



ADREvolution

ADR Services, Inc. 4th Annual MCLE Day

January 18, 2024

NAVIGATING ETHICAL WATERS

A DIVE INTO LEGAL ETHICS IN MEDIATION

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OUR SPEAKERS



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TODAY'S **AGENDA**

8.3 Reporting Requirement Rule

Mediation Confidentiality

Ethics in Mediation for Lawyers & Mediators

Procedural Fairness vs. Outcome Fairness

Competence



8.3

REPORTING REQUIREMENT RULE



BACKGROUND



Two attempts to pass since 2010



California Last State to Adopt
(Kentucky 2nd to last-in effect
1/1/1990)



Effective August 1, 2023

REASONS FOR IT

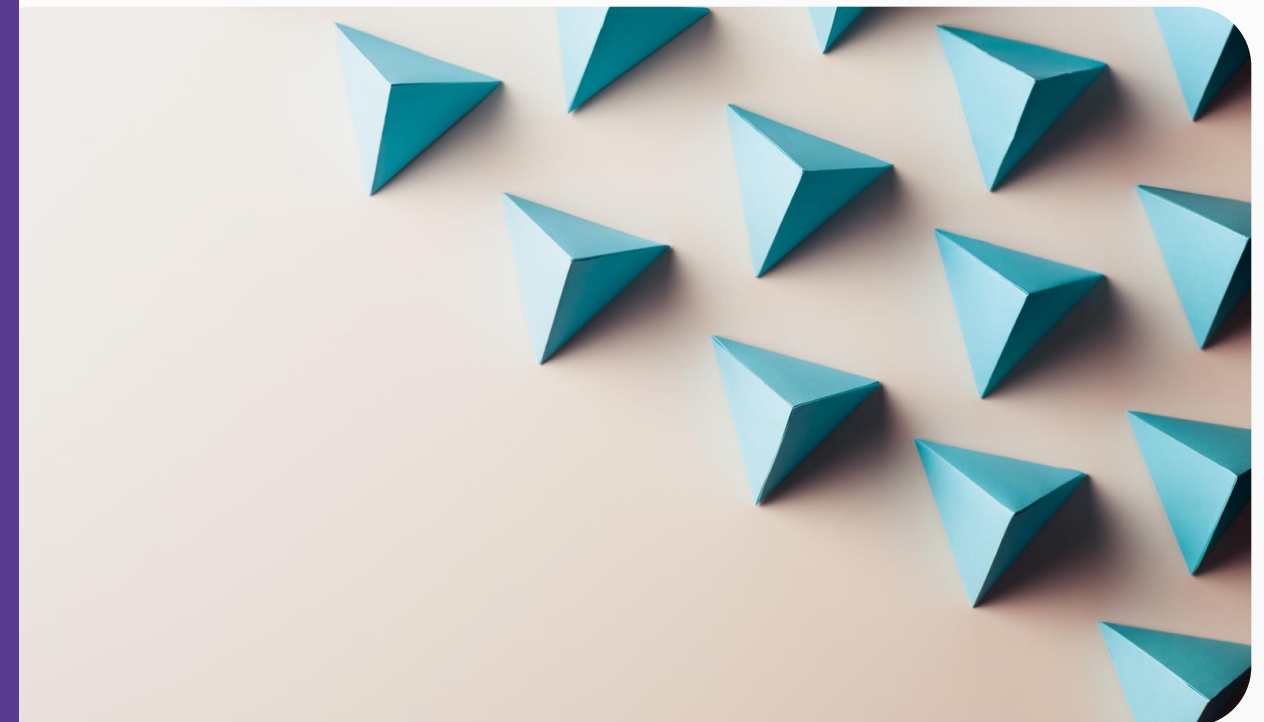
FROM CALIFORNIA

STATE BAR

The rule is important to maintain the integrity of the profession and protect public.

All other jurisdictions in the US have a version of rule 8.3.

The legislature is proposing SB 40 that would require attorneys to report other attorneys who they know participated in or planned to participate in acts of treason.****



REPORTING OBLIGATIONS



- An attorney **must** report certain types of misconduct by other attorneys;
- An attorney **may** report other types of misconduct by other attorneys; and
- An attorney is **prohibited** from reporting certain privileged and confidential information.

MANDATORY REPORTING OBLIGATIONS

Rule 8.3 **requires** attorneys to report the following types of misconduct by other attorneys:

- Criminal Acts
- Conduct Involving:
 - Dishonesty
 - Fraud
 - Deceit
 - Misrepresentation (reckless or intentional)
 - Misappropriation of Funds or Property

If the misconduct raises a substantial question as to the attorney's honesty, trustworthiness, or fitness as an attorney in other respects.



HYPOTHETICAL

- Anne and Richard are partners in a law firm. They have an IOLTA account which holds the funds of various clients.
- While performing the monthly reconciliation for the firm's IOLTA account, Anne sees a deposit that did not relate to any of their cases. She notices that the deposit was equal to Richard's salary. Anne also sees cancelled checks, signed by Richard, which paid his personal expenses, such as his car payment and his home mortgage. In total, these paid expenses exceeded his deposit by \$50.
- When Anne confronts Richard about using the client trust account in that manner, he explains that he could not deposit his paycheck into his personal account because his wife has access to that, and she has a severe gambling problem. The only way he can ensure that his family's bills get paid is if he uses the protections of the IOLTA account to hold his money. He also assures Anne that he knew he had used \$50 more than he had deposited, but that his next paycheck would be deposited into the trust account to cover that shortfall.



AUTHORITIES

RULE 8.3(a)

Reporting Professional Misconduct

- Knows of credible evidence
- Misappropriation of Funds

RULE 1.15

Safekeeping Funds and Property of Clients
and Other Persons

6106

Business and Professions Code section 6106
Moral Turpitude, Dishonesty or Corruption
Irrespective of Criminal Conviction



CRIMINAL ACT RULE 8.4 (B) USES “CRIMINAL ACT” IN A SIMILAR MANNER.

Criminal conduct that is subject to discipline, and therefore should be reported under rule 8.3:

- Crimes establishing moral turpitude per se.
- Crimes involving mishandling of entrusted funds, such as an employer's failure to pay payroll taxes and unemployment insurance contributions.
- Repeated criminal conduct, such as multiple drunk driving convictions.
- Substance abuse accompanied by harm or potential harm to others, even if only in the attorney's personal life.
- Violent crimes.
- Where the attorney's behavior evidences lack of respect for the legal system and an alcohol abuse problem.



SUBSTANTIAL QUESTION

“Substantial”

Defined in rule 1.0.1(I): “material matter of clear and weighty importance”



Oregon State Bar Formal Opinion No. 2005-95:

“Merely technical violations of the conflict of interest rules, for example, would not qualify, whereas destruction of evidence under subpoena, suborning perjury, or self dealing with trust funds assuredly would.”

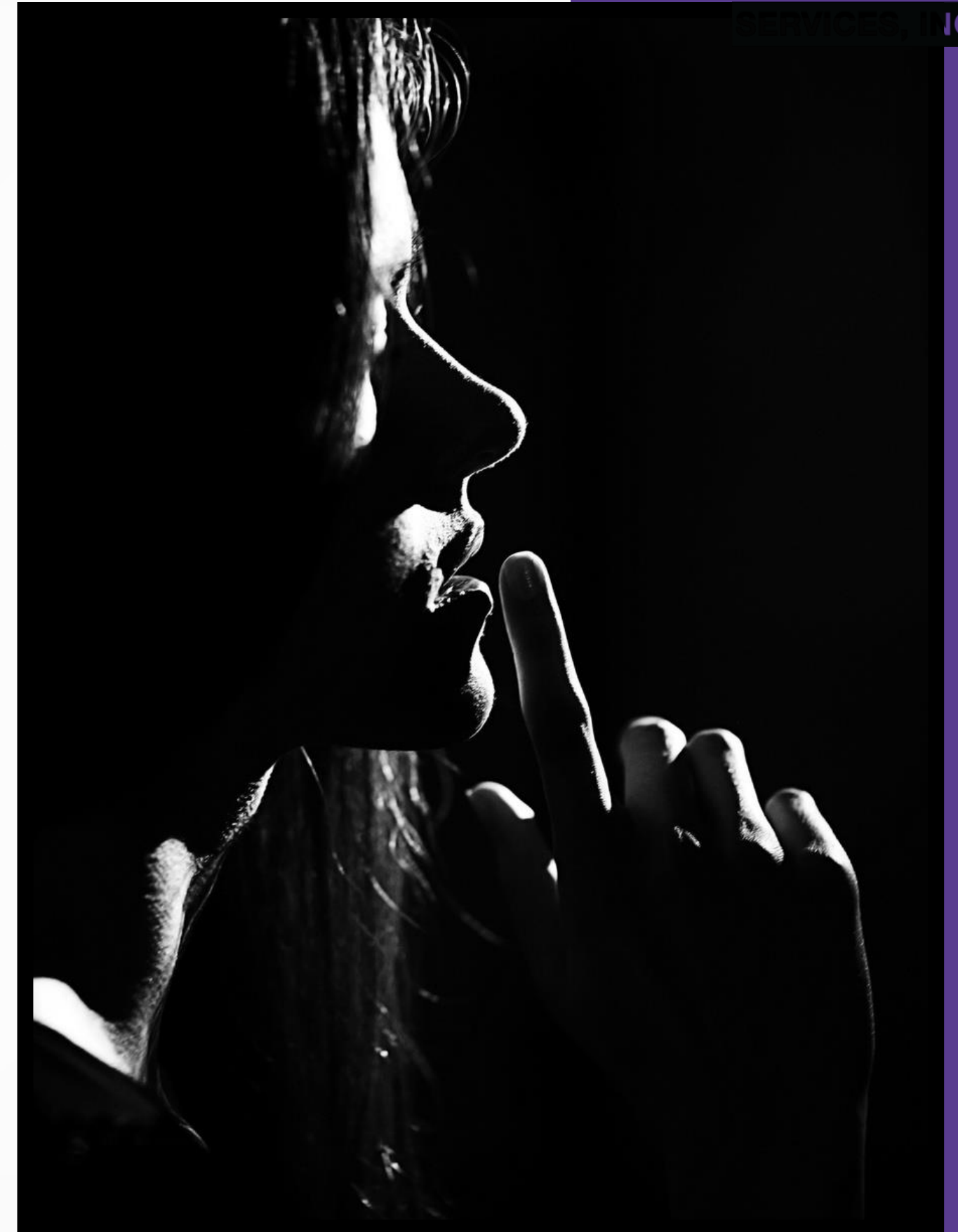
LIMITS ON MANDATORY REPORTING

Privileged & Confidential Info	Consultations with Other Lawyers	Ethics Hotline or Similar Service	Substance Use/ Mental Health Program
<ul style="list-style-type: none"> • Bus. & Prof. Code, § 6068(e) • Rule 1.6 • Rule 1.8.2 • Mediation confidentiality • Attorney-client privilege • Other applicable privileges • Other rules or laws 	<p>The duty to report does not apply to:</p> <ul style="list-style-type: none"> • a lawyer who is consulted about or retained to represent a lawyer whose conduct is in question • a lawyer consulted in a professional capacity by another lawyer on whether there is a duty to report a third-party lawyer 	<p>The duty to report does not apply if:</p> <ul style="list-style-type: none"> • the information is gained by a lawyer while participating as a member of a state or local bar association ethics hotline or similar service 	<p>The duty to report does not apply if:</p> <ul style="list-style-type: none"> • Information provided as part of the Attorney Diversion and Assistance Program (LAP) • Information learned while participating in a substance use or mental health program



HYPOTHETICAL

- Todd hires Sandra to consult her for advice about his ethical duties under rule 8.3.
- He explains to Sandra that he knows an attorney named Frank, from his group facilitated sessions for treatment of alcohol abuse that he attends through the State Bar's Lawyer Assistance Program.
- During group, Frank confessed to Todd and their counselor, that Frank has been convicted of DUI 3 times, and that he was arrested for DUI again, recently.



AUTHORITIES

RULE 8.3(d)

Rule 8.3(d) and Comment [5] (participating in substance use program), and Comment [2] (consulting attorney)

DUI

Multiple convictions for DUI raises substantial questions as to fitness to practice.

- In re Carr (1988) 46 Cal.3d 1089

CONF.

Client Confidentiality

- Rule 1.6 Confidential Information of a Client
- Bus. & Prof. Code, § 6068, subd. (e)



AN ATTORNEY MAY REPORT ANY OTHER VIOLATION OF THE Rules of Professional Conduct and or the State Bar Act.



CONSIDER SERIOUSNESS OF THE OTHER LAWYER'S OFFENSE AND POTENTIAL IMPACT ON PUBLIC AND THE PROFESSION.



WHEN TO REPORT

The duty of mandatory reporting arises when the lawyer ***knows of credible evidence*** that another lawyer has engaged in the conduct.



The attorney must report the conduct ***without undue delay.***



KNOWS OF CREDIBLE EVIDENCE

“Knows” is defined by rule 1.0.1(f)

- Actual knowledge of the fact in question
- Knowledge may be inferred from the circumstances

Credible evidence—issue of fact

- Eyewitness descriptions, business records, or admissions by an attorney

OTHER CONSIDERATIONS

RETROACTIVITY

What if the attorney's conduct occurred before rule 8.3 became effective?



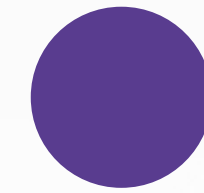
- A lawyer's duty to report another lawyer began on the rule's effective date: August 1, 2023.
- If a lawyer knows of credible evidence of another lawyer's conduct that occurred prior to August 1, 2023, the lawyer is obligated to report that past conduct because the lawyer's knowledge exists on or after the effective date of rule 8.3.



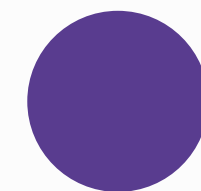
OTHER CONSIDERATIONS

MULTIPLE REPORTS

What if I know the attorney's conduct was already reported to the State Bar?



- In re Himmel* (1988) 125 Ill.2d 519, 538
- Attorney sought to excuse his failure to report by showing that his client had reported other attorney's conduct already.



- Receiving multiple complaints of the same misconduct is useful to the State Bar because it provides corroborating or additional evidence.



WITHOUT UNDUE DELAY

Rule 8.3, Comment [3]

As soon as the lawyer reasonably believes that reporting will not cause material damage to the interests of the lawyer's clients.

- Also, consider timing in light of other ethical obligations:
- • Rule 1.4 Communication with Clients
- • Rule 1.7(b) Conflict of Interest (material limitation conflict)
- • Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
- • Rule 5.2 Responsibilities of a Subordinate Lawyer



WHERE TO REPORT

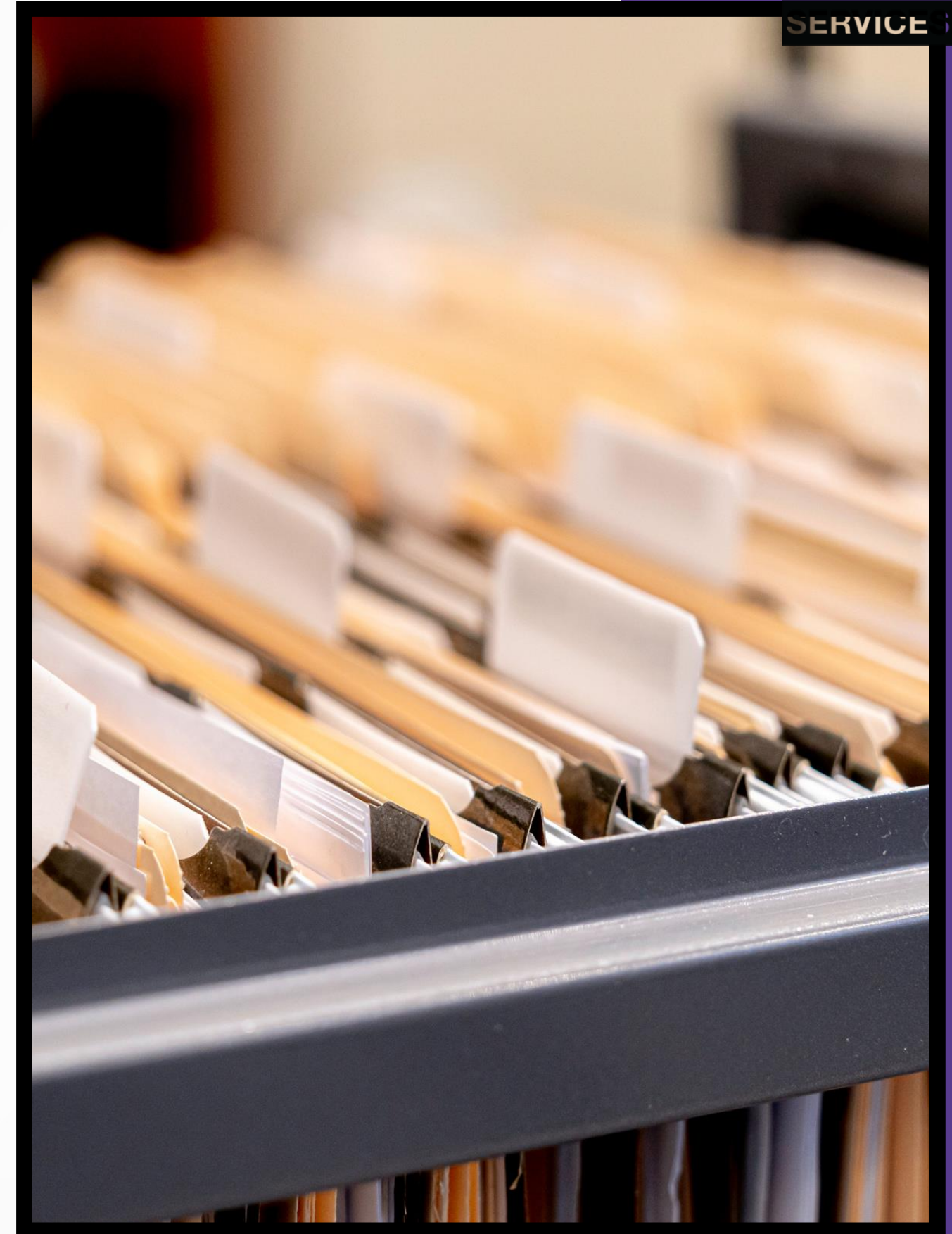
State Bar

- Use online complaint form



Tribunal – Rule 8.3, Comment [6]

- If litigation pending, and
- Tribunal has jurisdiction to investigate or act upon the misconduct.
 - Cannot be a private arbitrator
 - Must be a tribunal as defined in rule 1.0.1(m)



ABUSE OF RULE 8.3

Attorneys are still
prohibited from

- Threatening to file a State Bar complaint for the purpose of gaining an advantage in litigation (rule 3.10).
- Making a false or malicious report to the State Bar (Bus. & Prof. Code, § 6043.5) or offering false testimony to a tribunal (rule 3.3 and Bus. & Prof. Code, § 6068, subd. (d)).
- Agreeing or seeking an agreement to prevent reporting attorney misconduct (rule 5.6(b) and Bus. & Prof. Code, § 6090.5).



SUMMARY OF KEY POINTS

Rule 8.3 imposes mandatory reporting requirements when one attorney ***knows of credible evidence*** of certain misconduct by another attorney.

Reports shall be made to the State Bar or a tribunal with authority to investigate or act upon the misconduct.

Conduct subject to mandatory reporting includes:

- A Criminal Act
- Conduct Involving
- Dishonesty
- Fraud
- Deceit
- Reckless or Intentional Misrepresentation
- Misappropriation of Funds or Property

Reporting is mandatory when any of the conduct raises a ***substantial question*** as to the attorney's:

- Honesty;
- Trustworthiness; or
- Fitness as a lawyer in other respects.

Reports shall be made without undue delay, subject to other applicable Rules of Professional Conduct and the State Bar Act.

MEDIATION CONFIDENTIALITY



PURPOSE

To encourage the use of mediation by promoting a candid and informal exchange regarding events in the past. . . . This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.

VARIATIONS IN APPLICATION

ADMISSIBILITY AS EVIDENCE IN COURT

What is inadmissible? (**Evidence Code §1119**)

- All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.
- No evidence of anything said or any admission made 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 evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- No 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 noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.



FEDERAL RULE OF EVIDENCE

408

Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1)

Furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2)

Conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.



CONFIDENTIALITY DURING THE COURSE OF MEDIATION

Joint Sessions vs. Separate Caucuses



Different approaches to handling private information shared by the parties:

- All information shared is open to disclosure to all parties;
- Only information specifically designated by the parties may be disclosed to the other party; or
- Parties may designate the specific information that must NOT be shared with the other party



CALIFORNIA RULE OF COURT 3.854(D)

Confidentiality of separate communications; caucuses

If, after all the parties have agreed to participate in the mediation process and the mediator has agreed to mediate the case, a mediator speaks separately with one or more participants out of the presence of the other participants, the mediator must first discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants. Except as required by law, a mediator must not disclose information revealed in confidence during such separate communications unless authorized to do so by the participant or participants who revealed the information.

WHEN IS “THE COURSE OF MEDIATION OR A MEDIATION CONSULTATION” OVER?

(EV. CODE §1125)

Mediation ends when any one of the following conditions is satisfied:

<p>The parties execute a written settlement agreement that fully resolves the dispute.</p>	<p>An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.</p>	<p>The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121.</p>
<p>A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.</p>	<p>For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement. *** Some mediators ask the parties to waive this section so they can continue to follow up on a case that does not settle during the mediation session. ***</p> <ul style="list-style-type: none">• (b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:<ul style="list-style-type: none">◦ (1) The parties execute a written settlement agreement that partially resolves the dispute.◦ (2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.• (c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.	

CONFIDENTIALITY INVOLVING NON-PARTIES IN GENERAL

California Rule of Court 3.854(d)

A mediator must not use information that is acquired in confidence in the course of a mediation outside the mediation or for personal gain.

IMPORTANT CASE ADDRESSING THE EXTENT OF CONFIDENTIALITY

Cassel v. Superior Court, 51 Cal.4th 113 (2011)

The California Supreme Court ruled that mediation confidentiality applies to a different legal malpractice case brought by a client who sued his attorneys after the underlying case settled at mediation;

**** In 2018 California passed SB 954 which enacted Ev. Code §1129 requiring attorneys to get written acknowledgment from their clients prior to a mediation advising the client that communications during the mediation are confidential and inadmissible at trial. ****

THE UNIFORM MEDIATION ACT (“UMA”)

Many states have adopted the Confidentiality/Privilege terms of the UMA, which are similar to California’s Evidence Code

EXCEPTIONS TO MEDIATION CONFIDENTIALITY

(Ev. Code §1122)

(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter 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.

LIMITS TO INADMISSIBILITY/ CONFIDENTIALITY OF EVIDENCE OBTAINED DURING MEDIATION

- Criminal Proceedings
- May be admissible for impeachment in a California State Court
- **WARNING:** Information Discoverable? (Ev. Code §1120)
 - Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.



EXCEPTIONS TO CONFIDENTIALITY UNDER THE UMA

<p>An agreement evidenced by a record signed by all parties to the agreement;</p>	<p>Available to the public under the State’s open records act or made during a session of a mediation which is open, or is required by law to be open, to the public;</p>	<p>A threat or statement of a plan to inflict bodily injury or commit a crime of violence;</p>	<p>Intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity;</p>
<p>Sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;</p>	<p>Sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation;</p>	<p>Sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party;</p>	<p>Evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:</p> <ul style="list-style-type: none"> • A court proceeding involving a felony [or misdemeanor]; or • To prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

NOTE

This chapter does not apply to a settlement conference pursuant to Rule 3.1380 of the California Rules of Court.

ETHICS IN MEDIATION FOR LAWYERS & FOR MEDIATORS



REMOTE WORK-ATTORNEYS WHO WORK FROM HOME/MODIFIED OFFICES

ISSUES:

CONFIDENTIALITY

COMPETENCE

COMMUNICATION

SUPERVISION

The reality: smaller offices/shared work space-what happens to confidentiality

- Shared Space-issues with both calls (eavesdrop/overhear) and any documents/files (shared storage?)
- Technology Security-is your transmission of documents, motions, discovery responses secure? What about emails to/from clients-including clients providing discovery responses? Do your documents or documents from clients include PII-personally identifiable information and if so, do you have a duty to encrypt it?
- California amended Rule 1.1 re Duty of Competence to include duty of "technology competence" (March 22, 2021) ABA has adopted a standard that requires attorneys to take reasonable efforts re technological competence in e-discovery, social media, law practice management, virtual law offices and remote practice.
- **What about for Mediations and Mediators? Duty to ensure participants keeping confidential proceedings confidential, ie not mediating at Starbucks? What about other persons being in the space, exp home office, where information can be overheard?**

AFFECTS CREATION OF ATTORNEY CLIENT RELATIONSHIP

Essentially a communication issue—when do you need a disclaimer on communication, ie not legal advice, ie no attorney client relationship is created without a separate engagement

GOING INTO MEDIATION, KNOW:

<p>Your case /risks/ values</p>	<p>The injuries/ damages.</p>	<p>The medical bills and anticipated reductions (Howell numbers)</p>	<p>The plaintiff, pre- existing medical history, if any.</p>	<p>The defenses.</p>
<p>The law.</p>	<p>Your adversary</p>	<p>The settlement/ verdict range historically</p>	<p>Procedural issues/ conflicts where the mediator can be used to advance the case if the case isn't ready to settle</p>	<p>Use a mediator you trust</p>

NEW 2025 MCLE REQUIREMENT IN CIVILITY

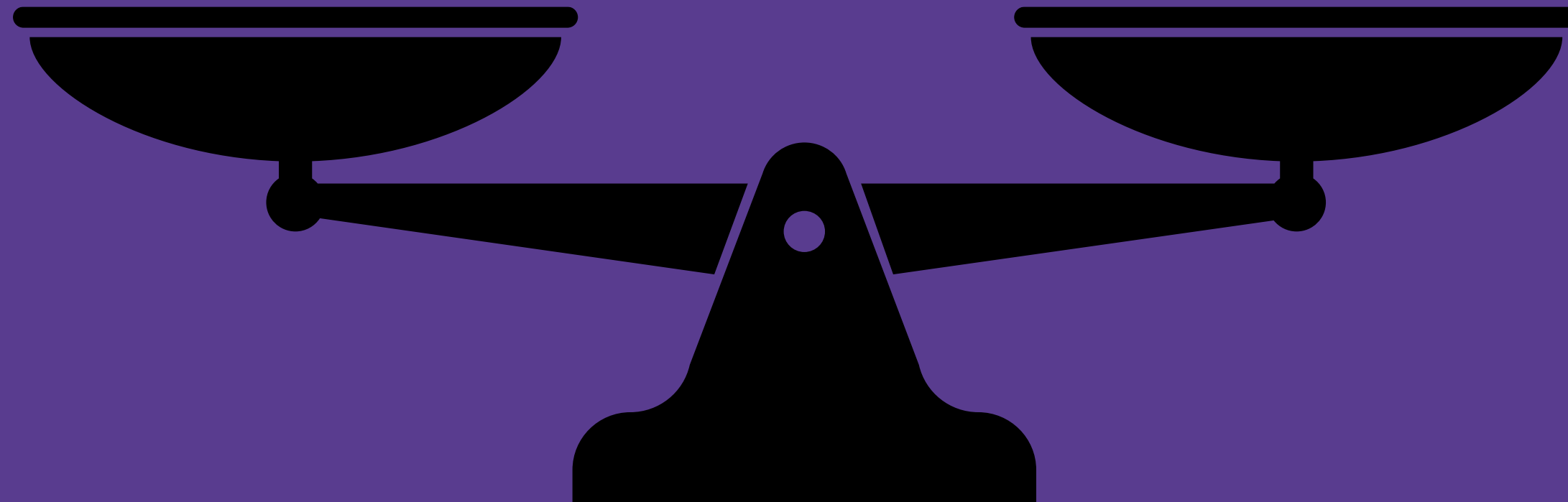
NEW! Rule 2.72 of the Rules of the State Bar has been revised to increase required hours for the Competence requirement and to add new requirements for Technology and Civility. These changes will be effective starting with the 1/31/2025 compliance period and impacts Group 1 (A-G) and Group 3 (N-Z) only.

New Civility Requirement – At least one hour of CLE is now required, addressing civility in the legal profession.

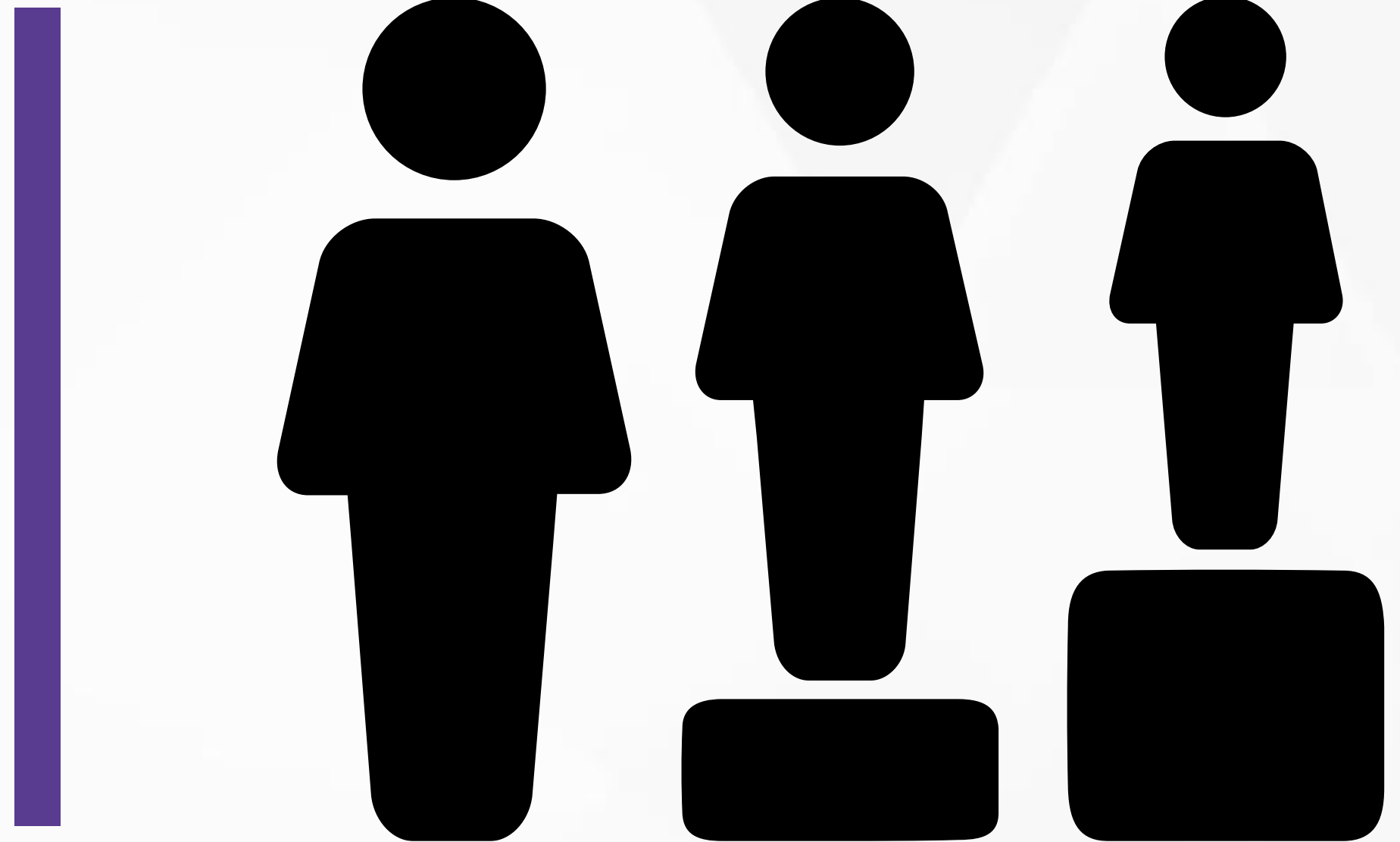
LYING IN MEDIATION

LYING

NEGOTIATION



PROCEDURAL FAIRNESS VS. OUTCOME FAIRNESS



CALIFORNIA RULES OF COURT, 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, at or before the outset of the first mediation session, that any resolution of the dispute in mediation 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.



CALIFORNIA RULES OF COURT, 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.

CALIFORNIA RULES OF COURT, RULE 3.857

Quality of Mediation Process (cont.)

(c) Explanation of process

In addition to the requirements of rule 3.853 (voluntary participation and self-determination), rule 3.854(a) (confidentiality), and (d) of this rule (representation and other professional services), 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.

CALIFORNIA RULES OF COURT, RULE 3.857

Quality of Mediation Process (cont.)

(d) Representation and other professional services

A mediator must inform all participants, at or before the outset of the first mediation session, that during the mediation he or she will not represent any participant as a lawyer or perform professional services in any capacity other than as an impartial mediator. Subject to the principles of impartiality and self-determination, a mediator may provide information or opinions that he or she is qualified by training or experience to provide.

CALIFORNIA RULES OF COURT, RULE 3.857

Quality of Mediation Process (cont.)

(i) Discretionary termination and withdrawal

A mediator may suspend or terminate the mediation or withdraw as mediator when he or she reasonably believes the circumstances require it, including when he or she suspects that:

- (1) The mediation is being used to further illegal conduct;
- (2) A participant is unable to participate meaningfully in negotiations; or
- (3) Continuation of the process would cause significant harm to any participant or a third party.

CALIFORNIA RULES OF COURT, RULE 3.857

Quality of Mediation Process (cont.)

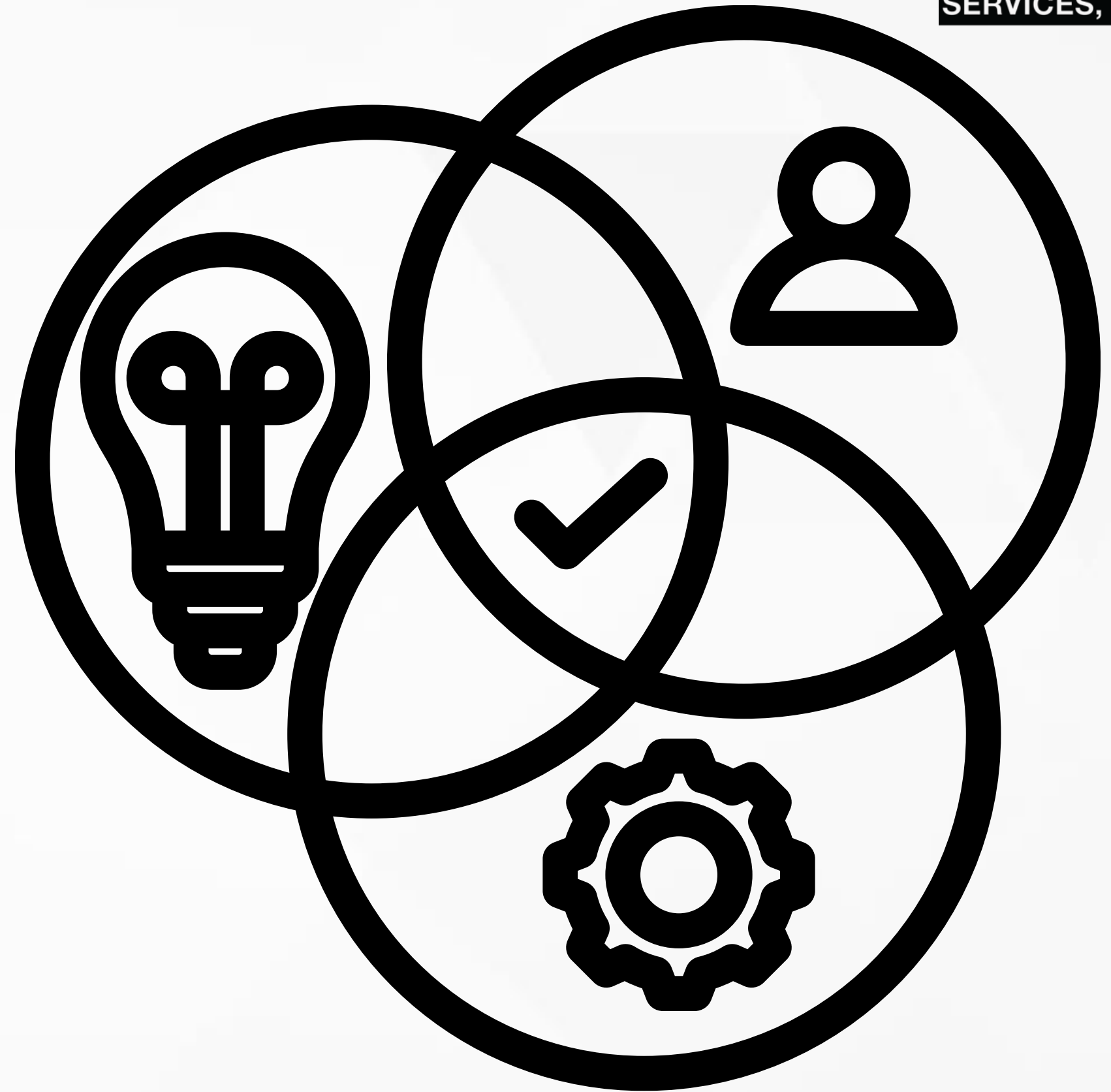
Advisory Committee Comment

Subdivision (d). Subject to the principles of impartiality and self-determination, and if qualified to do so, a mediator may (1) discuss a party's options, including a range of possible outcomes in an adjudicative process; (2) offer a personal evaluation of or opinion on a set of facts as presented, which should be clearly identified as a personal evaluation or opinion; or (3) communicate the mediator's opinion or view of what the law is or how it applies to the subject of the mediation, provided that the mediator does not also advise any participant about how to adhere to the law or on what position the participant should take in light of that opinion.

ABA'S STANDARDS OF CONDUCT FOR MEDIATORS

Self-Determination	Impartiality	Conflicts of Interest
Competence	Confidentiality	Quality of the Process
Advertising & Solicitation	Fees and Other Charges	Advancement of Mediation Practice

COMPETENCE



COMPETENCY OF THE PARTICIPANT

What are the ethical obligations of a lawyer for a client with diminished capacity?

[FORMAL OPINION NO. 2021-207](#)

There is no single standard for contractual capacity. (Andersen v. Hunt (2011) 195 Cal.App.4th 722, 730.) Rather, capacity “must be evaluated by a person's ability to appreciate the consequences of the particular act he or she wishes to take.” (Ibid. [emphasis in original].) The required level of understanding depends on the complexity of the decision being made. (Ibid.; In re Marriage of Greenway (2013) 217 Cal.App.4th 628,

WHEN THE MEDIATOR IS UNSURE IF THE ATTORNEY IS PROVIDING THE CLIENT WITH ALL OF THE INFORMATION.

Rule 1.4 of the California Rules of Professional Conduct (Communication with Clients). This Rule requires, as relevant here, that a lawyer “keep the client reasonably informed about significant developments relating to the representation[.]”

Rule 1.4.1 requires that a lawyer “promptly communicate to the lawyer’s client . . . all amounts, terms, and conditions of any written offer of settlement made to the client[.]” While this only applies to written offers, the Comment to the Rule clarifies that “An oral offer of settlement made to the client in a civil matter must also be communicated if it is a “significant development” under rule 1.4.”

COMPETENCE OF THE ATTORNEYS

Rule of Professional Conduct 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

THANK YOU



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