



Mediators and Lawyers Behaving Badly: Ethics in Mediation

EXCEL 2013 - Anne Bachle Fifer

Model Standards of Conduct for Mediators (*general civil - AAA, ABA, ACR*)

1. *Self-determination (neutrality)*
2. *Impartiality*
3. *Conflict of Interest*
4. *Competence*
5. *Confidentiality*
6. *Quality of the Process*
7. *Advertising and Solicitation*
8. *Fees*
9. *Advancement of Mediation Practice*

Ethics In Mediation

1. *Hartman*

The mediation has ended with a partial agreement, so the mediator asks the parties and their attorneys when they'd like to re-convene.

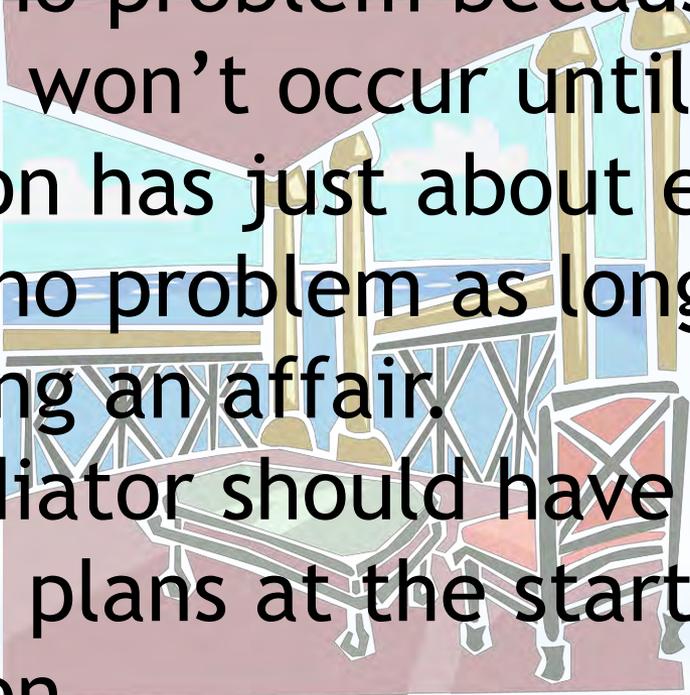
Plaintiff's attorney suggests a date two weeks out; the mediator agrees.

Defense attorney then says to the mediator, "That won't work for you or me because that's when you'll be at my place in Florida."

The mediator says, "Oh, that's right—I'm really looking forward to that! So it'll have to be four weeks out."

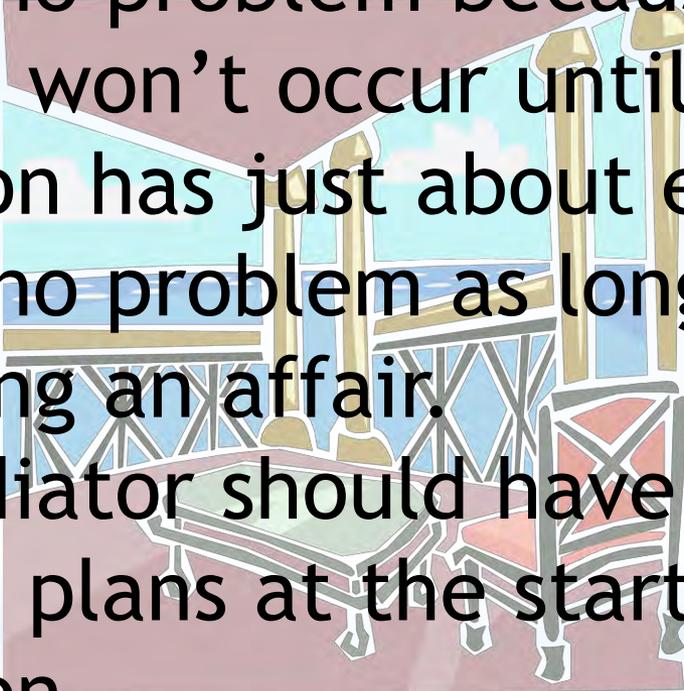
Ethics In Mediation

1. *Hartman*

- a. There's no problem because the vacation won't occur until after the mediation has just about ended.
 - b. There's no problem as long as they're not having an affair.
 - c. The mediator should have disclosed the vacation plans at the start of the mediation.
 - d. The mediator should have declined the mediation.
- 

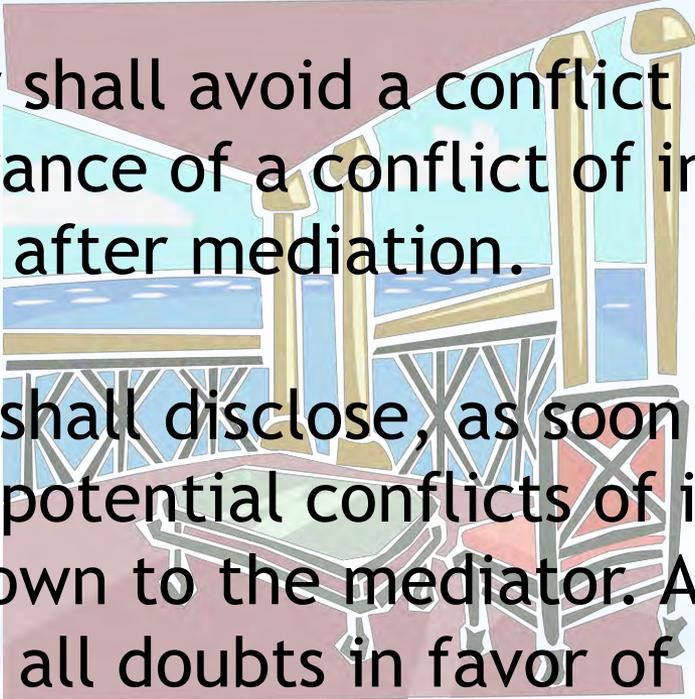
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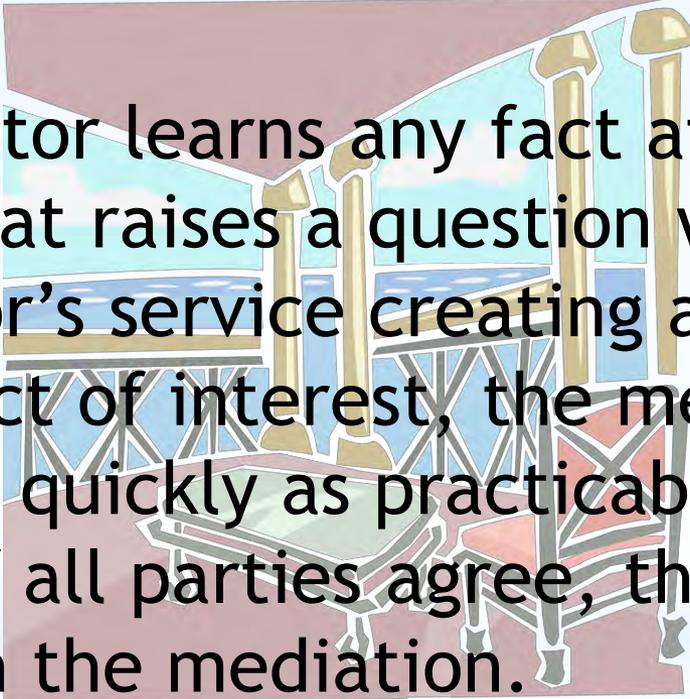
Ethics In Mediation

Standard III Conflict of Interest

- 
- A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest both during and after mediation.
- C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest ... reasonably known to the mediator. A mediator should resolve all doubts in favor of disclosure. Where possible, such disclosure should be made early in the mediation process and in time to allow the participants to select an alternate mediator...

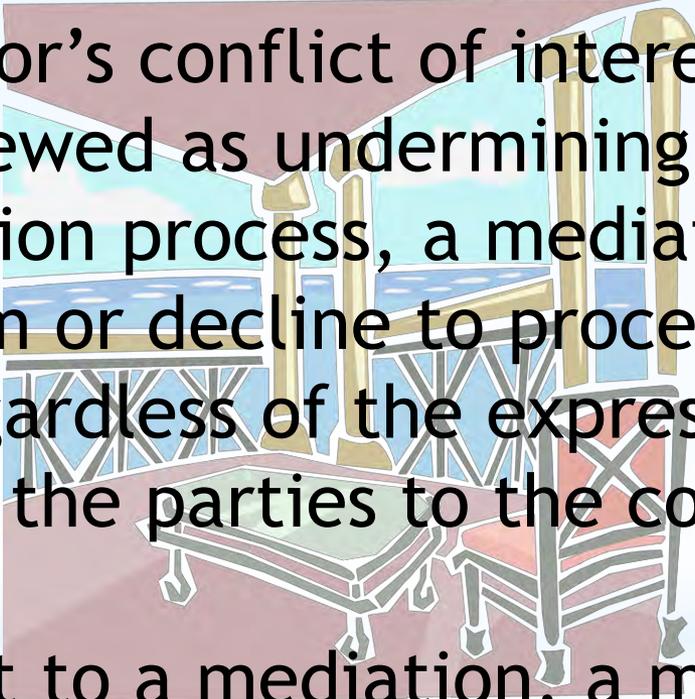
Standard III Conflict of Interest

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.



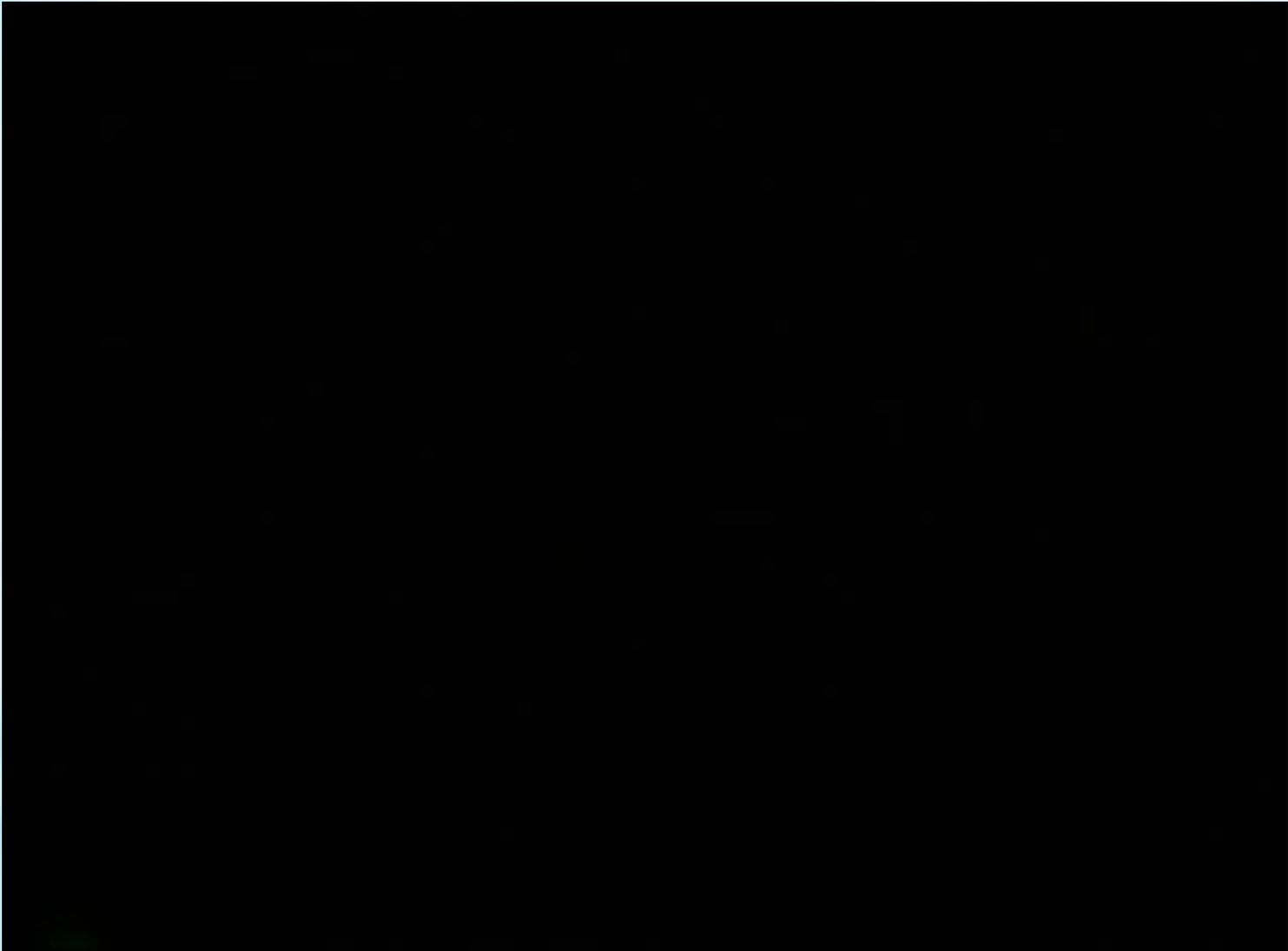
Standard III **Conflict of Interest**

E. If a mediator's conflict of interest could be reasonably viewed as undermining the integrity of the mediation process, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.



F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation...

2. *In re O.R. v J.R.*



Ethics In Mediation

3. *In re O.R. v J.R.*

- a. The mediator did the right thing - father knows best.
- b. The mediator did the right thing; the attorneys should have caught this.
- c. The mediator should have contacted mother before agreeing to this.
- d. The mediator should have re-convened the mediation.

Ethics In Mediation

3. *In re O.R. v J.R.*

- a. The mediator did the right thing - father knows best. ***The court said:***
- b. The mediator did the right thing; the attorneys should have caught this.
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Ethics In Mediation

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Ethics In Mediation

Standard I

Self-Determination

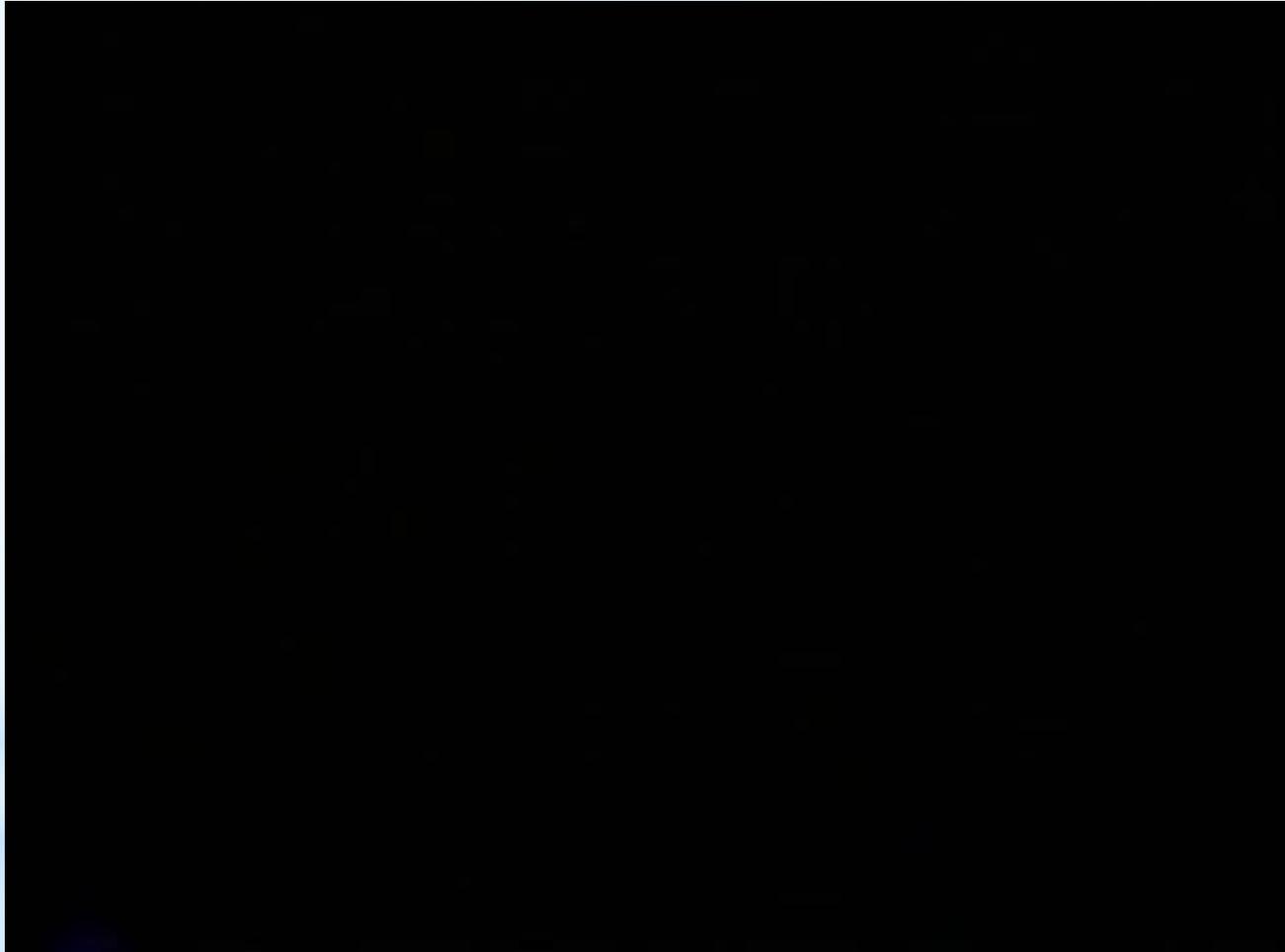
A. A mediator shall conduct mediation based on the principle of party self-determination.

Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

Parties may exercise self-determination at any stage of a mediation, including ... participation in or withdrawal from the process, and outcomes.

Ethics In Mediation

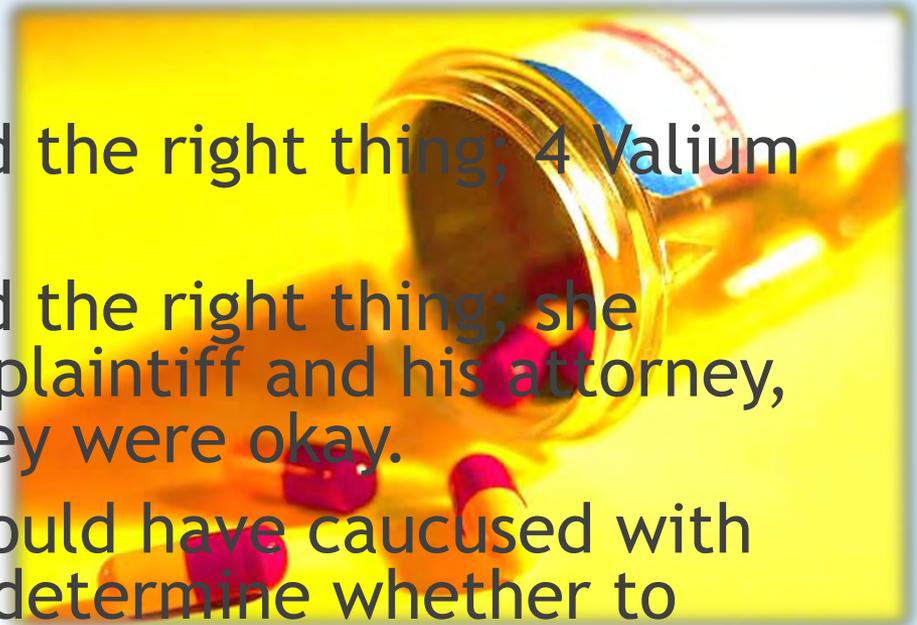
3. *Guthrie v Guthrie*



Ethics In Mediation

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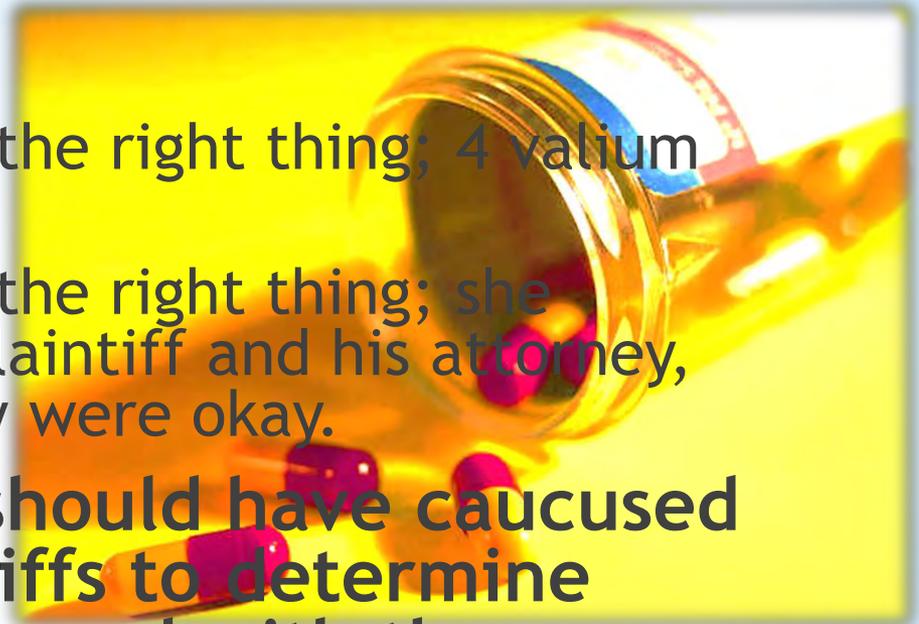
- a. The mediator did the right thing; 4 Valium isn't that many.
- b. The mediator did the right thing; she checked in with plaintiff and his attorney, and they said they were okay.
- c. The mediator should have caucused with the plaintiffs to determine whether to proceed with the mediation.
- d. The mediator should have terminated the mediation.



Ethics In Mediation

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Ethics In Mediation

Standard I **Self-Determination**

A.3. A mediator shall continuously assess the capacity of the parties to mediate.

A mediator shall make appropriate modifications to the process if there is concern about a party's ability to make voluntary and uncoerced decisions.

A mediator shall terminate the mediation process when a mediator believes a party cannot effectively participate.

Ethics In Mediation

Standard VI **Quality of the Process**

A.10. If a party appears to have difficulty ... participating in a mediation, the mediator should explore the ..potential accommodations...that would make possible the party's capacity to...participate...

If the mediator determines that a party does not have the capacity to mediate even with accommodations, modifications or adjustments, the mediator shall not continue the mediation process.

4. Sandy Hook

The mediator mediates the divorce of a middle-aged couple who have teenagers. Three years later, one of the teens kills his mother, several others, and himself. The media contact the mediator and ask her questions about the couple, their family issues, etc. How should the mediator respond?



Ethics In Mediation

4. Sandy Hook

- a. She can confirm that she was the mediator, but can say no more.
- b. She can share her recollections of the mediation, but cannot repeat statements made in the mediation.
- c. She can repeat only the party statements that reflect the parties in a positive light.
- d. Since one of the parties to the mediation is now dead, she is free to discuss what occurred in the mediation.



Ethics In Mediation

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Ethics In Mediation

Standard V

Confidentiality

A. A mediator shall maintain the confidentiality of information acquired by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.



Ethics In Mediation

Standard V Confidentiality

A. 1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

A. 2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.



*In re Non-Member of
State Bar of Arizona*

5. *In re Non-Member of State Bar of Arizona*

- a. The mediator handled this appropriately—he called a break and sought outside advice.
- b. The mediator should have discovered this problem prior to the mediation.
- c. The mediator should have terminated the mediation.
- d. This isn't a problem, since it happened in Arizona.



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5. *In re Non-Member of State Bar of Arizona*

- a. The attorney, “Carl,” handled this appropriately -- he had told his clients that he wasn’t licensed, then he disclosed to opposing counsel.
- b. This was not unauthorized practice of law because it was not court-ordered, and mediators do not need to be lawyers.
- c. The attorney should not have agreed to represent these people in mediation, because it’s unauthorized practice of law.
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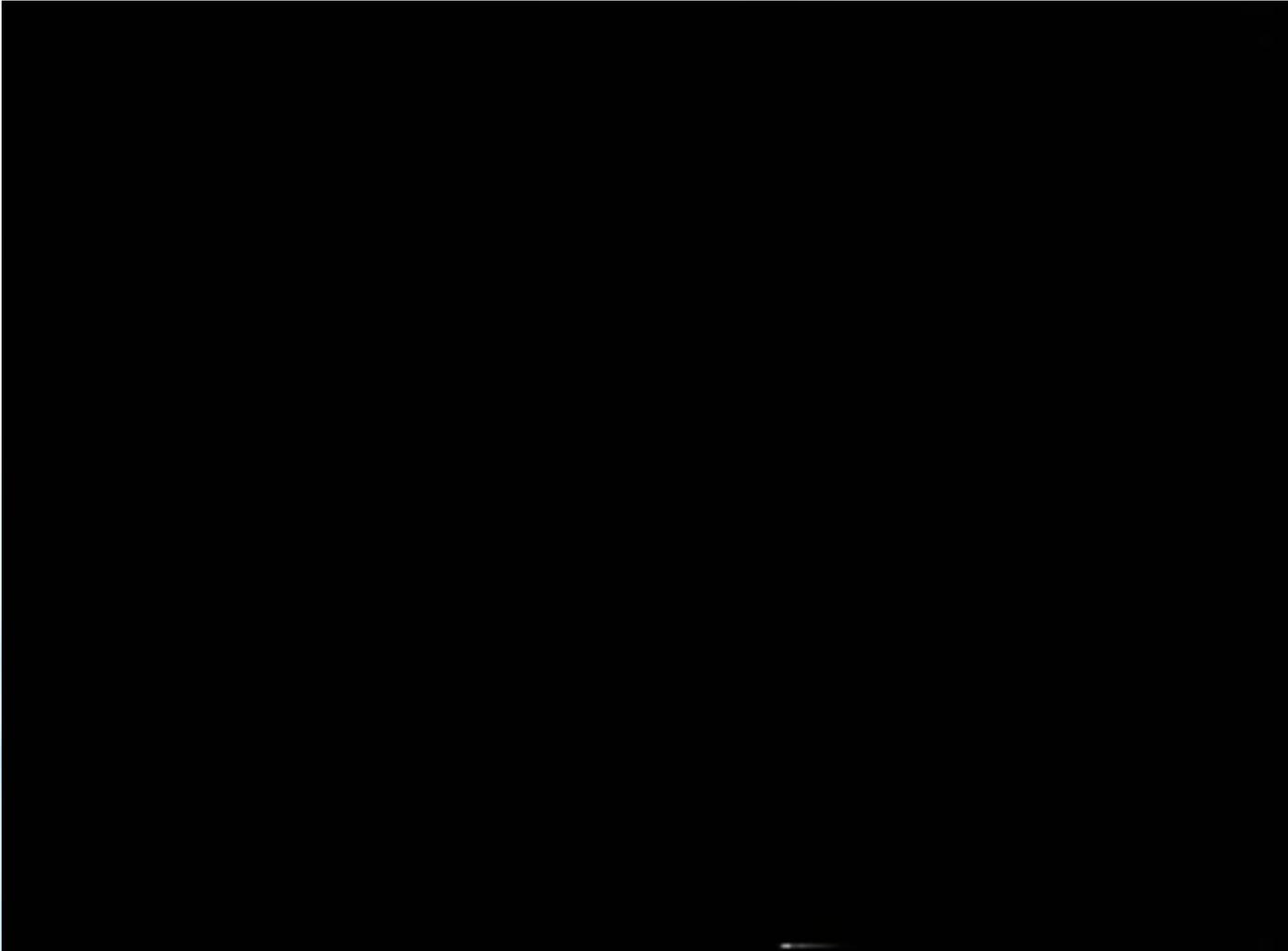
Model Rules of Professional Conduct,

Rule 5.5

(c) A lawyer admitted in another jurisdiction of the United States ... may provide *temporary* legal services in this jurisdiction that:

(3) are in ... a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, *if* the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. [*emphasis mine*]

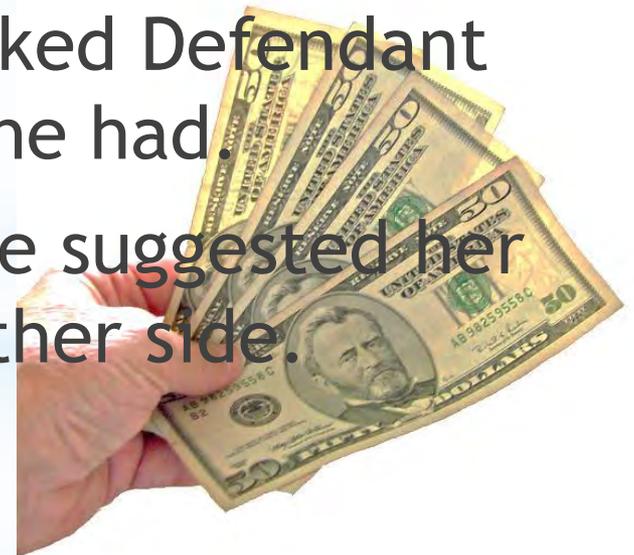
6. *Statewide Grievance Committee v Kennelly* :
Representing Insurance Company in Mediation



Ethics In Mediation

6. Statewide Grievance Committee v Kennelly

- a. The mediator handled this well.
- b. The mediator did the best she could, given that she's a judge.
- c. The mediator should have asked Defendant just how much more money he had.
- d. The mediator should not have suggested her own figure of \$400,000 to either side.



Ethics In Mediation

6. *Statewide Grievance Committee v Kennelly*

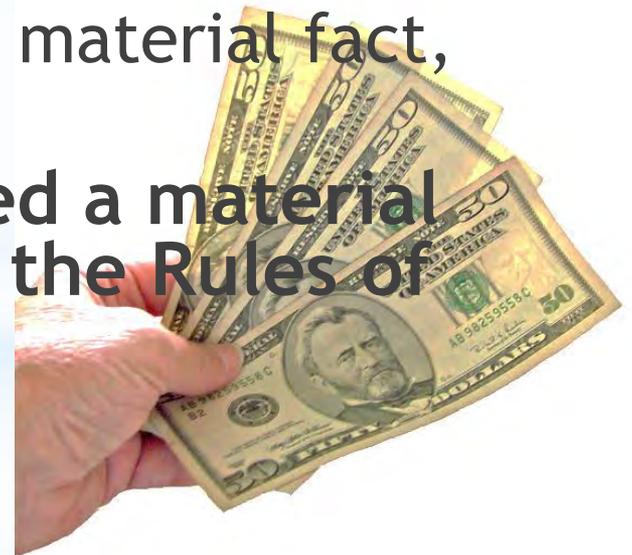
- a. The attorney did nothing wrong - this was just bluffing, which is acceptable attorney behavior in mediation.
- b. The attorney did nothing wrong—he put the amount of money on the table that the mediator asked for, \$400,000.
- c. The attorney misrepresented a material fact, but it's no big deal.
- d. The attorney misrepresented a material fact, which is a violation of the Rules of Professional Conduct.



Ethics In Mediation

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Ethics In Mediation

Model Rules of Professional Conduct

Transactions With Persons Other Than Clients

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person...

Ethics In Mediation

Model Rules of Professional Conduct

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Ethics In Mediation

7. Phoenix 2013

In a civil dispute between two businessmen, the mediator does no screening for safety. The mediation ends without an agreement. Plaintiff departs first, goes to his car, retrieves a gun, and returns to the lobby, where he shoots and kills the defendant and his attorney. (Plaintiff had no attorney.) Should the mediator have anticipated this?



Ethics In Mediation

7. Phoenix 2013

- a. The mediator did nothing wrong. It would not be reasonable to screen in a case such as this.
- b. Mediations should be held only in facilities with metal detectors.
- c. The mediator should have met with each party separately, prior to the start of the mediation, to screen for impediments such as violent tendencies.
- d. The mediator should have administered the “mediator screening protocol” for domestic violence prior to mediating this case.



Ethics In Mediation

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Ethics In Mediation

Standard VI Quality of the Process

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.



Ethics In Mediation

Michigan

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Ethics In Mediation

Michigan Standard VI Safety of Mediation

A. ...reasonable efforts shall be made throughout the mediation process to screen for the presence of an impediment that would make mediation physically...unsafe for any participant.

1. In general, “reasonable efforts” may include meeting separately with the parties prior to a joint session ...

Ethics In Mediation



8. *Vittiglio*

In caucus, the plaintiff's attorney repeatedly assures her client that defendant's offer is better than what the plaintiff could obtain at trial. The mediator -- a lawyer with subject matter expertise -- agrees with plaintiff's attorney. May the mediator say so?

Ethics In Mediation



8. Vittiglio

- a. No. To express an opinion would undermine the mediator's neutrality and party self-determination.
- b. No. To express an opinion would be taking on a role other than that of mediator.
- c. Yes. The parties hired the mediator for his expertise, so it would be unethical for the mediator *not* to express an opinion.
- d. Yes. This is a normal and expected role of an attorney-mediator.

Ethics In Mediation



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Ethics In Mediation



“... a certain amount of pressure to settle is fundamentally inherent in the mediation process ...”

Michigan Court of Appeals
Vittiglio v Vittiglio

Ethics In Mediation



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Ethics In Mediation



Standard I Self-Determination

A. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to ...outcome.

Ethics In Mediation



Standard VI Quality of the Process

A.5. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide if the mediator can do so consistent with these Standards.



Mediators and Lawyers Behaving Well: Ethics in Mediation