves. Such a communication is like an ex parte communication. It is especially troubling if the lawyer is using her volunteer mediator role to create a special relationship with the judge. See, e.g., National Standards for Court-Connected Mediation Programs §§ 12.1, 12.3, and Commentary. The general rule is that the neutral should not communicate with the judge about substantive matters. In a variety of cases this has led to post-settlement motions and attacks on the settlement.

There are other feedback processes for neutrals that are far superior to direct communications with judges. For example, the court and other organizations conduct periodic seminars where mediators can discuss with each other the kinds of problems and issues they have encountered in ADR matters. For example, the court will hold its Second Annual Bankruptcy Mediation Symposium at _____ on _____, 1997. In that setting, mediators would have the opportunity to discuss general problems that have come up in matters they have handled (without identifying names). The court also provides for referral of ADR ethical issues, as they arise in cases, to _____ who is designated by the court to handle ADR matters.

For more information, see Carrie Menkel-Meadow, Ex Parte Talks with Neutrals: ADR Hazards, 12 Alternatives to High Cost Litigation 109, 118-9 (1994).

Ethical Standards for Mediators: Correcting Errors of Law

This column will appear periodically to keep mediators informed about ethical standards they should follow when serving in the mediation program. The topic in this issue is the mediator's role, if any, in correcting a misreading of the law.

Consider the following hypothetical. One party in a contested matter makes a concession during a mediation that the mediator knows is based on a misreading of the current law. The other side clearly understands that it will benefit from its opponent's error. Does the mediator have any duty to inform the mistaken counsel about his misreading of the law?

The answer might depend on whether the mediator's approach is facilitative mediation or evaluative mediation. In facilitative mediation, in particular, many mediators would hesitate to give their interpretation of the law, even if the mediator is confident that a party has it wrong. There is tension between the facilitative mediator's obligation not to make recommendations regarding the substance or outcome of the case and the often-stated obligation of the mediator to educate the parties about the possible consequences of a proposed settlement agreement. Tension also exists between these obligations and the mediator's duty to be impartial and to maintain the appearance of impartiality. Disclosing a legal principle unfavorable to one side may destroy the appearance of impartiality.

On the other hand, if the parties consented at the outset that the mediator will conduct an evaluative mediation, the neutral might not hesitate to offer both parties a clear, correct statement of the law, thus eliminating confusion and moving the process back on track. This would be consistent with the neutral's role in evaluative mediation of providing the parties with a recommendation or opinion on certain or all of the issues in dispute. This approach, however, is still not without risk. For example, either or both parties might perceive this action as taking sides, undermining the neutral's appearance of impartiality. This is especially risky if the corrective action is taken early in the mediation process.

The mediator might also consider asking both parties to brief the issue or telling the uninformed counsel in a caucus that he might want to research the issue. Or, the mediator might ask the informed counsel in caucus if she believes that she has an ethical duty to disclose the misreading to the other side (see, e.g., Rule ___ of the California Rules of Professional Conduct concerning "candor toward the tribunal").

For more information on this topic, see James Alfini and Gerald S. Clay, Should Lawyer-Mediators be Prohibited from Providing Legal Advice or Evaluations? 1 *Dispute Resolution Magazine* 8 (1994). See also Carrie Menkel-Meadow, Ex Parte Talks with Neutrals: ADR Hazards, 12 *Alternatives to High Cost Litigation* 109 (1994); Carrie Menkel-Meadow, Professional Responsibility for Third-Party Neutrals, 11 *Alternatives to High Cost Litigation* 129 (1993).

Ethical Standards for Mediators: Excluding Attorneys from Mediation Conference

This column will appear periodically to keep mediators informed about ethical standards they should follow when serving in the mediation program. The topic in

this issue is whether, under certain circumstances, mediators may exclude attorneys from the mediation conference.

Consider the following hypothetical. At a second follow-up mediation conference, the mediator asks to meet with the parties alone, without counsel present. Is this allowed under the court's general order?

Sections 7.8 and 7.9 of G.O. 95-1 do not address this issue directly. Section 7.8 by itself can be read to require the attendance of primary counsel at all mediation conferences and continuances. But, § 7.9 provides for excusing parties or attorneys from attendance.

A basic premise of the mediation procedure is that the parties and their attorneys attend all conferences unless they are excused under § 7.9. A mediator's meeting with parties alone, without counsel present, can be dangerous. Some recommend that it should never be done. Others maintain that on rare occasions, when counsel clearly have become roadblocks to settlement, such a meeting may be justifiable--but only with the consent of all counsel and all participating parties.

The National Standards for Court-Connected Mediation Programs provides that "parties, in consultation with their attorneys, should have the right to decide whether their attorneys should be present at mediation sessions." National Standards for Court-Connected Mediation Programs § 10.2. The Commentary for that standard quotes a report of the Society of Professionals in Dispute Resolution which opposed all efforts to exclude attorneys from the mediation sessions where parties desire to have their lawyers present:

Lawyers may act as a crucial check against uninformed and pressured settlements, particularly when they are knowledgeable about the dispute resolution process. It is the parties in consultation with their lawyers -- not public authorities -- who are in the best position to decide when the lawyers' presence is indicated.

Society of Professionals in Disp. Resol., Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts (1991) at 20.

But, on the other hand, the Commentary to National Standard 10.3 cautions that:

[h]aving lawyers participate actively in mediation sessions . . . may have its drawbacks in reduced efficiency and, at times, in diminished participation by disputants in the process. In many cases, the best role for the lawyer may be a limited one, where the attorney educates the principals on the legal standards that courts might be expected to apply to their cases and advises them on negotiation strategies, while allowing the parties to negotiate on their own behalf. In other cases, especially where parties are unsophisticated, a more equal partnership between lawyer and client may be the most effective strategy.

For more information, see National Standards for Court-Connected Mediation Programs §§ 10.2, 10.3, and Commentary.