



JANUARY 18, 2023

ADR SERVICES, INC. 3RD ANNUAL MCLE DAY



EFFECTIVE MEDIATION

Pos and Don'ts

HON. ANGELA BRADSTREET
HON. JAMES MCBRIDE



Today's
SPEAKERS



**HON. ANGELA
BRADSTREET (RET.)**



**HON. JAMES
MCBRIDE (RET.)**

PRE-MEDIATION BRIEFING

DO

- **Do** exchange mediation and settlement conference statements in a timely manner. If there is a compelling need to hold any info back do not announce that in your brief- that is not conducive to settlement and the other side may think you are not serious about the process.
- **Do** prepare your client – the mediator will be assessing their credibility and witness appeal. Most important is that they appear truthful.

DO NOT

- **Do not** misstate the record. Remember at all times that you and your client are building trust with the mediator and the other side.
- ***Rule of Professional conduct 3.3 – duty of candor toward the tribunal and 4.1 – duty of candor to others.***
- **Do not** overly prepare the client such that he or she appears coached.
- **Do not** fudge the law!

DO

- **Do** accurately cite the record including deposition testimony and include all cites on the same subject matter.
- **Do** Accurately brief applicable law and why you believe the opposing party's interpretation is incorrect.
- **Do** ask the mediator or settlement officer if it would be possible to have a private pre-mediation call.
- **Do** anticipate and communicate with all necessary decision makers ahead of the mediation/settlement conference.
- **Do** be mindful of potential conflict situations

DO NOT

- **Do not** wait until the last minute to serve a mediation/settlement conference statement – parties and insurance carriers often need time to evaluate.
- **Do not** fail to ascertain who are the necessary decision makers.

DURING MEDIATION

DO

- **Do** pay attention to your zoom background on remote mediations.
- **Do** remember to mute yourself and have your clients mute themselves and/or stop talking when the mediator returns to the breakout room!
- **Do** employ litigation tactics during the mediation process that could help settlement.
- **Do** acknowledge perceived weaknesses in your case; do not be defensive.
- **Do** discuss your or your client's personal frustrations or complaints about the opposition privately with the mediator, preferably ahead of time.
- **Do** be sure that all parties share the same definition of terms of art.

DO NOT

- **Do not** make personal attacks on opposing counsel or the other parties in mediation briefs or in joint sessions.
- **Do not** be overly aggressive in employing litigation tactics during the mediation process that could hurt settlement.
- **Do not** Allow decision makers to be absent.
- **Do not** beat up on your client to force a settlement

DO

- **Do** have all decision makers participate.
- **Do** be patient with the process! Do not issue ultimatums. Immediately announcing your client's so called bottom line is unhelpful.
- **Do** have a draft settlement agreement prepared.
- **Always** communicate a settlement offer or demand to your client – see Rule of professional conduct 1.4.1
- **Do** be flexible and realistic on confidentiality and non-disparagement terms.
- **Do** set aside ego when it is to the benefit of your client.

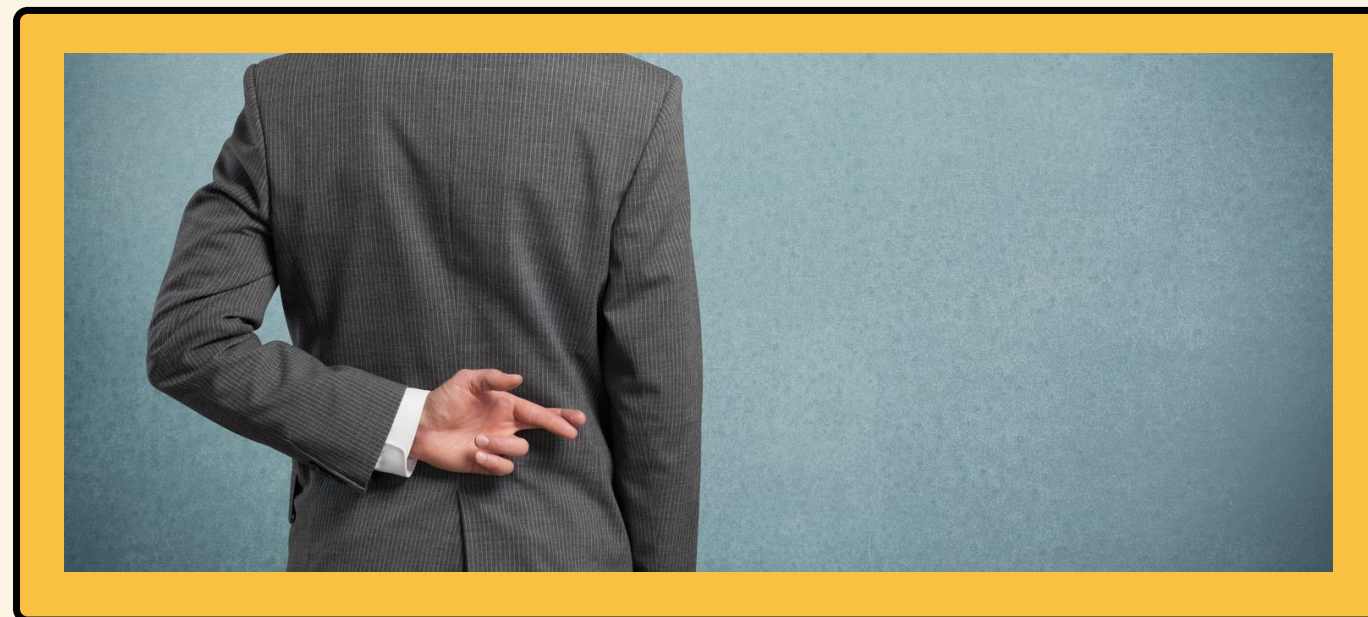
DO NOT

- **Do not** leave/end the mediation without a written agreement that is enforceable under CCP 664.6
- **Do not** get too caught up in unrealistic and overbroad confidentiality language.
- **Do not** let ego interfere with doing what is best for your client.
- **Do not** make premature ultimatums.


IS IT A PROBLEM?

MEDIATION PRIVILEGE PROTECTS THE UNETHICAL/INCOMPETENT ATTORNEY


- Communications in or in furtherance of a mediation cannot be used as evidence in a malpractice claim. *Cassel v. Superior Court*, 51 Cal. 4th. 113 (2011)
- Cannot serve as the basis for bar discipline (with an exception).
- Cannot be the basis for sanctions (with an exception).




CASSEL V. SUPERIOR COURT, 51 CAL. 4TH 113 (2011)



In a legal malpractice action, client contended that attorneys obtained his consent to an inadequate settlement through bad advice, deception and coercion.



Supreme Court held that private communications between attorney and client related to mediation remained confidential, even in a professional negligence action.



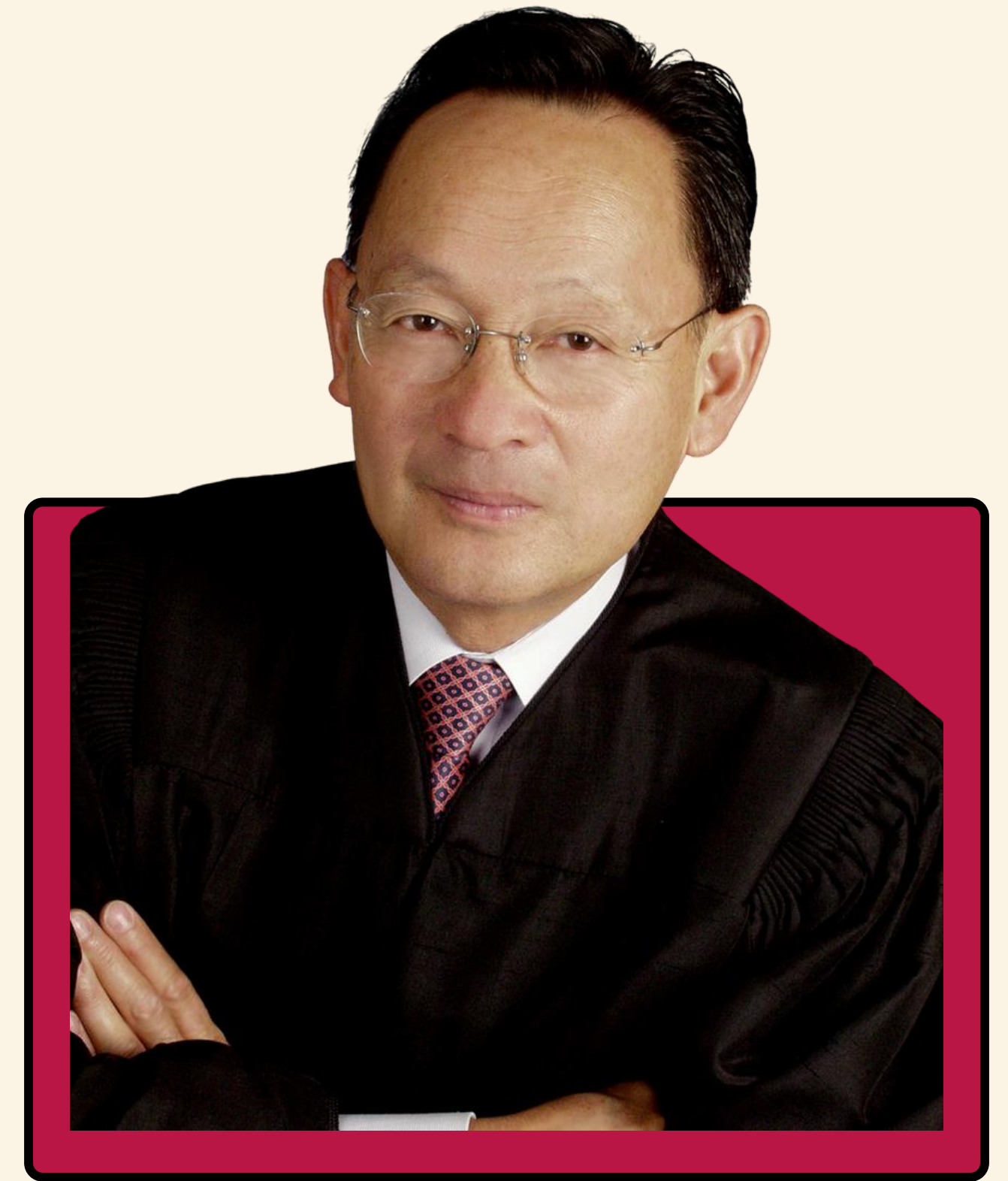
Much concern that *Cassell* shields attorneys from accountability for misconduct prejudicial to a client.

IN HIS RELUCTANT CONCURRENCE, JUSTICE CHIN WROTE,

**“ATTORNEYS PARTICIPATING IN MEDIATION WILL NOT BE HELD ACCOUNTABLE FOR ANY INCOMPETENT OR FRAUDULENT ACTIONS DURING THAT MEDIATION UNLESS THE ACTIONS ARE SO EXTREME AS TO ENGENDER A CRIMINAL PROSECUTION AGAINST THE ATTORNEY”
ID., 138**

In 2018, The California Law Revision Commission recommended adding an exception to the privilege for professional negligence actions.

Instead, the Legislature added Evidence Code Section 1129



THE SOLUTION?

DO OBTAIN CLIENT'S INFORMED CONSENT TO MEDIATE.

▶ Evidence Code Section 1129 requires a printed disclosure explaining mediation confidentiality before the client agrees to mediate.

▶ Attorney must "obtain a printed acknowledgment signed by the client stating that he or she has read and understands the confidentiality restrictions."

▶ Rule 1.2 Scope of Representation and Allocation of Authority.

Mediation Disclosure Notification and Acknowledgment

To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:

- All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
- Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
- A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.
- A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.

This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

I, _____ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

Date signed: _____

[Name of Client]

Date signed: _____

[Name of Attorney]

Do ENTER INTO A WRITTEN SIGNED AGREEMENT MEMORIALIZING MATERIAL TERMS.

- Agreement to enter into a more “comprehensive settlement agreement” was found to be an enforceable term.
- Not overly vague.

Pappas v. Chang (2022) 75 Cal. App. 5th 975





MAGIC WORDS REQUIRED

- ▶ Even a written agreement reached during mediation may be inadmissible in subsequent proceedings unless it provides that it is enforceable or binding or that it may be disclosed despite the privilege. Or words to that effect.
- ▶ *Fair v. Bakhtiari* (2006) 40 Cal. 4th 189, 191–92, as modified (Dec. 14, 2006)
- ▶ Evidence Code section 1123 (a)(b) and (c).



USE C.C.P. SECTION 664.6 (WHERE APPLICABLE)

- Pending litigation required.
- Of no use in pre-litigation settlements.
- Motion to enforce not available after dismissal.

Except if the parties have requested and the Court has ordered jurisdiction is preserved. ***Mesa RHF Partners, L.P v City of Los Angeles (2019) 33 CA 5th 913,918.***

- It is a matter of subject matter jurisdiction.

Viejo Bancorp v. Wood (1989) 217 Cal.App.3d 200



RECENT CHANGES TO 664.6

A TRAP FOR THE UNWARY?

- In *Levy v Superior Court* (1995) 10 Cal.4th 578 the Supreme Court decided that an agreement to have the court retain jurisdiction to enforce a settlement was such an important right that “signed by the parties” meant signed by the actual clients.
- Effective January 2021 amendments to Section 664.6 changed the *Levy* Rule. Now “signed by the parties” means;

A PARTY

**AN ATTORNEY WHO
REPRESENTS THE PARTY**

**IF THE PARTY IS AN INSURER, AN
AGENT WHO IS AUTHORIZED IN WRITING
BY THE INSURER TO SIGN ON THE
INSURER’S BEHALF.**



*D***O HAVE THE CLIENT SIGN SETTLEMENT AGREEMENTS**

Section 664.6(d) provides:

“(D) IN ADDITION TO ANY AVAILABLE CIVIL REMEDIES, AN ATTORNEY WHO SIGNS A WRITING ON BEHALF OF A PARTY PURSUANT TO SUBDIVISION (B) WITHOUT THE PARTY’S EXPRESS AUTHORIZATION SHALL, ABSENT GOOD CAUSE, BE SUBJECT TO PROFESSIONAL DISCIPLINE.”

(emphasis added)

REMEDIES FOR MISCONDUCT IN MEDIATION?

- Distinction between private mediation and court ordered mediation/settlement conference.
- California Rule of Court 3.890 **et seq.** authorizes the court to order certain cases to mediation.
- In **Ellerbee v. Cnty. of Los Angeles**, (2010)187 Cal. App. 4th 1206, the trial court imposed sanctions of \$6,194 against the defendants for their unexcused failure to participate in a court-ordered mediation in violation of Los Angeles Local rule 12.15 and C.R.C. Rule 3.894(a)
- The report to the court that a party did not appear with authority (conduct) did not violate the bar against using statements or documents (communication).





DO KNOW THE LOCAL RULES

- Ellerbee relied on *Campagnone v. Enjoyable Pools & Spas Serv. & Repairs, Inc.*, 163 Cal. App. 4th 566, 572, 77 Cal. Rptr. 3d 551, 555 (2008), as modified on denial of reh'g (June 18, 2008)



“THE FAILURE TO HAVE ALL PERSONS OR REPRESENTATIVES ATTEND COURT-ORDERED APPELLATE MEDIATION, AS REQUIRED BY LOCAL RULE 1(D)(9), IS CONDUCT THAT A PARTY, BUT NOT A MEDIATOR, MAY REPORT TO THE COURT AS A BASIS FOR MONETARY SANCTIONS. HOWEVER, REPORTING ANYTHING MORE MAY VIOLATE THE CONFIDENTIALITY RULES.”



ALAMEDA:

Local Rule 3.700 permits the court to refer any case to an “appropriate” form of ADR. Per 3.710, the parties may select any neutral they wish

SAN MATEO:

County Superior Court Rule 3.904 Stipulations to Private Appropriate Dispute Resolution

“(e) Failure of the parties to comply with these ADR Local Rules, and the deadlines set forth herein, may result in the issuance of an Order to Show Cause re: Sanctions.”

SAN FRANCISCO:

Superior Court has no similar rule. But Rule 5.0 requires appearance at and good faith participation in settlement conferences.

LOS ANGELES:

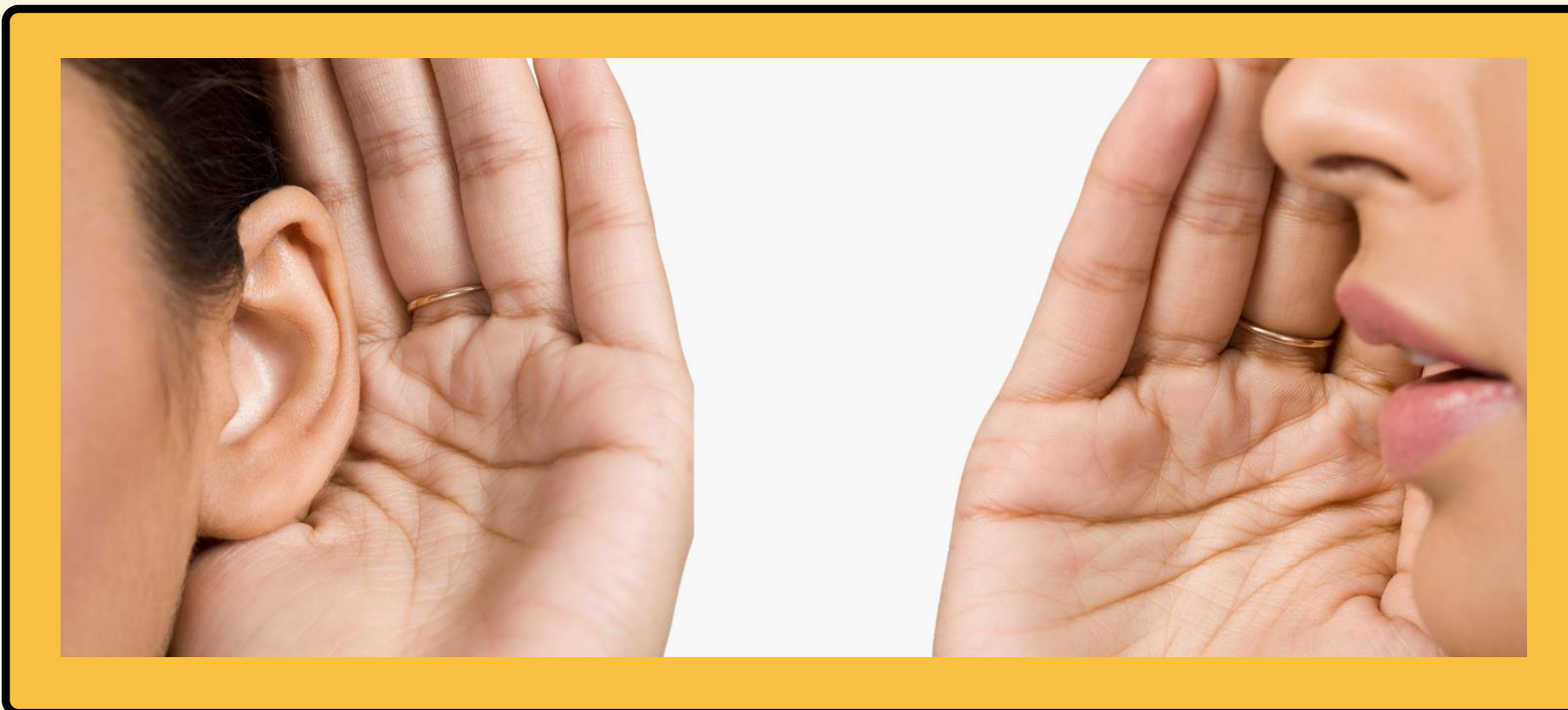
Unless expressly excused for good cause by the judge, all persons whose consent is required to effect a binding settlement must be personally present at a scheduled settlement conference in Local Rule 325 (d).

USDC:

CD Cal General Order No. 11-10. Each party shall appear at the mediation in person or by a representative with final authority to settle the case... A corporation or other... entity satisfies this attendance requirement if represented by a person who has final settlement authority and who is knowledgeable about the facts of the case.

A PARTY **MAY** REPORT MISCONDUCT BUT A MEDIATOR **MAY NOT**

- There are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports
- We also conclude that, while a party may do so, a mediator may not report to the court about the conduct of participants in a mediation session.



Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc. (2001) 26 Cal. 4th 1, 4.

FINAL TAKEAWAYS



Thank you

KEEP IN TOUCH



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