

**ADREvolution**

ADR Services, Inc. 4th Annual MCLE Day  
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# LEGAL ETHICS IN AN EVOLVING LANDSCAPE

Carmen Alberio, Esq.

Ed Weiss, Esq.

Chris White, Esq.



# Speakers



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**Carmen Alberio, Esq.**



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**Ed Weiss, Esq.**



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**Chris White, Esq.**

# Agenda

- 1 Civility in Our Current Climate
- 2 New Reporting Requirements
- 3 Confidentiality in Mediation
- 4 Diligence & competence
- 5 Technology in an Evolving World



# Civility

Why Does It Matter?



“As an officer of the court, I will strive to conduct myself at all times **with dignity, courtesy and integrity.**”

In 2014, the California Supreme Court—at the recommendation of the State Bar of California Board of Trustees—took a significant step aimed at improving civility among California lawyers. It adopted what is now Rule 9.7 of the California Rules of Court, adding new language to the attorney oath of admission.

# ABOTA

## Professional Standards

### Civility Matters

- Principles of Civility, Integrity, and Professionalism

### Code of Professionalism

- Includes promises to “Always remember that the practice of law is first and foremost a profession.”

***“Always remember that my word is my bond...”***

# Other Professional Standards



## OCBA Civility Guidelines

- Counsel shall show civility to other counsel and self-represented litigants.
- Counsel shall show civility during discovery.
- Counsel shall show civility to the courts.

[https://www.ocbar.org/Portals/0/pdf/docs/civility\\_guidelines.pdf](https://www.ocbar.org/Portals/0/pdf/docs/civility_guidelines.pdf)



## LACBA Civility guidelines

“I will commit to communicate my ideas and points of view clearly, and allow others to do the same without interruption. I pledge to be able to disagree without being disagreeable.”

[https://www.ocbar.org/Portals/0/pdf/docs/civility\\_guidelines.pdf](https://www.ocbar.org/Portals/0/pdf/docs/civility_guidelines.pdf)

# Learn to Disagree and Argue with Others

“An Ancient Solution to Our Current Crisis of Disconnection”  
John Bove, New York Times, Nov. 27, 2023

<https://www.nytimes.com/2023/11/27/opinion/disconnection-polarization-speech.html>



# Why Civility is the Right Choice



It is a professional requirement— You took an Oath, Professional rules of conduct, officer of the court



It is good for your client— saves time and money— less conflict over case "issues" generally



Making civility a fundamental part of your practice is a strength not a weakness— strength under control.



Makes mediations more successful generally.



Society in general losing the ability to have respectful discussions in which folks may disagree about something— examples— social media, cable news, politics etc... helps combat this corrosive trend and helps protect the importance and integrity of the court system judicial branch of government

# Is Court Etiquette Lost in a Post-Covid World?



## Experience

Less court experience because of COVID closures



## Mentorship

Remote work, less opportunity for mentorship, less rapport



## Communication

Communication tools like text & email encourage courser or rougher communication without immediate consequence



**Rise of incivility in court**

# Reporting Requirements Rule 8.3

The “Snitch” Rule



## RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(Rule Approved by the Supreme Court, Effective August 1, 2023)

- (a) A lawyer shall, without undue delay, inform the State Bar, or a tribunal\* with jurisdiction to investigate or act upon such misconduct, when the lawyer knows\* of credible evidence that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud,\* deceit, or reckless or intentional misrepresentation or misappropriation of funds or property that raises a substantial\* question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.
- (b) Except as required by paragraph (a), a lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.
- (c) For purposes of this rule, "criminal act" as used in paragraph (a) excludes conduct that would be a criminal act in another state, United States territory, or foreign jurisdiction, but would not be a criminal act in California.
- (d) This rule does not require or authorize disclosure of information gained by a lawyer while participating in a substance use or mental health program, or require disclosure of information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.8.2; mediation confidentiality; the lawyer client privilege; other applicable privileges; or by other rules or laws, including information that is confidential under Business and Professions Code section 6234.

# 8.3 Summarized

- **Took effect: August 1, 2023**
- **Requires attorneys, under appropriate circumstances, to report certain criminal or dishonest conduct of or misappropriation of funds by other attorneys to the State Bar**

# What does the Rule require?

## ● Inform

Inform the State Bar, or a tribunal with jurisdiction to investigate or act on misconduct

## ● When?

When the lawyer knows of “credible evidence” that another lawyer has either “committed a criminal act” or 1. has engaged in “conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property” and 2. the act or conduct has raised a substantial question as to the lawyer’s honesty, trustworthiness, or fitness in other respects.”



Requirements



Exceptions?  
YES!

# Exceptions

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Subsection (d) explicitly states that it “does not require or authorize disclosure of:

- Information protected by mediation confidentiality.



# Exceptions

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Subsection (d) also does not require disclosure of:

- Information Protected from disclosure by the attorney client privilege



# Exceptions

Subsection (d) provides, in part, the rule does not authorize or require disclosure of... information protected from disclosure by Business & Professions Code Section 6068(e) (“It is the duty of an attorney to ...maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, or his or her client.”)

# Exceptions

Also, Rule 8.3 does not require or authorize disclosure of:

- Information subject to other applicable privileges
- Information protected by California Rules of Professional Conduct 1.6 (confidential information of a client) and 1.8.2 (use of a current client's information); and
- Information gained by a lawyer while participating in a substance or mental health program; and
- Information "protected" by ...other rules or laws, including information that is confidential under Business & Professions Code section 6234 (which protects "information provided to or obtained by the Attorney Diversion Assistance Program")

# Are the reports to the State Bar or other tribunal confidential?

The first sentence of Comment 10 to Rule 8.3 states that:

**“Communications to the State Bar relating to lawyer misconduct are “privileged, and no lawsuit predicated thereon may be instituted against any person.”**

(Bus & Prof Code section 6094)



# Anything else to provide an assurance of confidentiality of a report under the Snitch Rule?

**The Rule does not otherwise or specifically address the confidentiality of reports. However, the FAQ's on the State Bar website state: "State Bar investigations and inquires , are by statute, confidential. The complaint becomes public when the disciplinary charges are filed in against an attorney in State Bar Court and will become public, with notice on the attorney's online profile. (See also People v. Hoy (2020 8 Cal.5th 892, 956 [noting that State Bar investigations are confidential until charges are filed]; Bus & Prof. Code Section 6086 1, subd. (b).)**

# Penalties for False Reports

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The second sentence in Comment 10: Lawyers may be subject to criminal penalties for false and malicious reports or be subject to discipline or other penalties by offering false statements to a tribunal.

A close-up photograph of a document with a dark, textured surface. The word "PENALTY" is stamped in white, capital letters. A gavel is visible in the upper right corner, resting on the document. The background is a wooden surface.

PENALTY

Retroactive Application?

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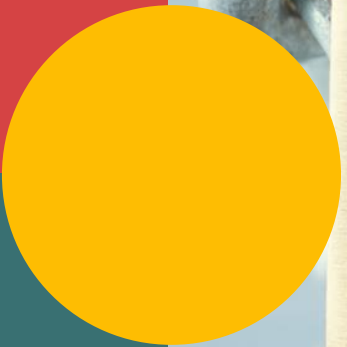
# Silent.

## What does this mean for mediation?

- **Penalties for malicious reports**
- **The Rule against threatening criminal, administrative or disciplinary action (Rule of Professional Conduct 5-100) as well as prohibitions against extortion also apply**
- **How does the new rule impact civility – general civility and rules requiring civility?**
- **Concern the rule could lead to or we could see vindictive litigation games.**
- **Mediation confidentiality still applies.**

# Confidentiality in Mediation

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# Why Confidentiality is important in the Mediation Process:

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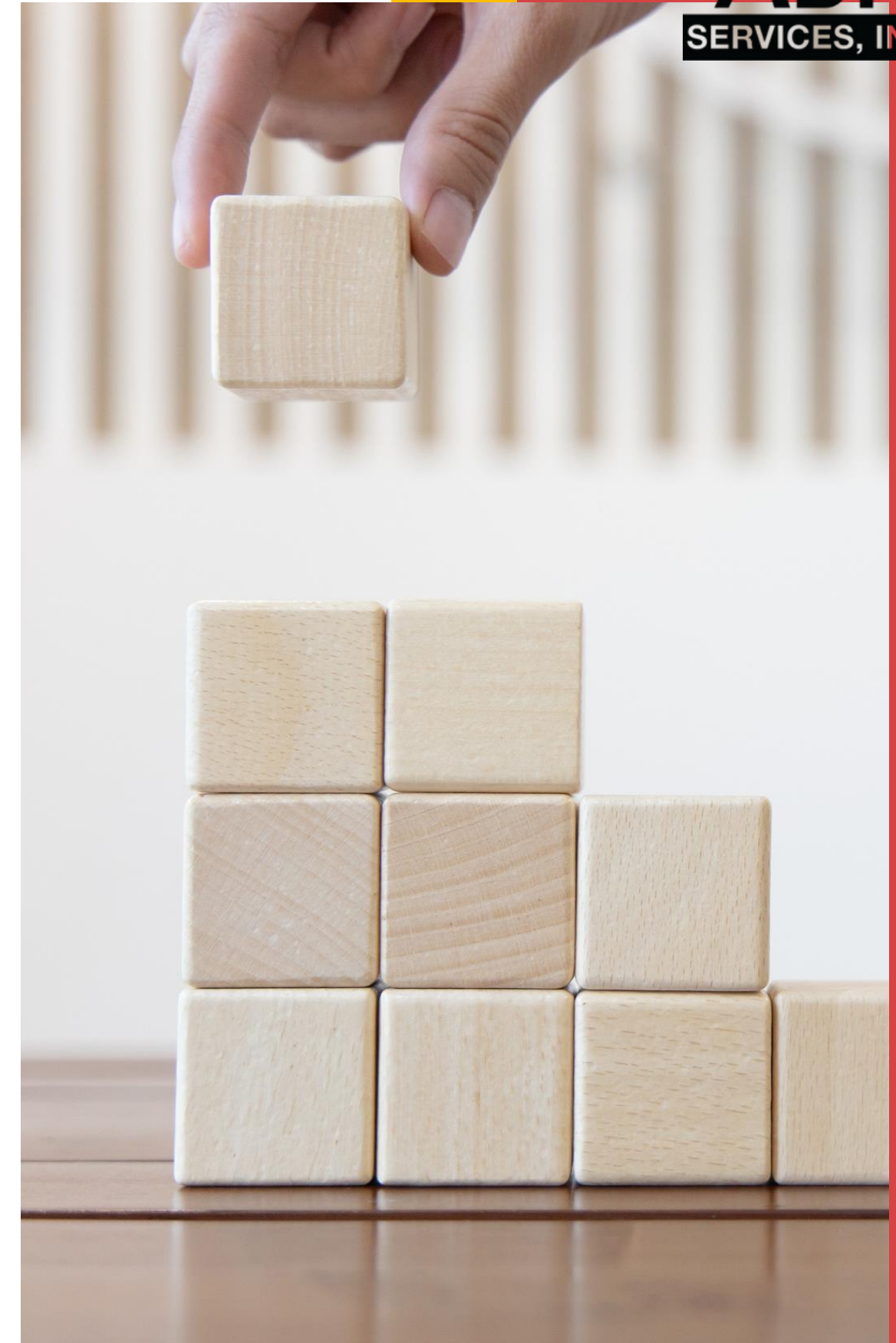
**The Rules of Evidence and Case Law require it.**

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**The Parties Rely on It.**

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**It promotes settlement of cases.**



# Statutes and Case Law

# Check the Statutes!



## Federal Rules of Evidence, Rule 408

Evidence of compromise offers and negotiations are not admissible to prove validity or invalidity of a claim or to impeach prior inconsistent statements in a civil proceeding.

But such evidence may be admissible for another purpose such as proving bias or prejudice of a witness, negating a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.

## California Evidence Code Sections 703.5 and 1115-1129

Section 1119 ( c ) says: “ All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.”

The rule applies to the mediators, the parties and the attorneys.

The policy is designed to encourage people to share information and compromise so as to resolve disputes by making their communications inadmissible. People need to know that their efforts to compromise will not be disclosed and will not be used against them should the case not settle.

Mandatory Settlement Conferences are different. They are governed by rules of court

# Check the Case:

## Cassel v. Superior Court Case

(2011) 51 Cal 4th 113, 244 P. 3d 1080, 119 Cal Rptr 3d 437

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In a separate action for legal malpractice Michael Cassel tried to have communications he had with his attorneys during the mediation of another case admitted in the malpractice action. The Supreme Court ruled against admission and said: “ All communication, negotiations, or settlement discussions by and between the participants in the course of the mediation ...shall remain confidential. We have repeatedly said that these confidential provisions are clear and absolute. Except in rare circumstances, they must be strictly applied...”

Note that on September 11, 2018: SB 954 passed- it revised Evidence Code section 1122 and added section 1129 which requires attorneys to get written acknowledgement from their clients prior to mediation that mediation communications are confidential and inadmissible at trial

## Statutory Exceptions Communications or Writing:

**California Evidence Code Section 1119 makes written or oral communications during the mediation process inadmissible but Section 1122 allows a communication or a writing as defined in Section 250 to be admissible if any of the following conditions are satisfied:**

- (1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with [Section 1118](#), to disclosure of the communication, document, or writing.
  - (2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with [Section 1118](#), to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.
  - (3) The communication, document, or writing is related to an attorney's compliance with the requirements described in [Section 1129](#) and does not disclose anything said or done or any admission made in the course of the mediation, in which case the communication, document, or writing may be used in an attorney disciplinary proceeding to determine whether the attorney has complied with [Section 1129](#).
- (b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in [subdivision \(b\) of Section 1115](#).

## Statutory Exceptions

# Settlement Agreements:

**California Evidence Code 1123 makes settlement agreements inadmissible unless any of the following conditions are met:**

- The agreement provides that it is admissible or subject to disclosure, or words to that effect.
- The agreement provides that it is enforceable or binding or words to that effect.
- All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.
- The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

# When is the Mediation Over?

(Impacts Confidentiality)

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## Agreement

When there's an executed written agreement or an oral agreement is reached in accordance with Calif. Evid. Code Sec 1118

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## 10 Days

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

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## Termination

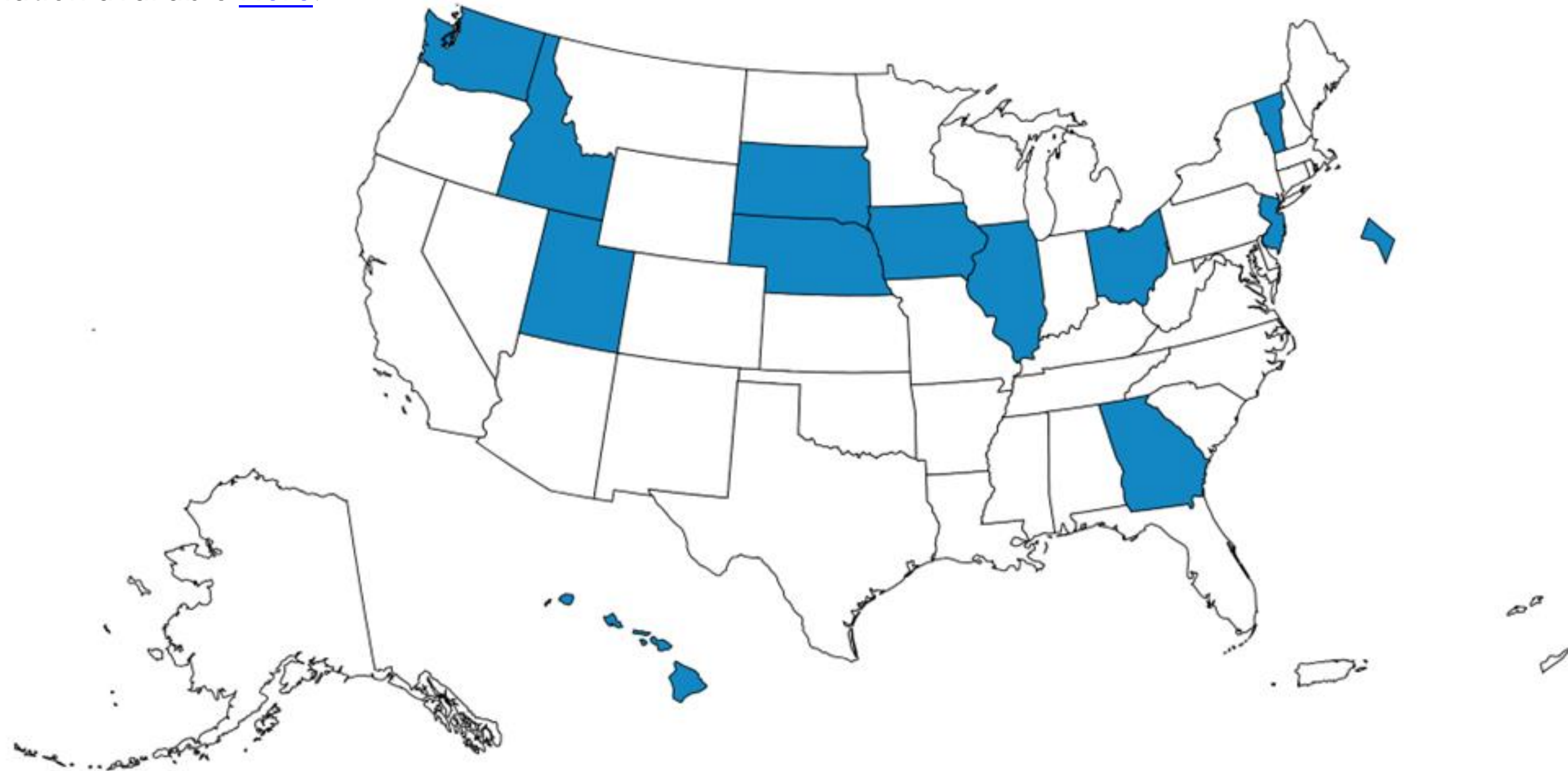
The mediator or a party provide a writing that the mediation is terminated consistent with Calif. Evid. Code Section 1121



# Uniform Mediation Act

13 jurisdictions have adopted the Uniform Mediation Act – DC, GA, HI, ID, IL, IA, NE, NJ, OH, SD, UT, VT, and WA. As stated by the Uniform Law Commission, The Uniform Mediation Act establishes a confidentiality privilege for mediators and participants that prohibits what is said during mediation from being used in later legal proceedings.

More information available [Here](#).





# Uniform Mediation Act

## Exceptions to Confidentiality

<b>Agreement signed by all the parties</b>	<b>Plans to conceal an ongoing crime</b>	<b>Evidence is not otherwise available</b>
<b>Documents required to be kept open to the public</b>	<b>Information needed by mediator to respond to claims made against him</b>	<b>Need for evidence outweighs need to keep information confidential</b>
<b>Threats to commit bodily injury or violence</b>	<b>Situations involving child abuse or neglect</b>	<b>Evidence offered in court involving felony or litigation over the contract reached in mediation</b>

# California Assembly Bill 924 is pending

## Overview

This bill, introduced in 2023 and tabled, would require a dispute resolution neutral, including a mediator and arbitrator, as well as an alternative dispute resolution provider to report to the State Bar of California the receipt of any complaint that the dispute resolution neutral violated a provision of any applicable rule of conduct, as provided in the ABA's Model Standards of Conduct for Mediators, Family Mediation Standards, Code of Ethics for Commercial Arbitrators or Judicial Council Ethical Rules.

## Concerns

The proposed legislation raises some concerns about the negative impact it could have on the mediation process which has helped with the early resolution of cases and helped an overburdened Judicial System. Note that current law already protects the ability of parties to report suspected or alleged misconduct to the State Bar.



Remember that all communications, negotiations, or settlement discussions by and between Participants in the course of a mediation or a mediation consultation shall remain confidential. Evidence Code 1119(c)



Remember that Evidence Code 1129 requires attorneys to get written acknowledgment from their clients prior to mediation that the mediation communications are confidential and inadmissible at trial.



Confidentiality in mediation Promotes settlement of case And reduces the caseload of the Already burdened court system



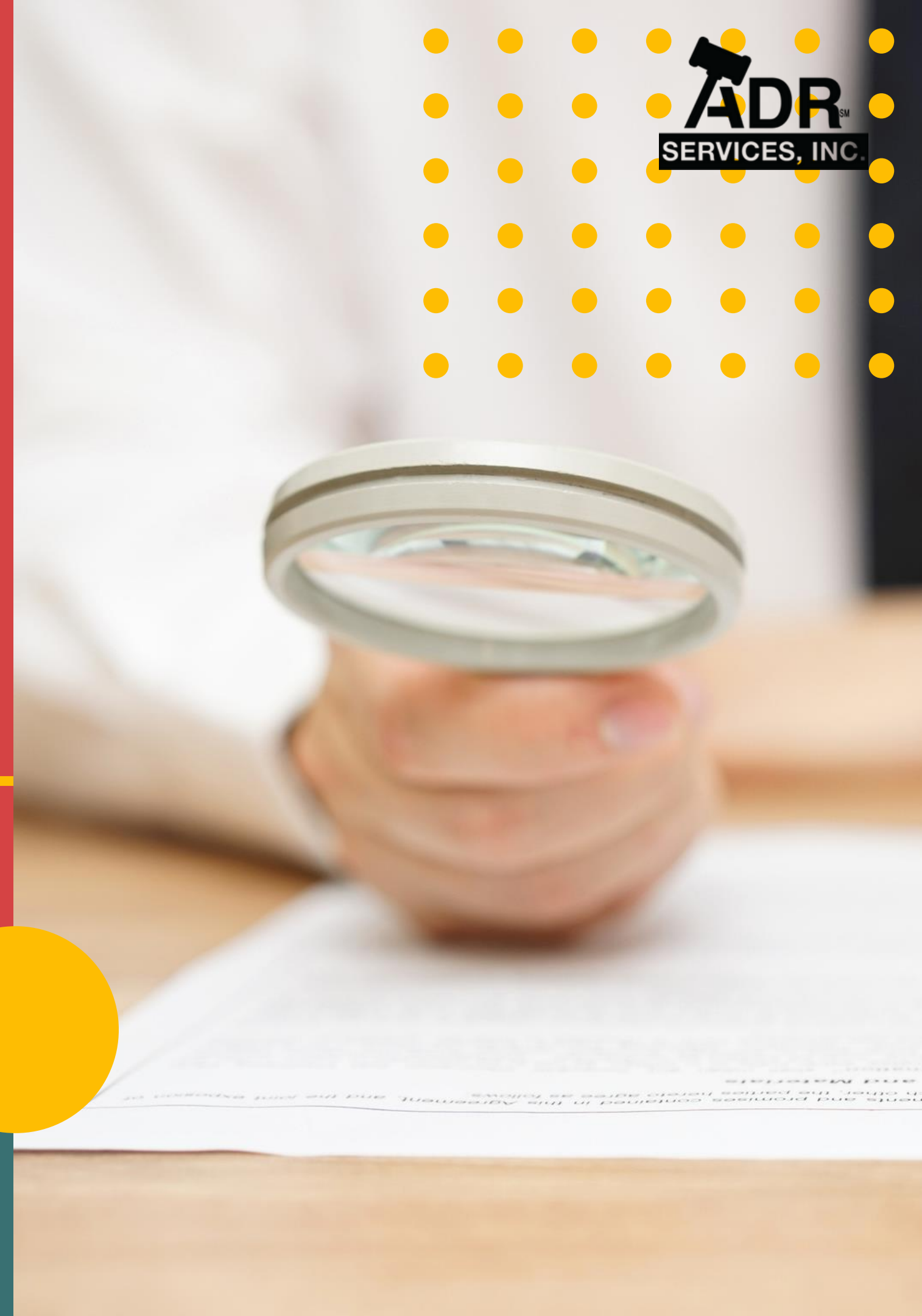
Discuss with your client the importance of keeping information confidential and not posting such information on social media.



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

# Requirement for Attorney Diligence in Mediation

Diligence & Competence



# California Rule of Professional Conduct 1.3

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“A lawyer shall act with reasonable diligence and promptness in representing a client.”

(See also ABA Model Rule 1.3)



# California Rule of Court 1.3 (a)

“A lawyer shall not intentionally, repeatedly, recklessly or within gross negligence fail to act with reasonable diligence in representing a client.”



# What does it mean to be diligent and prompt? More particularly, what does that mean in mediation?



- Prepared for mediation?: what does it mean to be prepared?
- What does it mean to misuse mediation?
- When does practicing outside one's area of expertise or in an unfamiliar area of the law a violation of the rules requiring diligence?



# California Rule of Professional Conduct 1.3(b)

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For purposes of this rule, “reasonable diligence” shall mean that a lawyer act with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.”





# Hypothetical & Considerations in Mediation:

01

How much time before a mediation should a lawyer file a brief of statement?

03

How much time and expense? When is the time and effort put into the brief and mediation preparation sufficient?

02

Knowledge of the facts?

04

Calculation of damages?

05

How persuasive are you able or prepared to be? When is not being prepared enough for a mediation a violation of the rules requiring “reasonable diligence?”

# When Is Not Being Properly Prepared for Mediation a violation of the Rules of Professional Conduct?

**Rule 3.2 of the Rules of Professional Conduct: “In representing a client, a lawyer shall not use means that have no substantial\* purpose other than to delay or prolong the proceeding or to cause needless expense.” See also Bus. & Prof. Code section 6128(b)**

Rule 3.2 Delay of Litigation

# Example

**Going to a voluntary mediation without a good effort to settle to delay or drive up the cost.**

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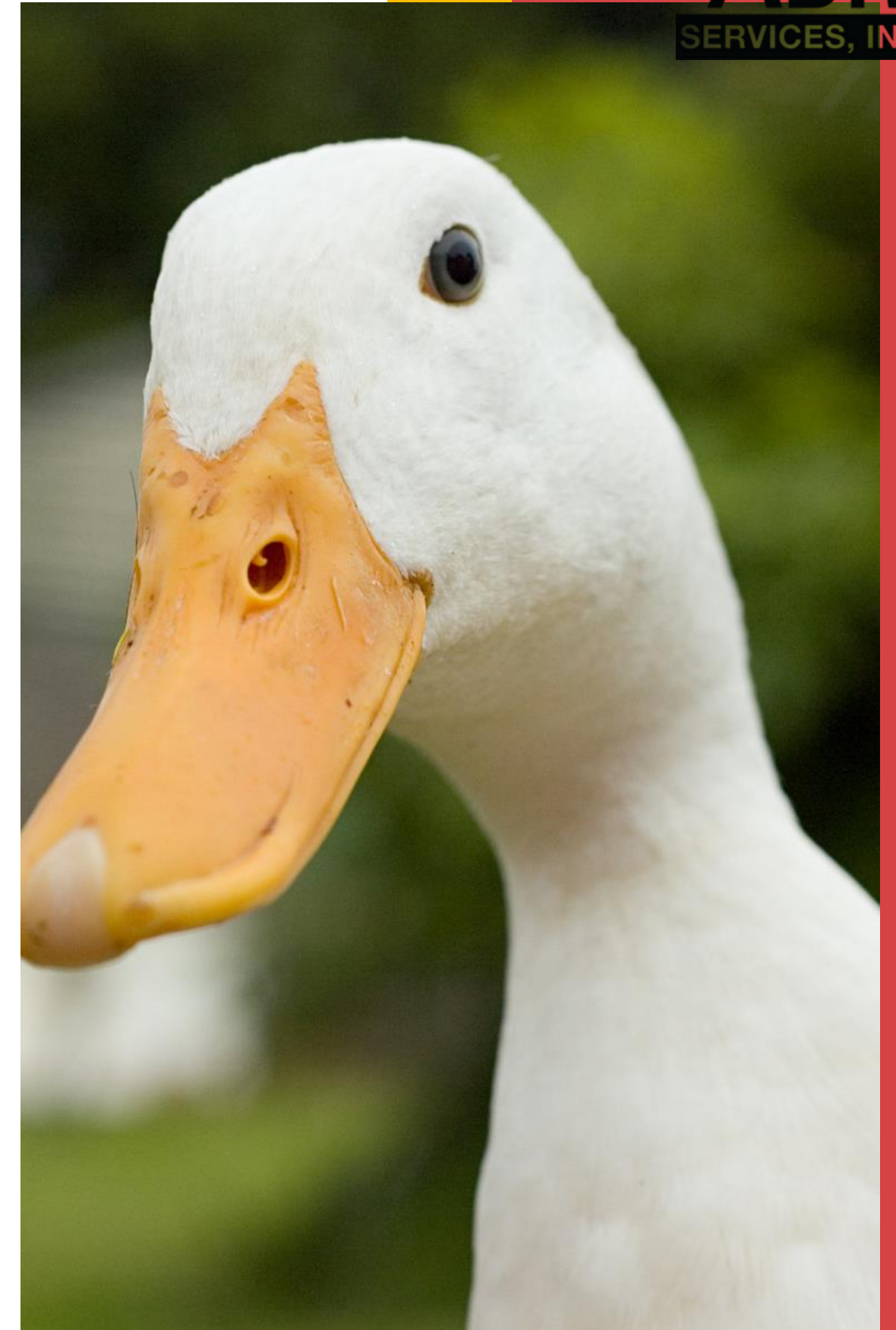
Wasting Client's Time & Wasting (not using wisely) client's money

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Missing an opportunity to settle -- best to feed the ducks while they are quacking

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Ultimately not best serving your client's interests

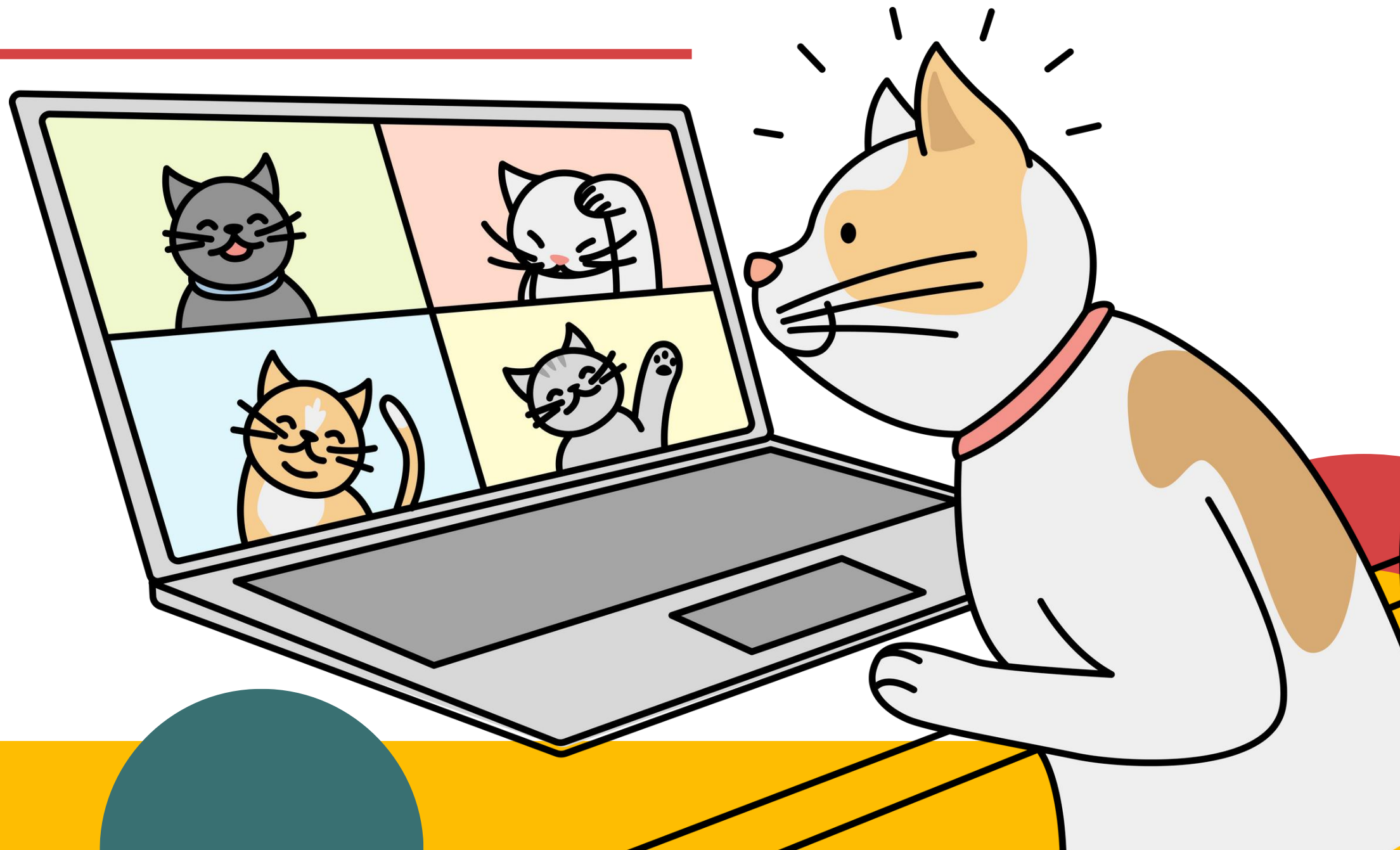


# Technology

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# I am not a Cat!



# Rule of Professional Conduct 1.1

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Comment:

[1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with **relevant technology**.



# Remote Appearances

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Fraught with potential pitfalls

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Cannot represent your client effectively

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A level of professional conduct that is part of the court system – here to stay

**Don't fight it. learn it.**





# Zoom mediation best practices & suggestions

Tips from mediators

<https://www.adrservices.com/zoom/>

# Theoretical Framework

- **“ Myspace” story**
  - What is it I don’t know?**
  - Client testifying under oath**
  - Consider confidentiality**
- **We didn’t learn this in law school...**

Closing Thoughts

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# Questions?

# Thank You



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# Rule of Professional Conduct 5-100 Threatening Criminal, Administrative, or Disciplinary Charges

(A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(B) As used in paragraph (A) of this rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

## **Discussion:**

Rule 5-100 is not intended to apply to a member's threatening to initiate contempt proceedings against a party for a failure to comply with a court order.

Paragraph (B) is intended to exempt the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

For purposes of paragraph (C), the definition of "civil dispute" makes clear that the rule is applicable prior to the formal filing of a civil action.

# ABA Model Rule 1.3: Diligence

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## *Client-Lawyer Relationship*

A lawyer shall act with reasonable diligence and promptness in representing a client.

# 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;\* 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.

## Comments

[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. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person\* that the lawyer knows\* is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this rule, lawyers remain bound by Business and Professions Code section 6106 and rule 8.4.

[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, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.\*

[3] Under rule 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows\* is criminal or fraudulent.\* See rule 1.4(a)(4) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud\* by withdrawing from the representation in compliance with rule 1.16.

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see rule 8.4, Comment [5].