



Mediating Ethically

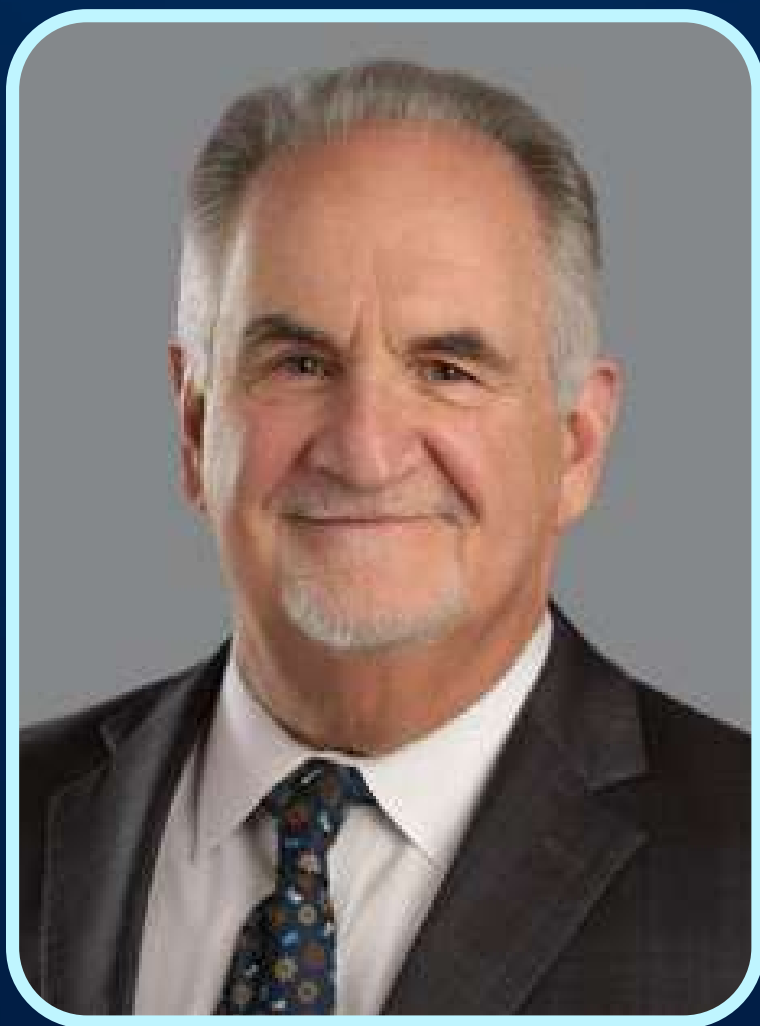
ADR Services, Inc. MCLE Day
January 11, 2023

Michael Balmages, Esq.
Stacie Feldman Hausner, Esq.
Michael Maguire, Esq.





Speakers



**Michael
Balmages, Esq.**



**Stacie Feldman
Hausner, Esq.**



**Michael
Maguire, Esq.**

Agenda



2

**Confidentiality & Mediation
Privilege**

**Procedural Fairness vs.
Outcome Fairness**

Lying in Mediation

Neutrality

Civility in Mediation

Confidentiality



3 Ways We Discuss Confidentiality in Mediation



Formal Rules of Evidence

govern admissibility of evidence
in court & whether material is
subject to discovery



Confidentiality in Caucus

when a party wants to tell us
private information and ask us not
to repeat it to the other side



Broader Sense

of keeping information private so
that others outside the mediation
will not learn of the mediation
communications



Statutory Protections

*Federal Rules of Evidence, Rule 408

Evidence of compromise offers and negotiations are inadmissible to prove validity and invalidity of a claim or to impeach prior inconsistent statements in a civil proceeding. This carves out criminal proceedings & public investigative and regulatory enforcements. Seemingly allows the communication for collateral purposes.

*California Evidence Code sections 1115-1123

Basically say anything done, said or written in a mediation is inadmissible in non-criminal proceedings. Applies to mediators, parties & attorneys.

- * Policy is to encourage people to share information and compromise to resolve disputes by making their communications inadmissible. They need to know efforts to compromise won't be used against them should case not settle.
- * Mandatory Settlement Conferences are different – governed by rules of court

Settlement Agreements

***Evidence Code section 1123 makes settlement agreements inadmissible unless any of the below conditions are met—**

1. Parties make it clear that the agreement is admissible or subject to disclosure;
2. The agreement provides that it is enforceable or binding (or words to that effect)
3. All parties to the agreement expressly agree to its disclosure
4. The agreement is used to show fraud, duress or illegality

*Advice: for clarity, make sure to waive Section 1123 and then add in some of the other language as well.



When is the Mediation Over?

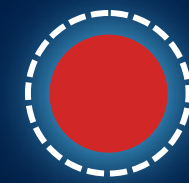
(Impacts Confidentiality)



**Fully executed
written agreement**



**10 days with no
communication
between the mediator
and any of the parties**



**Agreement by parties
to terminate the
mediation**

Limits to Confidentiality

*Not as protective as most lawyers think –
problematic because information is power
& mediators want it

1. Only applies to admissibility of evidence in a civil proceeding

(a) Does not make information “private”
(note: most mediators tend to treat it as such)

(b) Does not protect information from being
revealed in a criminal proceeding

(c) Maybe admissible for impeachment in
California State court



Limits to Confidentiality

2. Confidentiality statutes do not really protect communications from discovery

*No worries if past discovery cut-off date

*If discovery ongoing, be careful with this
(strategic for trial vs. trying to settle the case)



Limits to Confidentiality

3. States Have Different Confidentiality Protections

*CA is a bit unclear because not much case law regarding mediation confidentiality & seemingly not very protective

*Other states, like NJ, adopt the Uniform Mediation Act (UMA) & have much more robust protections

*So which state laws apply?

*Forum state v. state where mediation communication was made?

*Forum state judge decides which law applies



Uniform Mediation Act

(adopted by approx. 12 states, including NJ)



Exceptions to Confidentiality

Agreement signed by all the parties

Plans to conceal an ongoing crime

Evidence is not otherwise available

Documents required to be kept open to the public

Information needed by mediator to respond to claims made against him

Need for evidence outweighs need to keep information confidential

Threats to commit bodily injury or violence

Situations involving child abuse or neglect

Evidence offered in court involving felony or litigation over the contract reached in mediation

Confidentiality Protects Communications Offered in a Different Civil Proceeding

Cassel v. Superior Court Case - Supreme court says confidentiality provisions apply to a different legal malpractice case & told state legislature to pass a different bill if they didn't want confidentiality to be so robust as to protect a lawyer from malpractice during a mediation

September 11, 2018: SB 954 passed- it revises Evidence Code section 1122 and add section 1129 –require attorneys to get written acknowledgement from their clients prior to mediation that mediation communications are confidential and inadmissible at trial.



What can we do given the limits to confidentiality?

Contract - Confidentiality Agreement

1. Make stricter protections

Ex. No sharing any mediation communications with anyone outside the mediation room or with specific people (co-workers, neighbors, media, etc)

2. Contract for Which State Law Applies

- * Although some courts do not uphold (Larsen v Larsen – Wyoming Court did not uphold confidential communications made in CO despite an agreement saying CO confidentiality rules apply on the grounds of public policy reasons because confidential communication was allowed under the Wyoming).
- * Judges probably want the relevant mediation communications to be produced because they want to make good decisions
- * Be Careful Here – Should not be a default setting to sign a confidentiality agreement because it can take away some of your clients' legal protections. Instead, perhaps write your intent to be bound by Evid Code sections 1115 et seq. even when making stricter protections so that they do not nullify these protections as well.

Caucus Affords Another Layer of Confidentiality Protection

3 Main Models Used by Mediators



Explicit Permission Model

Mediator does not share any information without express permission

Explicit Reservation Model

Mediator can share information unless told otherwise.

Carte Blanche Model

Mediator uses his or her best judgment

* Lawyers – be clear with your mediator regarding how and what information to share – know which model works best for you.

Summary



Be careful & do not just naturally assume comprehensive confidentiality protections when your mediator says everything is confidential. Know what that means.

Don't blindly sign confidentiality agreements because you may be losing or gaining confidentiality protections for your client – be thoughtful here & draft the agreements yourselves if you want them.

Some judges do not honor the confidentiality agreements so be careful when revealing information even when using these agreements.

Make sure your mediator knows if and when you want to share information.

Make strategic decision regarding sharing information and when.

Procedural Fairness vs. Outcome Fairness



3 Irrelevancies (?)



1. **Fairness**
2. **Justice**
3. **Equity**

- Maybe also the facts and the laws.
- Smartness is the goal.

THIS IS NOT
FAIR.

Mike Balough

2022 California Rules of Court

Rules of Conduct for Mediators in Court-Connected Mediation Programs

Rule 3.853. Voluntary participation and self-determination

A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. For this purpose a mediator must:

- (1) Inform the parties ... that any resolution ... requires a voluntary agreement of the parties;
- (2) Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and
- (3) Refrain from coercing any party to make a decision or to continue to participate in the mediation.



2022 California Rules of Court

Rules of Conduct for Mediators in Court-Connected Mediation Programs



Rule 3.857. Quality of mediation process

(b) Procedural fairness. A mediator must conduct the mediation proceedings in a procedurally fair manner. "Procedural fairness" means a balanced process in which each party is given an opportunity to participate and make uncoerced decisions. **A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties.**

(c) Explanation of process. ... at or before the outset of the mediation the mediator must provide all participants with a general explanation of:

- (1) The nature of the mediation process;
- (2) The procedures to be used; and
- (3) The roles of the mediator, the parties, and the other participants. ...

(h) Settlement agreements.

... A mediator may also assist the parties in preparing a written settlement agreement, provided that in doing so the m

Advisory Committee Comment

Subdivision (c). The explanation of the mediation process should include a description of the mediator's style of mediation.

Elements of a Fair Mediation

Voluntary
Neutral
Confidential
Competent



Lying in Mediation



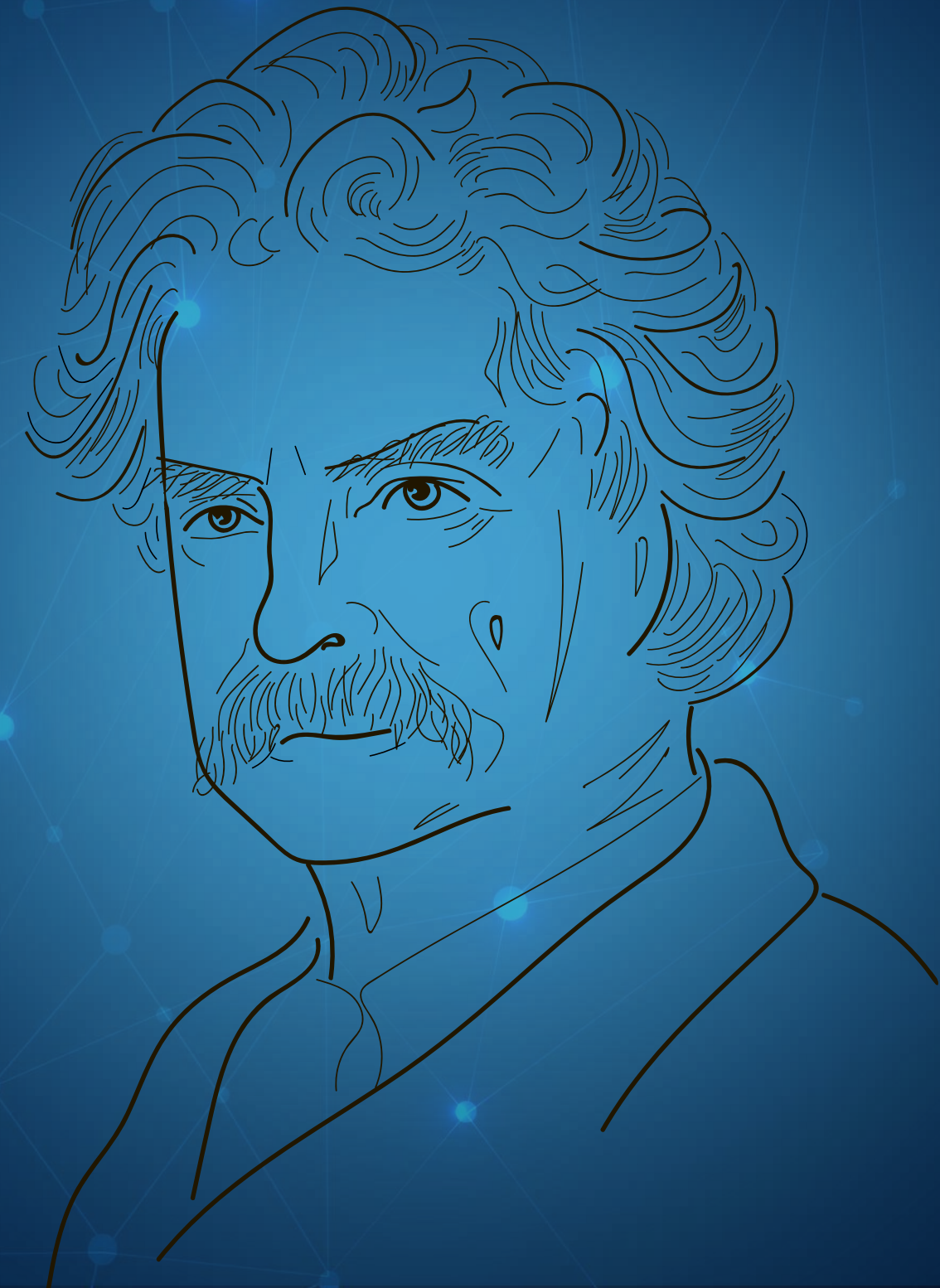


**Is it okay to lie
to the
mediator?**

"A man is never more truthful than when he acknowledges himself a liar."

"There are three kinds of lies: Lies, Damned Lies, and Statistics"

-Mark Twain



Lies!



Bottom Line

Authority to
Settle

Coverage

Top Line

Authority to settle at
a certain amount?

Solvency/
Bankruptcy Facts

Desire to Settle

Decision Makers
Present

Witnesses

LACSC Local Rule 325 (d) – Settlement Conferences

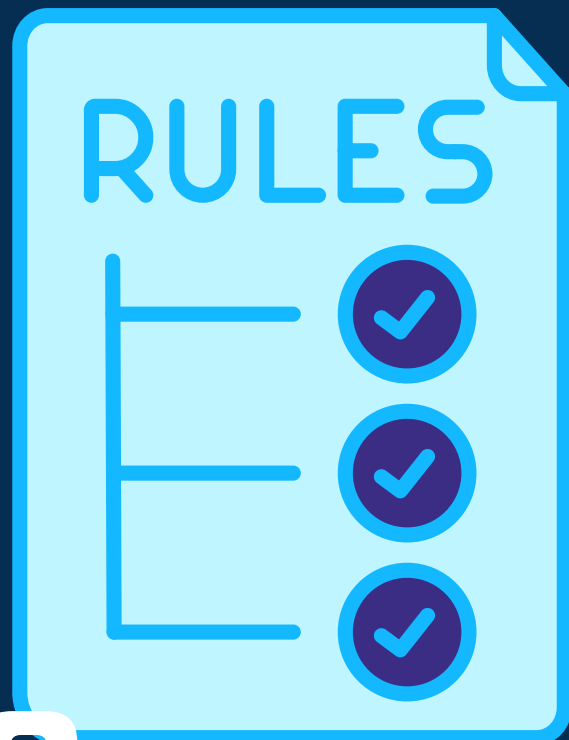
(1) Attendance. Unless expressly excused for good cause by the judge, all persons whose consent is required to effect a binding settlement must be personally present at a scheduled settlement conference, including the following: (1) the parties (unless consent of a party is not required for settlement); (2) an authorized representative of any insurance company which has coverage, or has coverage at issue, in the case; and (3) an authorized representative of a corporation or other business or government entity which is a party. These persons must have full authority to negotiate and make decisions on settlement of the case...

(3) Familiarity with Case. Counsel must attend the settlement conference and be familiar with the pertinent available evidence involving both liability and damages. Counsel must be prepared to discuss the case in depth and, except for good cause shown, must be the person who will try the case.

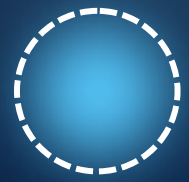
(4) Liens. Plaintiff's counsel must ascertain whether there are liens which bear on a potential settlement and, if so, request the claimants or their representatives to attend the settlement conference or be available for telephone communication during the conference...

OCSC Local Rule 316 – MSCs

- ...the attorney who will try the case must be present or...someone completely familiar with the case and who has full authority....
- All plaintiffs...must be personally present. **An appearance by an attorney claiming to have settlement authority does not satisfy...**
- If a plaintiff...is an entity...all persons whose consent...is necessary must be present...
- All defendants... must be personally present, unless an insurance carrier acknowledges an unqualified and unlimited duty to indemnify... An appearance by an attorney claiming to have settlement authority does not satisfy...
- If the defendant...is an entity... all persons whose consent... is necessary must be present...
- **Each insurance carrier which acknowledges a duty to indemnify... and each insurance carrier as to which any party contends there is a duty to indemnify... must have a representative present... who has the unlimited and unconditional authority to enter into a settlement.**



USDC CD Cal General Order No. 11-10 - ADR



8.5

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.



Representatives of insurers with decision-making authority are required to attend...



8.6

Each party shall be represented at the mediation by the attorney who is expected to try the case...

California Rules of Professional Conduct: Rule 4.1



Truthfulness in Statements to Others

(Rule Approved by the Supreme Court, Effective November 1, 2018)

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;* or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e)(1) or rule 1.6.

Comment

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. ...

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category...

Neutrality



Voluntary Participation & Self-Determination

Model Standards of Conduct

Standard 1. Self-Determination

- American Bar Association
- American Arbitration Association
- Association for Conflict Resolution

Ca. Court Rule 3.853

Voluntary participation and
self-determination



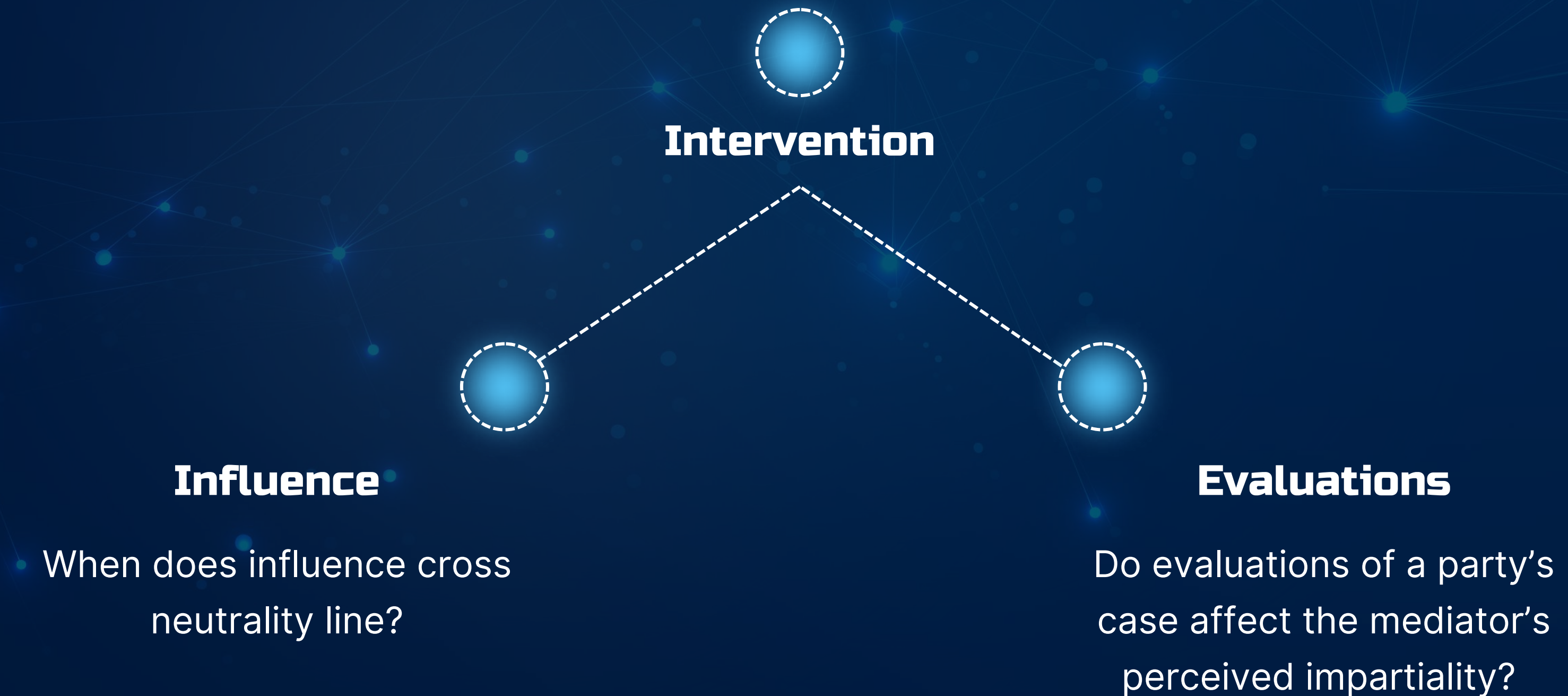
**What is
Neutrality?**

**How does it
differ from
Impartiality?**

Why Is Neutrality Vital in Mediation?



Mediator Neutrality & Impartiality



The Mediator's Proposal

What the "Experts" Say!

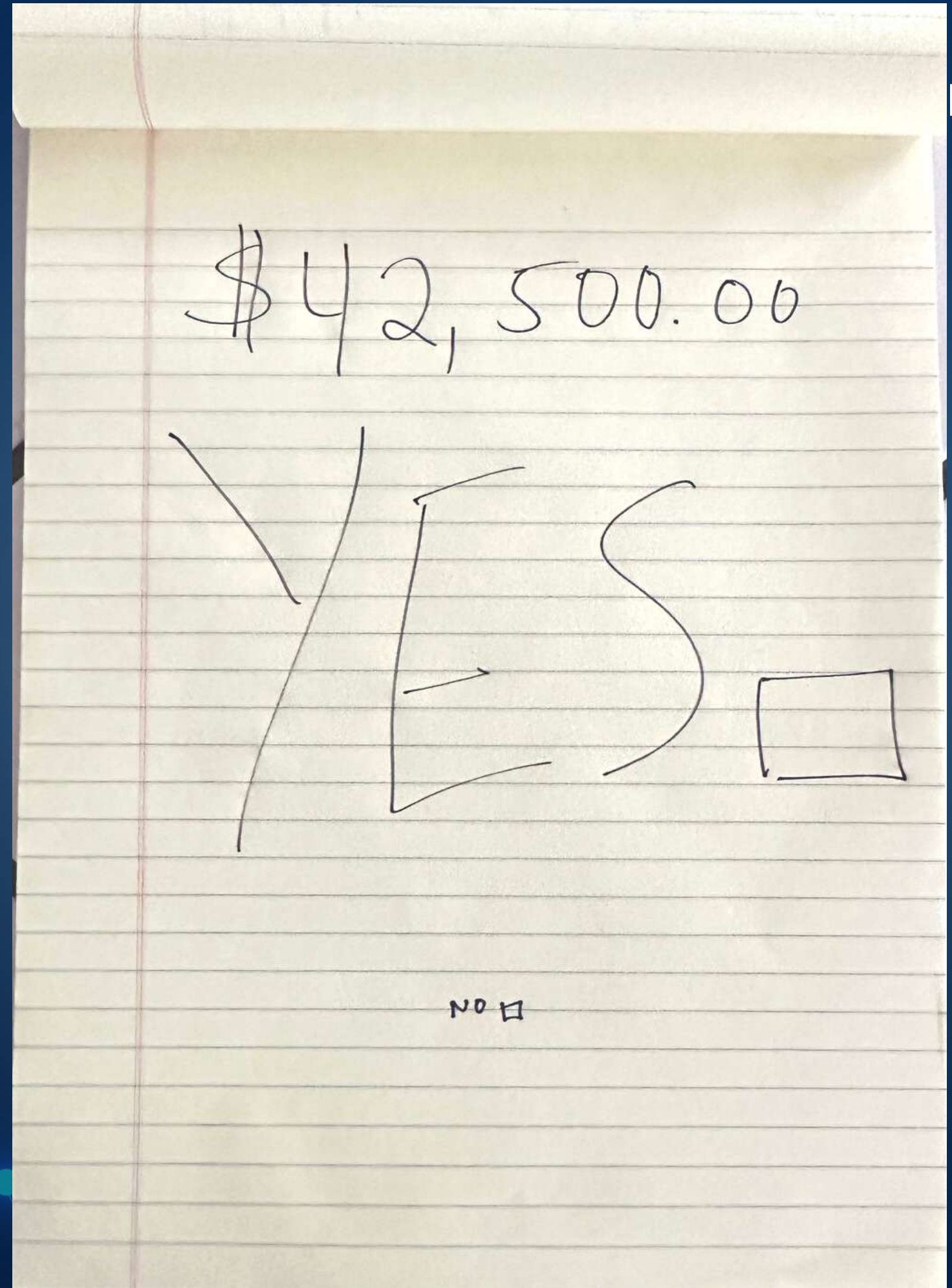
"I define the mediator's proposal as the exact point in time where the mediator ran out of skills."

"Some mediators use it as a tool for self-importance in a way that says, 'Here, I'll resolve this for you.'"

"Could it be that if more mediators possessed a wider variety of skills and techniques, then the mediator's proposal might quietly slip away?"

"Unfortunatley, I think many counsel looking for a mediator's proposal are more lazy than savvy."

The Mediator's Proposal





Civility in Mediation

State Bar Request for Public Comments

State Bar Civility Proposals:

- First, changes to the Rules of Professional Conduct that would make incivility subject to disciplinary action. Rule 8.4 Misconduct
- Second, changes to the MCLE program, including a requirement that lawyers take one hour of civility training during each compliance period.
- Third, a proposal to change California Rule of Court 9.7 to require all lawyers to subscribe to the aspirational civility pledge contained in the current version of the attorney oath. "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

The deadline for public comment is January 30, 2023.

Chapter 8. Maintaining The Integrity Of The Profession

Rule 8.4(d) Misconduct (**Current**):
It is professional misconduct for a
lawyer to engage in conduct that is
prejudicial to the administration of
justice.



Comment to Rule 8.4 (Proposed additions)

[6] A lawyer's violation of paragraph (d) includes engaging in significantly unprofessional conduct that is abusive or harassing in the practice of law or related professional activities. A lawyer does not violate paragraph (d) by standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity.

- * For further guidance, a lawyer should consult the current California Attorney Guidelines of Civility and Professionalism and other applicable civility authorities.

(Proposed) New Rule 8.4.2

Prohibited Incivility

(a) In representing a client, a lawyer shall not engage in incivility in the practice of law or related professional activities.

(b) For purposes of this rule, “incivility” means significantly unprofessional conduct that is abusive or harassing and shall be determined on the basis of all the facts and circumstances surrounding the conduct.

Proposed New Rule 8.4.2

Comments include

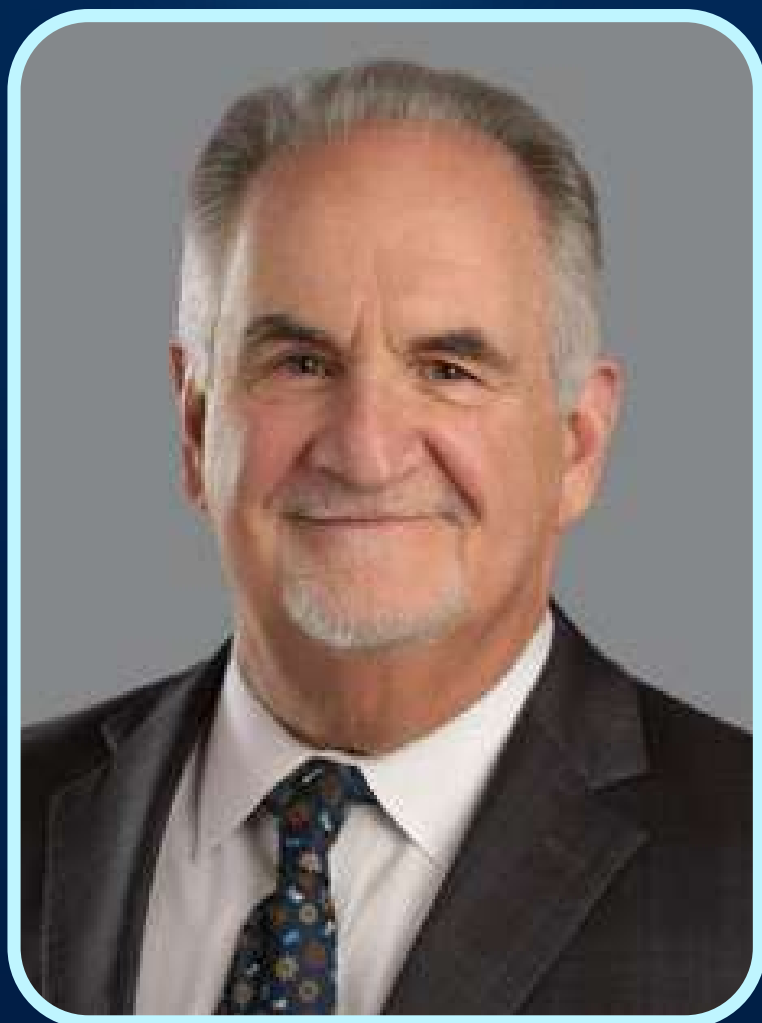
- Directs lawyers to consult the current California Attorney Guidelines of Civility and Professionalism and other applicable civility authorities;
- Describes conduct that would not violate the rule;
- Indicates that a violation of rule 8.4.2 may also violate rule 8.4(d) (Misconduct) and/or the State Bar Act; and
- Clarifies that the rule does not apply to conduct protected by the First Amendment.



How does civility, or lack thereof, affect the outcome of a mediation?



Thank You



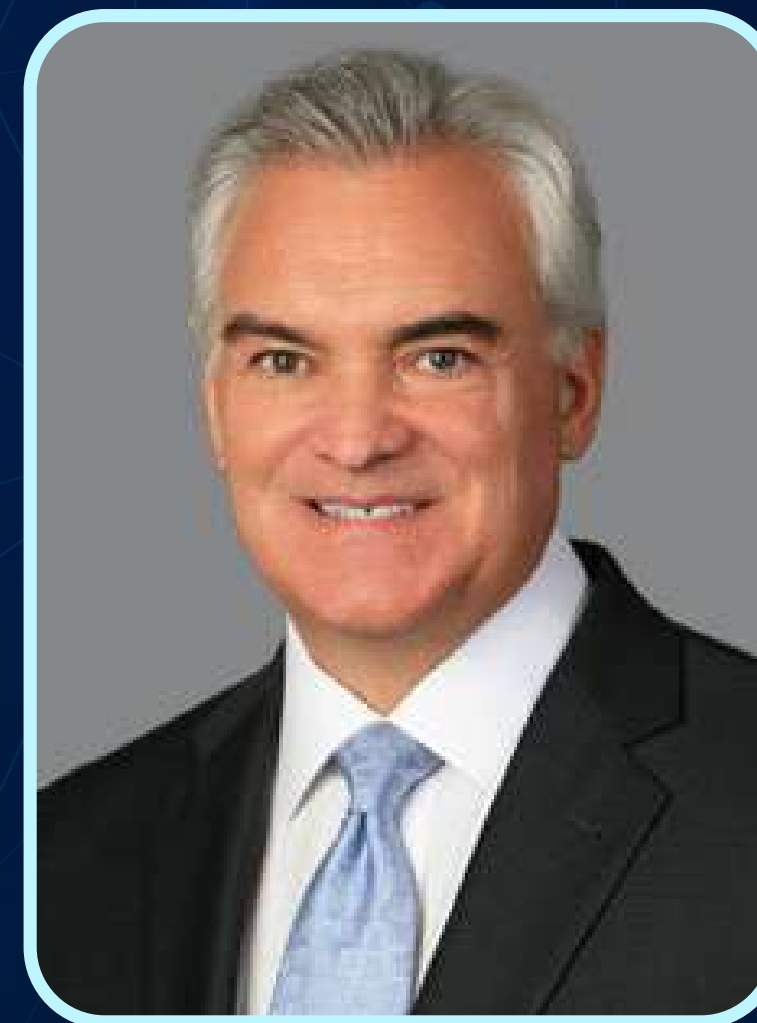
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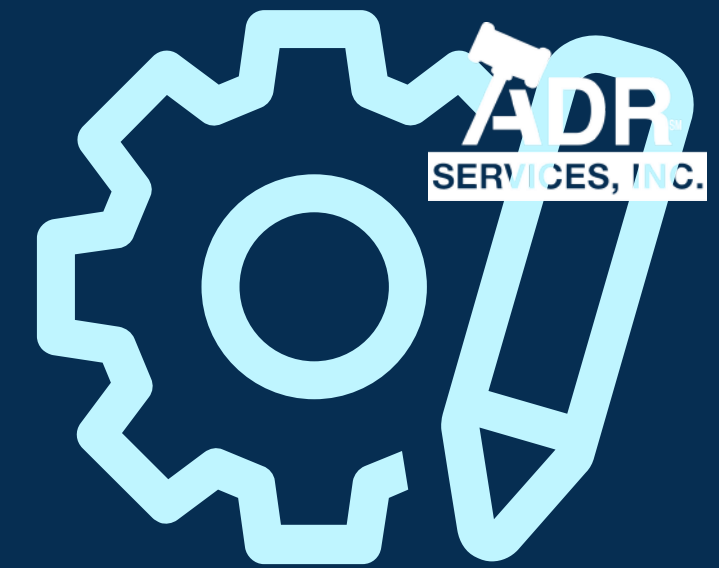
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Resources



Cognitive biases in mediation by Stacie Feldman Hausner, Esq.
<https://www.adrservices.com/wp-content/uploads/2016/11/Feldman-Hausner-article.pdf>

Influence in settlement negotiations: 15 tips by Stacie Feldman Hausner, Esq.
<https://www.adrservices.com/wp-content/uploads/2016/11/Hausner-article.pdf>

BEYOND THE OATH: Recommendations for Improving Civility by the CLA and the CJA
<https://caljudges.org/docs/PDF/California%20Civility%20Task%20Force%20Report%2009.10.21.pdf>

A General Comparison of Mandatory Settlement Conferences Versus Mediation by Michael Balmages, Esq.
<https://www.virtualonlineeditions.com/publication/?m=15276&i=778052&p=46&ver=html5>

Pay Now or Pay Later: A Mediation Story By Michael Balmages, Esq.
<https://www.adrservices.com/wp-content/uploads/2017/10/Pay-Now-or-Pay-Later-OC-Lawyer.pdf>

Puffing in Negotiations by Standing Committee On Professional Responsibility And Conduct Formal Opinion No. 2015-194
[https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2015-194%20\(12-0007\)%20Puffing%20in%20Negotiations%20FINAL%2012-29-15.pdf](https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2015-194%20(12-0007)%20Puffing%20in%20Negotiations%20FINAL%2012-29-15.pdf)

California Judges Association
<https://caljudges.org/civility.asp>

State Bar Public Comment
<https://www.calbar.ca.gov/about-us/our-mission/protecting-the-public/public-comment>

Proposed Amendments

- [Re. Incivility](#)
- [Re. Annual Civility Pledge](#)
- [Re. MCLE](#)