Ethical Consideration In Mediation

Model Standards of Practice for Mediators

Inspired By:

- American Bar Association (ABA)
- Association for Conflict Resolution (ACR)
- American Arbitration Association (AAA)

QUESTIONS ???

- ✓ Is the mediator qualified?
- ✓ Internal or external neutral?
- ✓ Should the employer judge all or part of the neutral's performance based on his or her settlement rate?
- ✓ Who decides where and when to conduct the mediation?

QUESTIONS Cont'd

- ✓ Is a manager a voluntary participant when ordered to attend mediation by a Judge or higher level management?
- ✓ What constitutes "good faith" participation in mediation?
- ✓ Does the present dispute lend itself to mediation or another form of Alternative Dispute Resolution (ADR)?

WHICH ETHICS GUIDELINES SHOULD YOU FOLLOW?

- ✓Should your professional ethics change with the client?
- ✓200+ different ethical guidelines on web

1. SELF-DETERMINATION

A mediator shall recognize that mediation is based on the principle of self-determination by the parties.

GOOD FAITH REQUIRED

- ✓ Insure the ability of parties to reach a totally voluntary agreement
- ✓ Parties can withdraw at anytime
- ✓ Advise parties to consult a professional

2. NEUTRALITY

A mediator shall conduct a mediation in an impartial manner

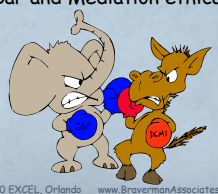
- ✓ Includes "appearance" of partiality
- ✓ Mediators have no decision-making authority

3. CONFLICTS OF INTEREST

- ✓ Actual and potential conflicts of interest reasonably known to the mediator
- ✓ After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator
- ✓ The need to protect against conflicts of interest governs conduct that occurs during and after the mediation

AVOIDING CONFLICT Cont'd...

- ✓ No pressure to settle
- ✓ Consider subsequent professional relationships
- ✓ Avoid "appearance" of conflict
- ✓ Attorney conflict with Bar and Mediation ethical requirements
  - ✓ **Which has priority?**



4. COMPETENCE

A mediator shall mediate only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties.

- ✓ Share experience, training with parties
- ✓ Meet court/state certification requirements
- ✓ Meet Agency requirements

5. CONFIDENTIALITY

A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality

- ✓ Discuss expectation of confidentiality
- ✓ Caucus expectations vary
- ✓ Program monitoring, statistics

EXCEPTIONS TO CONFIDENTIALITY

- ✓ Enforcement of settlement document
- ✓ Mutual agreement of parties
- ✓ Complaint against mediator
- ✓ Criminal matters
  - ✓ bodily injury, threats, fraud
- ✓ Potential future transgression?

6. QUALITY OF THE PROCESS

A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties.

- ✓ Opportunity to participate by all
- ✓ Adequate time set aside
- ✓ No unduly delay in scheduling
- ✓ Duty to educate public

7. SOLICITATION AND AVAILABILITY

A mediator shall be truthful in solicitations.

Mediators should be available on a reasonably quick basis

- ✓ No artificial time constraints
- ✓ No promises or puffing

8. FEES

A mediator shall fully disclose and explain the basis of compensation, fees, and charges to the parties.

- ✓ No contingent fees
- ✓ No commissions, rebates, or other referral fees
- ✓ Bartering OK?

9. SETTLEMENTS

- ✓ Case belongs to the parties in dispute, not the mediator.
- ✓ Terms of the settlement agreement must reflect the needs, interests and values of the parties to the dispute.
- ✓ If a party appears not to have full control of their decision-making abilities, postpone signing the agreement.
- ✓ Terms agreed upon are enforceable

California Court Denies Sanctions Against Counsel Who Refused to Interpret Mediator's Communications to Their Clients (5/19/10)

- A federal district court in California declined to sanction plaintiffs' counsel for refusing to interpret so a mediator could present settlement offers and explanations directly to Spanish-speaking plaintiffs during a mediation which did not settle. The court rejected defendant's argument that plaintiffs' counsel did not mediate in good faith, noting that the mediation was not court ordered and there was no indication that direct communication would have resulted in settlement. The court suggested that if the mediator or the defendant felt that direct communication with plaintiffs was critical they should have ensured that an interpreter would be present during the mediation.
- ***EEOC v. ABM Industries, Inc., No. 1:07-cv-01428 (E.D. Cal., March 3, 2010) (Subscription Required)***

Mediation Confidentiality Shields Alleged Legal Malpractice During Mediation in Oregon (12/01/09)

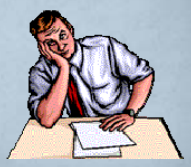
- ***The federal district court in Oregon granted summary judgment to a lawyer against claims by his clients that he had committed malpractice by advising them against settling a case in mediation that they subsequently lost in court, because the evidence against the lawyer was inadmissible due to the state's mediation confidentiality statute. The court … concluded that the clients had no case where they could not reveal the proposed settlement terms.***
- ***Fehr v. Kennedy, 2009 WL 2244193 (D. Ore. July 24, 2009) (Subscription Required)***

Is Mediation the Practice of Law

- Tennessee Attorney General. In Opinion No. 06-079, the State Attorney General states that:mediation does not involve the practice of law: "'Mediation', is an informal process in which a neutral third party conducts discussions among disputing parties to facilitate an agreement between them concerning the issues in dispute. Under the definitions of 'practice of law' in Tenn. Code Ann. § 23-3-101(2) and 'the practice of law' in Tenn. S. Ct. R. 9, § 20.2(3), one of the components of engaging in the practice of law is acting in a representative capacity either as an advocate or counselor. Because a mediator is neutral and not acting in a representative capacity, the mediator does not engage in the practice of law."
- What does your state say?

OTHER ETHICAL CONSIDERATIONS

- ✓ Court and state certifications
- ✓ Varies with client and location
- ✓ Dissociation from agreement mediator perceives to be clearly unreasonable
- ✓ Statutory obligations
- ✓ Settlement expectation
- ✓ Co-mediations
- ✓ Pro bono vs. paid mediation



ETHICAL ISSUES

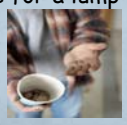
- Identify each of the ethical issues raised in the following cases.
  - What **should** you do?
  - What **would** you do?

MARY HADDA-LITTLELAMB

Hannibal Lecter, a senior manager, has been accused of sexual harassment and stalking Mary Hadda-Littlelamb. They have agreed to mediation. In Hannibal's opening statement he admits that everywhere Mary went, he was sure to go. He further states he wants to share an intimate meal with Mary. Personally, you find Hannibal to be reprehensible and quite scary. Accordingly, you are fearful of having a private caucus with Hannibal. You also know from Mary that if the case doesn't settle today, she will withdraw her complaint because she is intimidated by Hannibal.

Anita Cash

In caucus you learn that the defendant, Justin Trabel, wishes to settle the retaliation claim against him. He indicates he will pay up to $50,000 to settle this case today. The plaintiff, Anita Cash, confides in caucus that she desperately wishes closure today and would be willing to settle the case for a lump sum payment of $25,000.



C. F. Istolit

C. F. Istolit is 37 years old, but looks 50. He was fired for workplace theft after a missing Blackberry was found in his desk. He is alleging he was fired because of his age. The agency representative, not checking any personnel records, believes C. F. is over 40 years old. In his first caucus with you, C. F. confides that he took the Blackberry because he is a kleptomaniac and he is only 37 years old. He demands all caucus information remain confidential.

Dee Vout

Dee Vout is an observant Muslim, who resembles Osama Bin Laden. He has been subjected to extreme forms of harassment by his supervisor. He resigned six months ago and is psychologically unable to work. He does not have an attorney because he cannot afford one. The Employer confides with the mediator that its liability in this case is well in excess of $300,000. Knowing Vout is financially desperate, the Employer will offer a $3,000 lump sum, if he accepts the settlement today. Vout tells you that he feels compelled to accept the offer or he will get nothing.

DOWEE, CHEATEM & HOWE

Your eight hours of mediation are about to pay off, the agency has offered a sizeable amount of money to settle this case. (More than you believe the case is worth). The Plaintiff tells you that she needs to call her mom, who is an attorney at the well known local law firm of Dowee, Cheatem, & Howe After privately consulting with her mom, she informs you that she wants her mom to represent her as her attorney because the proposed settlement is just too complicated. Her mom can be there in 10 minutes.

Rose Byanynaim

- Rose has been working for the past five years as a "Lead Analyst," analyzing the lead content of paint for Leadbetter Paint, Inc. She claims that she is doing the exact same job as the males analysts', but is paid 25% less. She is seeking a retroactive pay adjustment for two years. As an attorney-mediator you ask her if she is aware of a recent Supreme Court decision regarding back pay going back beyond 2 years, coincidentally called Ledbetter. You also ask her is she is familiar with the strategic differences between the EPA and Title VII as it relates to sex-based discrimination and back pay.
- http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/1995%20Opinion%20002.pdf

The First Thing We Do...

- Henry King, VI, was suspended 5 days for refusing to cooperate with agency counsel on a procurement issue. He simply doesn't trust lawyers and blames them for everything. He has agreed to go to mediation to resolve this EEO complaint. The agency uses a mediation roster that rotates mediators. The next mediator is a (non-practicing) attorney. After the opening statement by the mediator, King states he will not sit through a mediation run by an attorney.

- http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/2000%20Opinion%20005.pdf

Sheila Beagood

The agency has offered to reinstate Sheila Beagood with full back pay. In caucus, Sheila has indicated she only real goal is getting her job back with back pay. Her lawyer is discouraging her from accepting the offer, stating that the damage amount will not provide him with sufficient fees. The attorney and client have a contingency fee agreement under which the lawyer takes 1/3 if the case settles before trial.

Adapted from: http://www.teachingadr.org/131

True or False

- It is within a mediator's discretion to permit individuals other than those specified in the Rules to attend and participate in a mediated settlement conference, including paralegals.
- A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business. Lawyers must keep their law practices entirely separate from their business enterprises. Consequently, lawyers must operate their practices and businesses in physically distinct locations, refrain from joint advertising or marketing of the two, and avoid any other demonstration of a relationship between them.
- The mediator did not act unethically in suggesting to counsel – outside the presence of his client – that he could consider offering his client a fee reduction in order to reach a settlement at the mediation. However, the mediator must be sensitive when handling this delicate subject, which, if mishandled, may create tension between client and counsel and potentially jeopardize the mediation.