Telling lies, telling secrets, and other ADR issues of ethics and professionalism in mediation and arbitration

By Jan Frankel Schau

ABSTRACT: Has mediation become an easy way to protect conduct by lawyers and their clients that is less than professional and civil? Has mediation confidentiality gone too far? This article will examine some recent decisions in California Courts which uphold confidentiality even to the point of excusing behavior which would otherwise appear unethical. California Mediator and Arbitrator, Jan Frankel Schau takes a critical look at ABA Model Rule 4.1 (Opinion 06-439), California Rules of Professional Conduct and California State Bar's Civility Guidelines and draws upon several key examples of behavior that may appear to be unethical, but that have been protected by virtue of the strict confidentiality of mediation. In doing so, she tries to answer the question: has mediation confidentiality gone too far?

Model Standards of Conduct for Mediators

Attorneys should know that although there are "Model Standards of Conduct for Mediators" which have been approved by the American Arbitration Association and the ABA's Section of Dispute Resolution, there are no universally adopted rules governing mediators or conduct of litigants within mediation. In California, there are guidelines which purport to govern "court-connected mediation", but do not guide or govern private mediation in any systematic way.

Because mediation is still an "unregulated" profession in most jurisdictions, including California, the ABA Model Rules are not binding upon any individual mediator. Especially because our community is comprised of many non-lawyer mediators, on the one hand, and retired judges, accustomed to making independent determinations from the bench, on the other, there are currently no means of enforceability of these or any other standards of practice on a particular mediator in California.

Moreover, the Standards themselves leave lots of room for interpretation. For example, Standard V "Confidentiality" Subsection A states:

"A mediator shall maintain confidentiality of all information obtained by a mediator in mediation, unless otherwise agreed to by the parties or required by applicable law." This leaves the mediator free to interpret the confidentiality of the process subject to the parties agreement or a court order demanding her to reveal otherwise confidential information in another action, for example. The broad umbrella of confidentiality has yet to be interpreted or codified in ways that will meaningfully assist mediators in analyzing the appropriate response to a subpoena or discovery request in litigation.

Most strikingly, even in these "Model Standards" Subsection D allows: "The parties may make their own rules with

respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations." This general standardized analysis is somewhat aided by the California courts and statutes contained in our Evidence Code, but is certainly still an evolving issue.

Historical Overview of Confidentiality in California Mediations

Under California Evidence Code Sec. 1119:

> "[N]o writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding in which, pursuant to the law, testimony can be compelled to be given."

Essentially, the statute makes both written and oral mediation communication inadmissible in any case, for any purpose. Evidence Code Section 250, defines what constitutes a writing as: "[H]andwriting, typewriting, printing, photostat, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, and form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and any record thereby recreated, regardless of the manner in which that record has been stored."

Accordingly, the legislative intent to protect confidentiality and promote the candid and informal exchange encouraged in mediation is clear.

In Foxgate Homeowners Association v. Bramalea California, Inc. (2001) 26 Cal. 4th 1, 4, the California Supreme Court set forth broad support for confidentiality in mediation, stating: "[T]here are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator reports. Neither a mediator nor a party may reveal communications made during mediation." Foxgate, 26 Cal. 4th 1, 4.

The issue was examined again in Eisendrath v. Superior Court (2003) 109 Cal. App. 4th 351, when one of the parties sought to learn what another participant had said and done after the mediation. The court refused to admit the evidence of the parties conduct following the mediation, holding that: "[A] party cannot impliedly waive the right to protection" by conduct that occurs after a mediation hearing is over.

The next year, in Rojas v. Superior Court (2004) 33 Cal. 4th 407, 415-416, the Supreme Court of California emphasized the important public policy interest in maintaining mediation confidentiality, stating that disclosure of specified communications and writings associated with mediation 'absent an express statutory exception' were "unqualifiedly barred".

Recent Challenges to Confidentiality

In July, 2008, the California Supreme Court gave a victory for confidentiality in mediation. In that case, a wrongful death arising out of an alleged medical malpractice, the matter had been settled at mediation for $125,000.00 based upon prior consent given by the physician. Unfortunately, the physician left before the conclusion of the hearing and later refused to sign the settlement agreement that had been drafted and signed by all other parties at the mediation hearing. The Judge in the Los Angeles Superior Court, admitted a declaration by the mediator, a retired Judge of the same court as to the parties' intent, and enforced the settlement agreement as an oral contract. The 2nd District Court of Appeal upheld the ruling. However, the California Supreme Court overruled the Appellate Court's decision, finding that the rules of confidentiality protect against evidence of an oral agreement to settle, sending the original malpractice claim back to trial court. Simmons v. Ghaderi (2008) 44 Cal. 4th 570.

Peter Robinson, managing director of Pepperdine University's Straus Institute for Dispute Resolution, called this result "too extreme" in an interview by Greg Katz of the Los Angeles Daily Journal in an article which appeared on July 22, 2008, "Ruling Boosts Confidential Mediation Talk". The attorney for the Plaintiff, who sought to enforce the settlement based upon Dr. Ghaderi's oral consent at mediation, told the Los Angeles Daily Journal Reporter, Greg Katz, that he wasn't surprised. "It's another opinion by the Supreme Court where they've used mediation confidentiality to uphold conduct that is less than upright and forthcoming, which is too bad", said Martin Berman of the Law Offices of James Aaron Pflaster.

Does the Confidentiality of Mediation Afford Too Much Protection for Bad Behavior?

In April, 2006, the ABA issued a Formal Opinion (06-439) on "Lawyer's Obligation of Truthfulness when Representing a Client in Negotiation: Application to Caucused Mediation". That Opinion analyzed the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003. In particular, Model Rule 4.1 restricts a lawyer representing a party from making a "false statement of material fact to a third person", which would include a confidential communication to a mediator in private caucus. However, the drafters of the Opinion were quick to point out that "statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can be fairly characterized as negotiation "puffing" are not ordinarily considered "false statements of material fact". (ABA Formal Op. 06-439, page 5).

Model Rule 3.3, which also prohibits lawyers from knowingly making untrue statements of fact, is not applicable in the context of mediation or negotiation among the parties as its application is limited to statements made to "a tribunal", which

presumably would apply to arbitration or court proceeding, but not mediation.

California has its own Rules of Professional Conduct, which include Rule 5-200 which states: "In presenting a matter to a tribunal, a member…(B) shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law." This Rule, too, seems to be limited to judicial officers engaged in pretrial settlement negotiations. This rule would also subject an attorney to discipline for intentionally misleading a settlement judge about the facts of a case (See: In the Matter of Jeffers (1994) 3 Cal. State Bar Ct. Rptr. 211), but does not extend to misrepresentations to mediators.

Finally, in a set of voluntary guidelines issued by the California State Bar in 2007, "California Attorney Guidelines for Civility and Professionalism", Rule 18 © states: "An attorney should avoid negotiating tactics that are abusive; that are not made in good faith; that threaten inappropriate legal action; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position or that do not accurately reflect the client's wishes or previous oral agreements."

This latter guideline, if enforceable, would seemingly address the potential for unethical negotiations in the context of mediation. The problem, however, is that the guidelines are voluntary and the enforceability is nearly completely obstructed by the ardent confidentiality protection of most statements made in a mediation. Accordingly, it is entirely within the discretion and conscience of both litigator and mediator to safeguard the ethics of negotiation, while striving to protect one of the key hallmarks of mediation: confidentiality.

Tricky Situations as Examples of Ethical Issues that Arise in Mediations

Consider the case which is unfortunately more and more common where the business defense counsel arrives at the mediation only to confidentially disclose that her client is likely to file for bankruptcy protection before the settlement payment becomes due. The mediator is invariably urged to maintain this confidentially, and yet attempt to assist the parties in negotiating the best deal for each side based upon liability and damages as well as timing and numerous other factors. Throughout the mediation, the litigator refuses to reveal, nor allow the mediator to reveal, the business party's intent to file for bankruptcy and thereby default on the settlement agreement.

Under Rule 4.1, this conduct would not be an ethical violation, as it would not apply to a statement of fact or law. The settling lawyer on the other side may, of course, have remedies such as attempting to set aside this debt from the bankruptcy based upon fraud, but would likewise have difficulty proving the intent to defraud solely upon a confidential communication made at a mediation hearing!

Another difficult situation arises where the Defendant reveals that there is an EPL policy which covers sexual harassment in a particular case alleging employment discrimination. If this fact is revealed to the mediator in confidence, she has no right to advise the adverse party. However, under ABA Rule 4.1, misrepresentation of insurance coverage in a negotiation has been considered an affirmative misrepresentation, subjecting at least one New York lawyer to professional discipline.

On the other hand, although it would appear to be unethical in the abstract, even the Model Rules do not require disclosure of the fact of insurance in a mediation setting. Failure to make a statement is still not considered to be a "false statement", and litigants are not required to fully disclose any private facts, including insurance to a mediator, only a "tribunal", such as a Judge or arbitrator. Once again, query whether this permits a degree of unethical behavior which we would prefer to guard against.

One surprisingly common issue that arises is an inadvertent failure to sign a negotiated settlement agreement by a single party representative. Typically, a negotiated agreement will have provisions allowing for enforcement by Court order (in California under Code of Civil Procedure Sec. 664.6) in the event of a default. However, according to attorney Jeffrey Cohen of Pavone & Cohen of Los Angeles, Courts may refuse to enter a negotiated settlement as a judgment if the assent to the terms of the settlement somehow rests upon conduct which occurred in mediation. Nonetheless, according to Cohen, "Confidentiality is too important to bust. Ultimately, it's the mediator's job to forestall or avoid the use of unethical conduct to gain an unfair advantage in mediation." Just as the parties in Simmons v. Ghaderi found, the Courts may be loathe to imply assent based upon conduct and an oral agreement. Most mediators would also be reluctant or refuse to submit evidence by way of a memo or declaration to reveal that which took place within the confines of the confidential hearing. Accordingly, it seems inevitable that some bad behavior following mediation will go unpunished, and some mediated agreements will remain unenforceable.

According to Mary B. Culbert, Professor and Director of the Loyola Law School Center for Conflict Resolution, the California Court's so strongly support the enforcement of mediated agreements, that they will even allow for "language outside of the written settlement agreement itself" to satisfy the requirement of an express written agreement contrary to Evidence Code Section 1123 ©. (See: In re Estate of Thottam (2008) 165 Cal. App. 4th 1331.)

Nonetheless, Judge Michael Marcus (retired), a member of the California State Bar Board of Governors, has concluded that: "[U]nethical behavior, although it may never be discoverable in the context of mediation, will undoubtedly adversely impact your legal reputation as the trust you hope to gain from your mediator".

Finally, be mindful that certain representations, such as the threat of criminal investigation or prosecution in order to gain an advantage in a civil dispute are still considered unethical behavior. In a recent case where the employer had sub-rosa video of the injured Plaintiff engaged in gymnastics while collecting worker's compensation benefits for a back injury, the threat of insurance fraud loomed large. In fact, the attorney for the employer refused to negotiate the return of the worker to his former position based upon his concern that he would not be eligible for re-hire once the employer (and not just the attorney in the civil litigation) learned of this behavior. Although this would not be discoverable based upon communications made by the attorney in private caucus to the mediator, the mediator appropriately admonished the attorney that neither the mediator's code of ethics nor his allowed this fact to figure into the settlement of the civil dispute. The evidence, of course, was critical and pivotal to the settlement, but the potential criminal charges which may stem from that investigation were not to be considered. (California Rules of Professional Conduct 5-100(A) states that "A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.").

Conclusion

The protections afforded by the Confidentiality statutes governing conduct in mediation cloak the professional conduct with a secrecy that may, in some instances allow for unethical behavior to go unpunished. However, if attorneys recognize that they are still subject to ethical rules which govern their professional conduct, in most instances the "puffing" and "exaggeration" that comes in nearly every mediation can be considered for what it is: negotiation strategy. Unfortunately, the implication is also the converse: one cannot justifiably rely upon representations made in mediation, and must ultimately resort to legal principles to enforce their negotiated settlement (as in a writing signed by the party to be charged).

Although academicians and litigators who have been unable to enforce settlements would disagree with me, on balance I believe the promise of settled cases, satisfied clients and creative and durable resolution to conflict justifies the few ethical violations which may engender harm to the parties participating in the mediation process. In the meantime, all of us should be mindful of our ethical obligations of truthfulness as it pertains to material representations on the one hand and hyperbole, which should never be exalted to the point of a factual representation which is known to be false on the other.

As Attorney Bert Deixler of Proskauer, Rose says of advice from another mediator: "Be careful about lying to me, because I may believe you and act upon the false information."

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