

EVERYDAY ETHICS IN MEDIATION & LITIGATION

HOW ETHICS IMPACT YOUR DAILY PRACTICE, AND
WHAT TO DO IF THINGS GO WRONG

PRESENTED BY

Debra Bogaards | Mediator, Arbitrator, Referee

Hon. Thomas Goethals (Ret.) | Mediator, Arbitrator, Referee, Appellate Consultant

John Hanover | Mediator, Arbitrator, Referee, Special Master

Edward Weiss | Mediator, Arbitrator, Referee

AGENDA

1

**Mediation Confidentiality
& Cross-jurisdictional
Practicing**

2

Discovery in Arbitration

3

**Ethics in Technology:
Artificial Intelligence &
Social Media**

4

**Rule 8.3 Reporting
Requirements**

5

**Settlement
Agreements in
Mediation**



PART
ONE

**MEDIATION
CONFIDENTIALITY &
CROSS-JURISDICTIONAL
PRACTICING**

PRESENTED BY
DEBRA BOGAARDS, ESQ.



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

MEDIATION CONFIDENTIALITY ACROSS JURISDICTIONS

Increasing prevalence of remote mediations involving attorneys across state lines.



Confidentiality depends on:

- Jurisdiction of the case.
- Location of the mediator.
- Applicable confidentiality rules.

JURISDICTIONAL COMPARISONS

CALIFORNIA

Governed by Cal. Evid. Code 1119:

- Communications, negotiations, or settlement discussions are inadmissible in non-criminal proceedings.
- Policy encourages candid discussions to promote dispute resolution.

FEDERAL COURT

Fed. Rule of Evid. 408:

- Focuses on admissibility of compromise-related evidence.
- Does not explicitly address confidentiality.

UNIFORM MEDIATION ACT

13 States & DC

- Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington

MEDIATION COMMUNICATIONS ARE PRIVILEGED, WITH EXCEPTIONS:

- Waivers.
- Proof of malpractice claims.

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.

CA 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

UNIFORM MEDIATION ACT

Adopted by 13 States & DC

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

MEDIATION CONFIDENTIALITY SUMMARY

1. Be careful & do not just naturally assume comprehensive confidentiality protections when your mediator says everything is confidential. Know what that means.
2. 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.
3. Some judges do not honor the confidentiality agreements so be careful when revealing information even when using these agreements.
4. Make sure your mediator knows if and when you want to share information.
5. Make strategic decision regarding sharing information and when.

PRACTICAL CONSIDERATIONS: BEST PRACTICES

**PROACTIVELY
ADDRESS
CONFIDENTIALITY
UPFRONT:**

Discuss applicable laws and expectations with the mediator and all parties.

**RESEARCH
JURISDICTION-
SPECIFIC RULES
BEFORE AGREEING TO
MEDIATE.**

**WHEN
AGREEMENTS ARE
POSSIBLE,
CLEARLY DEFINE
THE SCOPE OF
CONFIDENTIALITY.**

**PART
TWO**

DISCOVERY IN ArbitRATION

**SB 940: SIGNIFICANT CHANGES TO
RULES FOR DISCOVERY WHEN IN
ARBITRATION**

**PRESENTED BY
EDWARD WEISS, ESQ.**



IN SUMMARY

- 1** Effective January 1, 2025
- 2** Expanded Discovery in Arbitration
- 3** SB940, Amended CCP sections 1282.6 and 1283.05 and repealed section 1983.1

EXPANDED DISCOVERY RIGHTS IN ARBITRATION

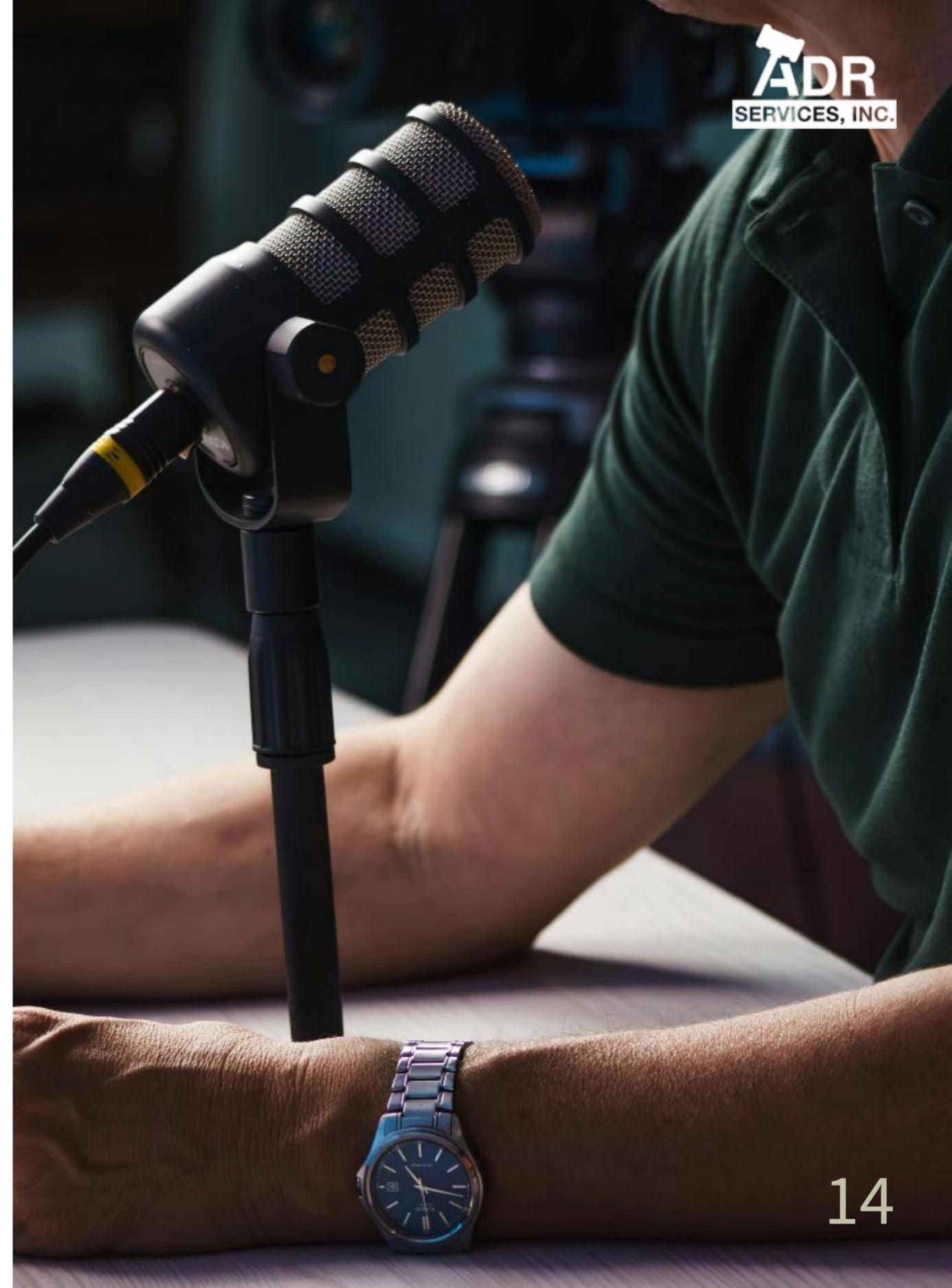
Amendments to Sections 1282.6 and 1283.05 of the CCP and repealed Section 1283.1 of the CCP, significantly changing the rules for discovery in arbitrations.

Prior to January 1, 2025...

- Full discovery rights were limited to certain types of cases
- Effective January 1, 2025, with repeal of 1283.1, full rights under the Discovery Act (Section 20127.010-2033.420) are deemed incorporated into every arbitration agreement “as if the subject matter of the arbitration were pending before the superior court of this state in a civil action other than a limited civil case.”

DEPOSITIONS?

CCP 1283.05(e) will continue to provide: “Depositions for discovery shall not be taken unless leave to do so is first granted by the arbitrator or arbitrators.”



ALERT!

Some attorneys do not seem to be aware of these changes and expansion of rights.

Prior to January 1, 2025, CCP 1283.05 (providing rights under the Discovery Act) was deemed incorporated into arbitration agreements involving personal injury or wrongful death claims. CCP §1283.1.

Effective January 1, 2025 this was expanded to be included in every arbitration agreement.



STATUS OF THIRD PARTY SUBPOENAS?

CCP §1282.6 amended to delete “if Section 1283.05 is applicable” and provides as follows:

“(a) A subpoena requiring the attendance of witnesses, and a subpoena duces tecum for the production of books, records, documents, and other evidence, at an arbitration proceeding or a deposition under Sections 1283 and 1283.05 for the purposes of discovery, shall be issued as provided in this section. In addition, the neutral arbitrator upon their own determination may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents, and other evidence.

(b) Subpoenas shall be issued, as of course, signed but otherwise in blank, to the party requesting them, by a neutral association, organization, governmental agency, or office if the arbitration agreement provides for administration of the arbitration proceedings by, or under the rules of, a neutral association, organization, governmental agency or office, or by the neutral arbitrator.

(c) The party serving the subpoena shall fill it in before service. Subpoenas shall be served and enforced in accordance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of this code.”

PROPOSED FRCP RULE 45 (C)(2)

(2) For Remote Testimony. Under Rule 45(c)(1), the place of attendance for remote testimony is the location where the person is commanded to appear in person.

Not sure how this would apply to proceedings under the FAA.



PENDING LEGISLATION AFFECTING ATTORNEYS AND ARBITRATORS USE OF AI (SB 574)



(passed CA Senate 1/22/26)

For attorneys: This bill would obligate an attorney who uses generative AI to practice law to ensure confidential personal identifying, or other non-public information, is not entered into a public generative artificial intelligence system and to use reasonable steps to verify the accuracy of generative artificial intelligence material and correct erroneous or hallucinated output. (Adds Bus. & Prof. Code §6068.1).

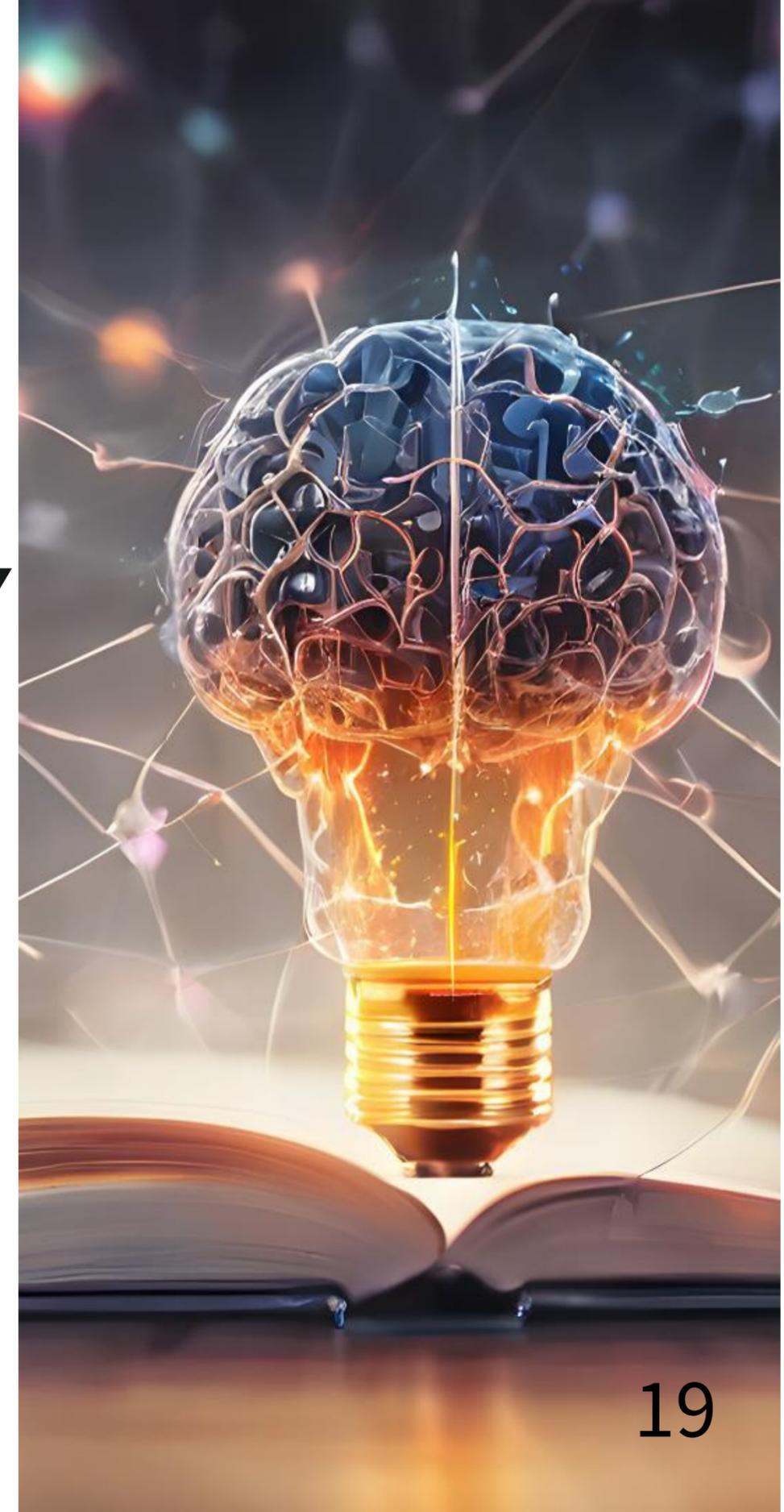
For arbitrators: This legislation would add various restrictions on delegating the decision making process to any generative artificial intelligence tool.

(AI will be further discussed in the next segment, but a brief cautionary tale about discovery...)

**PART
THREE**

**ETHICS IN TECHNOLOGY
GENERATIVE ARTIFICIAL
INTELLIGENCE & SOCIAL MEDIA**

**PRESENTED BY
HON. THOMAS GOETHALS (RET.)
& JOHN HANOVER**



AI ETHICS OVERVIEW

1

Competence, Candor, and Professional Responsibility

2

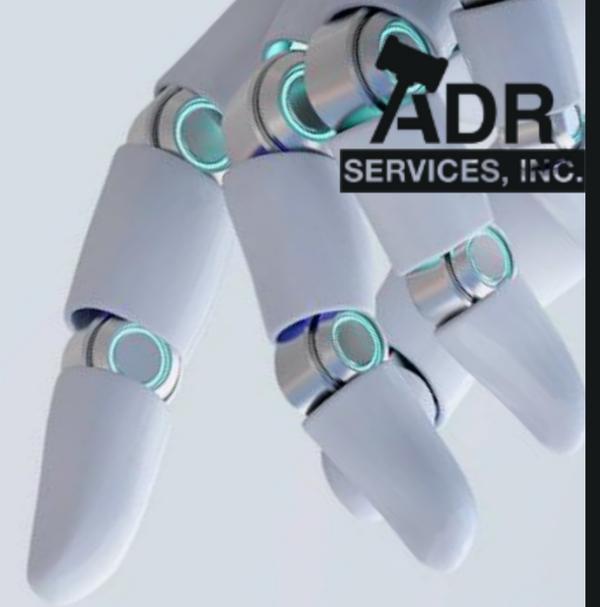
Efficiency vs. ethical risk

3

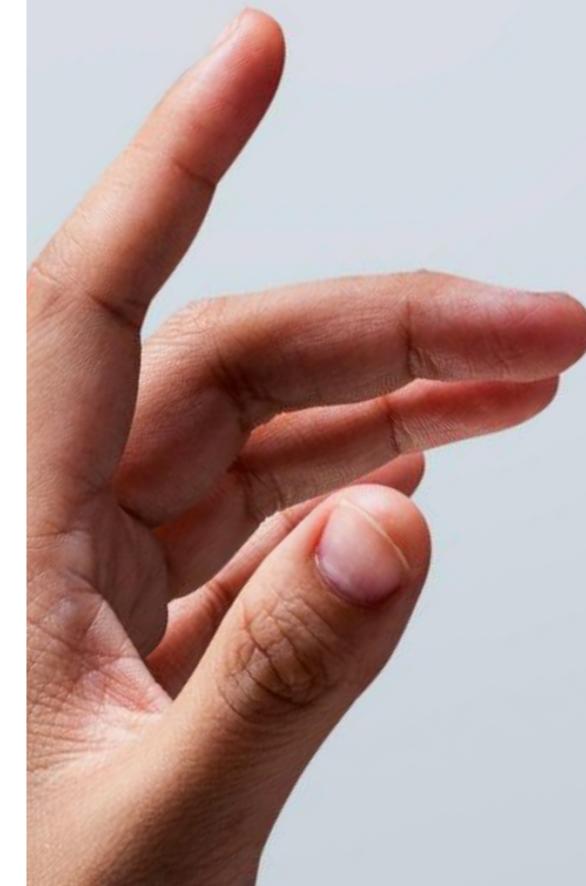
AI hallucinations and fabricated authority

4

Emerging sanctions jurisprudence



ADR
SERVICES, INC.



MATA V. AVIANCA (S.D.N.Y. 2023)

768 F. Supp. 3d 443

- Non-existent judicial opinions cited
- \$5,000 sanctions imposed
- Failure to verify AI-generated authority

A close-up photograph of a document with the word "Sanctions" printed in a large, bold, serif font. The document is resting on a wooden desk. In the background, a pair of glasses and a pen are visible.

RULE 1.1 - COMPETENCE

- No intentional, reckless, or grossly negligent failure
- Competence = learning, skill, mental ability
- Duty to understand risks of technology



As of March 22, 2021, California adopted as an amendment to comment 3 to Rule 1.1 (which is derived from comments to ABA Model Rule 1.1 (Maintaining Competence), the following language:

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.*

RULE 1.3 - DILIGENCE

- Act with commitment and dedication
- Avoid neglect or undue delay
- Independent verification required



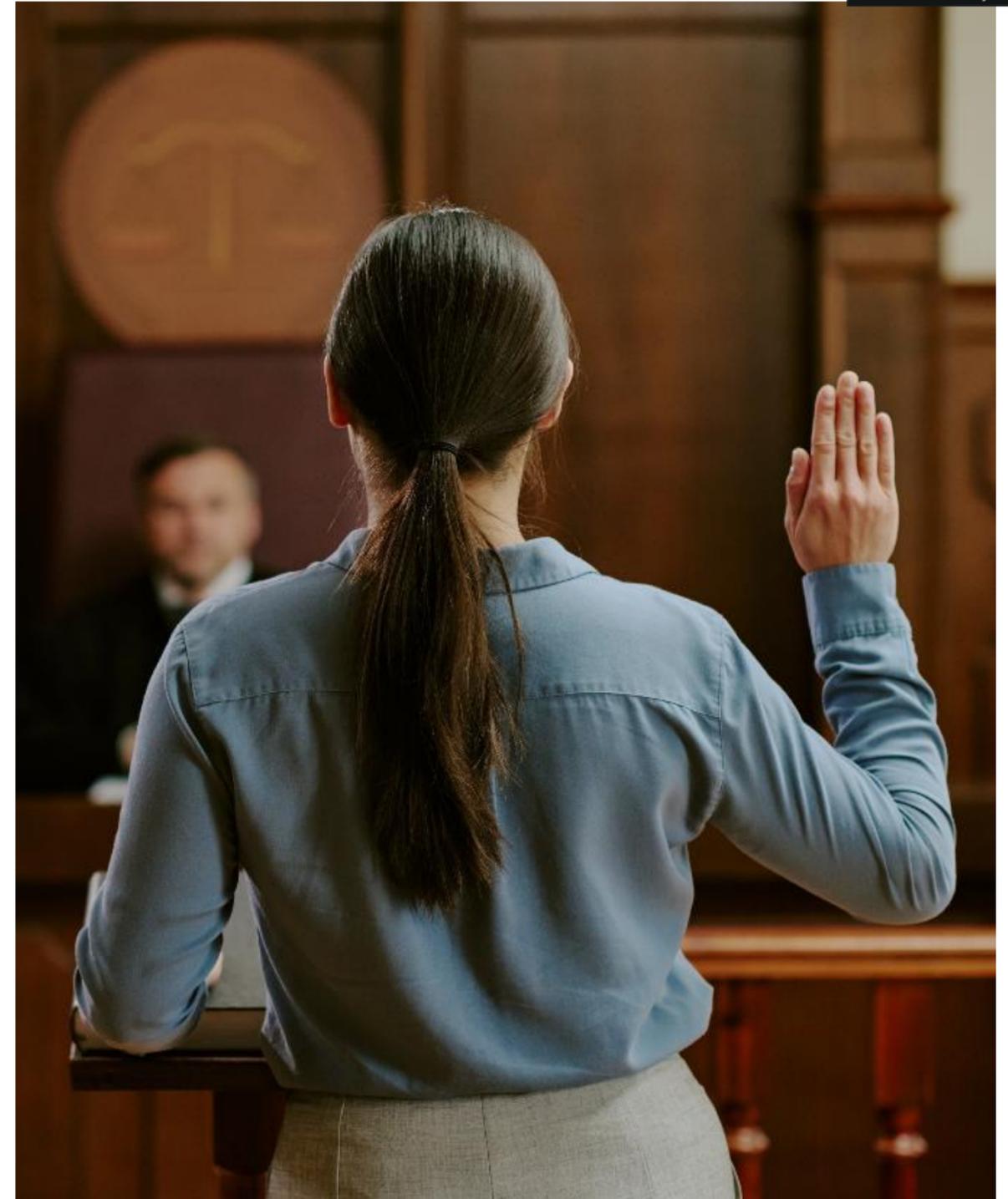
RULE 3.1 - MERITORIOUS CLAIMS

- No claims without probable cause
- Good faith argument required for extension of law
- Fabricated authority violates probable cause requirement



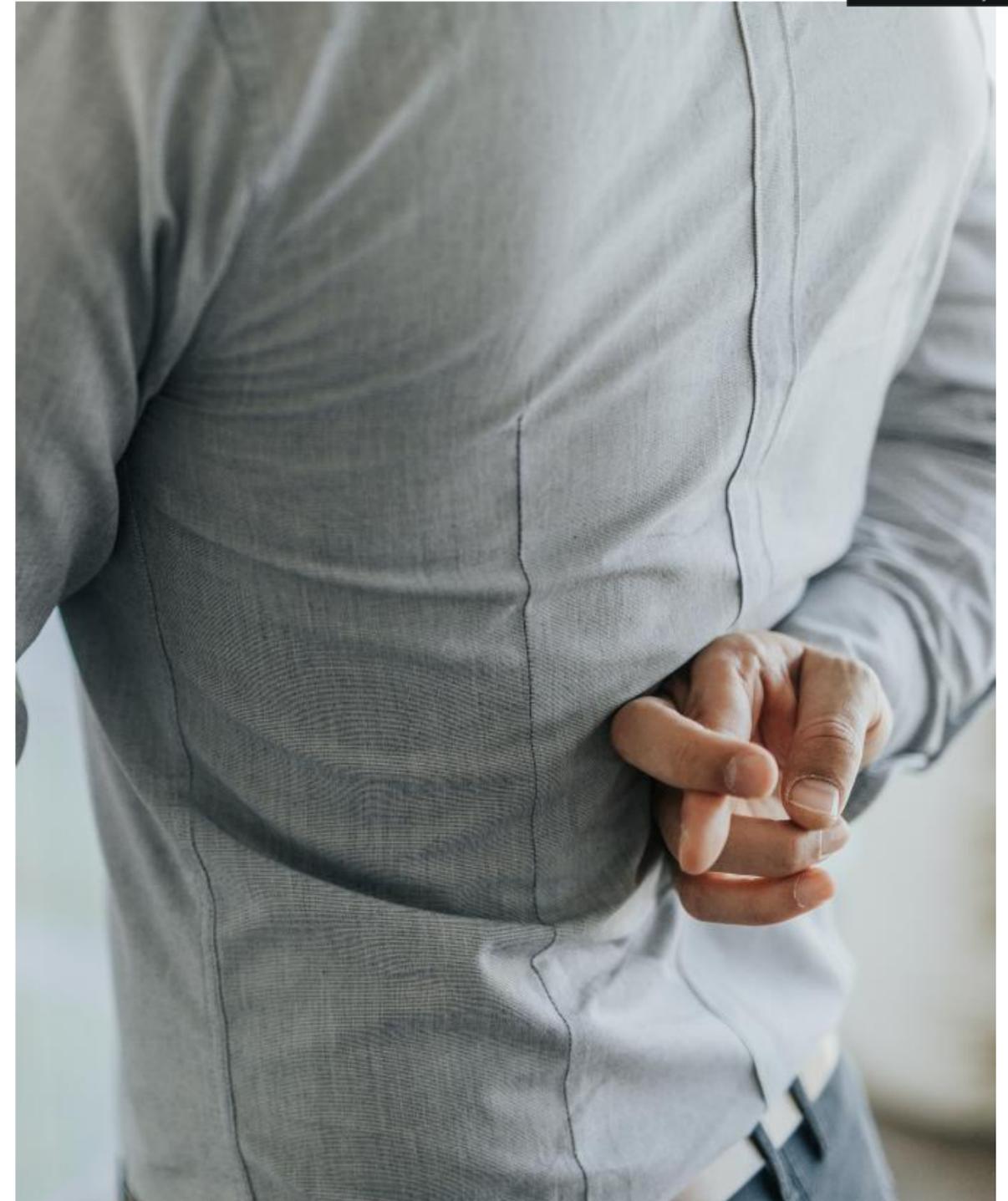
RULE 3.3 – CANDOR TO TRIBUNAL

- No false statements of fact or law
- No misquotation of authority
- Duty to take remedial measures



RULE 8.4(C) - MISCONDUCT

- Prohibits dishonesty or misrepresentation
- Includes reckless conduct
- Business & Professions Code §6106 implications



ABA FORMAL OPINION 512

CORE ETHICAL DUTIES IN AI USE

AI Does Not Change the Rules – It Triggers Them

Competence (Model Rule 1.1)

- Lawyers must understand AI's capabilities, limitations, and risks before using it.

Confidentiality (Rule 1.6)

- Safeguard client data; assess vendor security, data retention, and training policies.

Independent Judgment (Rule 2.1)

- AI may assist – but lawyers must verify accuracy and exercise professional judgment.

Supervision (Rules 5.1 & 5.3)

- Lawyers are responsible for supervising AI tools and third-party providers.

ABA FORMAL OPINION 512

PRACTICAL & BILLING CONSIDERATIONS

Lawyers Remain Ultimately Responsible

Communication (Rule 1.4)

- Inform clients about AI use when material to representation or billing.

Reasonable Fees (Rule 1.5)

- No billing for inefficiency or charging as though work was done manually if AI reduced time.

Candor to the Tribunal (Rule 3.3)

- Verify all AI-generated citations and authorities – avoid “hallucinations.”

Bottom Line: AI is a tool – ethical accountability always rests with the lawyer.

CALIFORNIA SANCTIONS CASES (2025)

Noland v. Land of the Free, L.P. (2025)
114 Cal.App.5th 426

\$10,000 Sanctions

People v. Alvarez (2025) 114
Cal.App.5th 1115, 1117

\$1,500 Sanctions

Schlichter v. Kennedy (2025) 116
Cal.App.5th 24, 26

\$1,750 Sanctions

Shayan v. Shakib (2025) 116
Cal.App.5th 619, 621

\$7,500 Sanctions

CALIFORNIA SUPREME COURT

Kjoller v. Superior Court
(SCOCA Case No. S293723)



- Supreme Court ordered show cause on sanctions
- Heightened scrutiny from high court

FEDERAL APPELLATE CASES

Park v. Kim

(2d Cir. 2024) 91 F.4th 610, 613-616

Jones v. Kankakee County Sheriff's Department

(7th Cir. 2026) 164 F.4th 967, 969-971



Personal accountability emphasized.

CONFIDENTIALITY & ARTIFICIAL INTELLIGENCE

RULE 1.6 – PROTECT CLIENT INFORMATION

- Risk of entering data into public AI platforms
- Evaluate security and obtain consent when required



LEGISLATIVE DEVELOPMENTS

SB 574

- Requires verification of AI-generated material
- Passed California Senate
- Outcome in Assembly and Governor uncertain

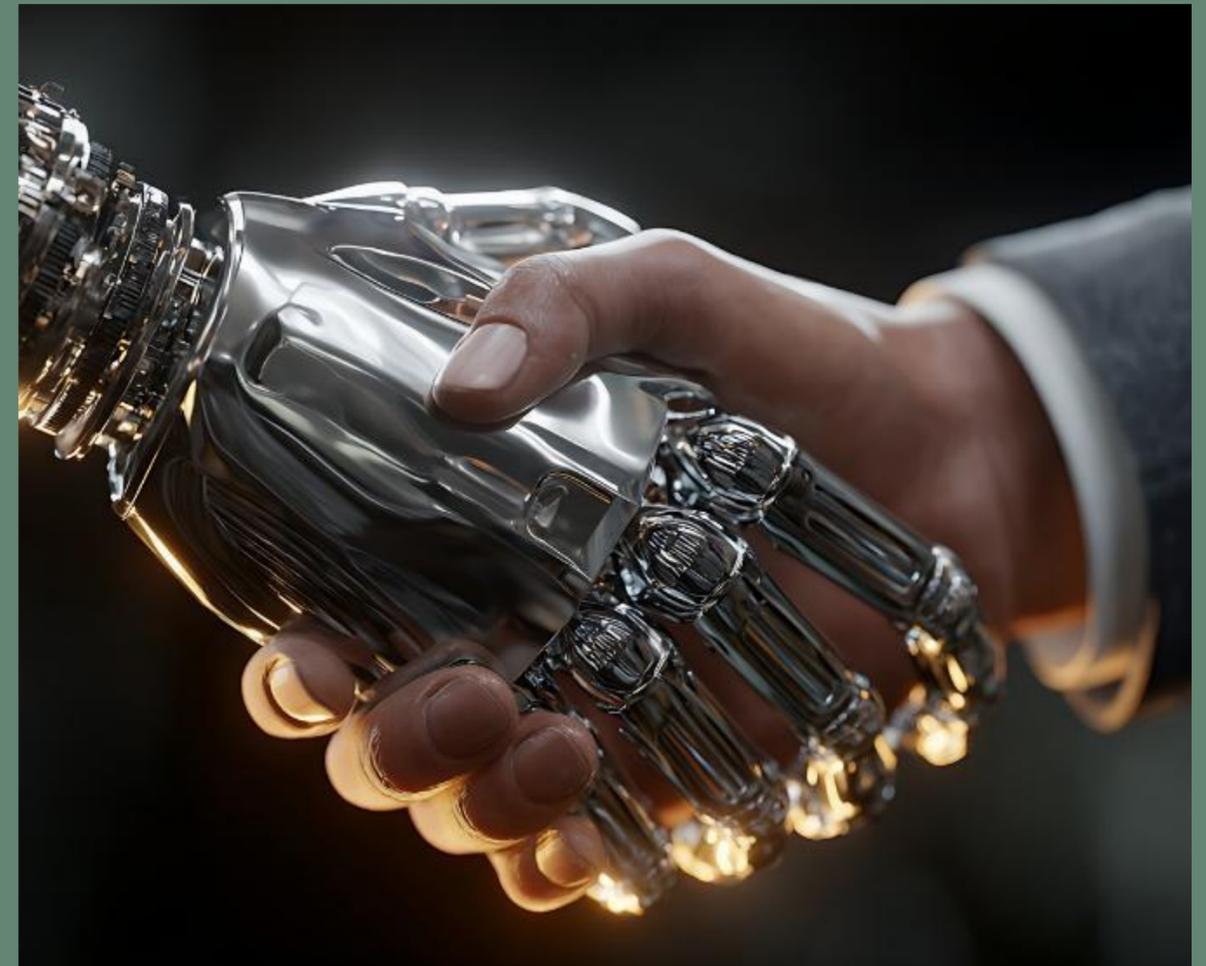


BEST PRACTICES FOR ETHICAL AI USE

1. Own mistakes immediately
2. Verify all citations and quotations
3. Implement internal review protocols
4. Train lawyers and staff
5. Be careful about entering confidential client information into AI tools

| THE BOTTOM LINE

- AI increases efficiency—not immunity
- Ethical duties remain unchanged
- Verification is mandatory
- The lawyer bears responsibility



LIKELY USES OF AI/SOCIAL MEDIA IN DISPUTE RESOLUTION

AI in Mediator/Arbitrator Selection	Jury Selection	Assistance with Case Management	Contract and Document Review
Transcription Services	Early Case Evaluation	Legal and Factual Research	Design of Questionnaires or Case Assessment Tools

GENERAL ETHICAL CONSIDERATIONS OF AI AND SOCIAL MEDIA USE FOR ATTORNEYS



1. Competence with New Tools
2. Confidentiality for the Protection of Jurors
3. Confidentiality of Client Information
4. Communications with Clients
5. Maintaining Security of Information
6. Transparent and Fair Billing Practices

ATTORNEY COMMUNICATION WITH CLIENTS



- Proper Disclosures and Waivers
- Scope of Work Product Protection
- Maintaining Attorney-Client Privilege with Client-Generated Drafts
- Discovery of Prompts Used
- Effective Use of Subpoenas for Generated AI Product and Meta Data

ETHICAL CONSIDERATIONS FOR MEDIATORS AND DECISION-MAKERS



- Proper Disclosures and Waivers
- Uncovering Biases in AI
- Ensuring Accuracy and Reliability of Information and Evidence
- Remaining Neutral and Fair
- Keeping Complete Control of Decision-Making
- Maintaining Fairness in the Process

DEALING WITH AI EVIDENCE



- Recognition of Increasingly Sophisticated “Synthetic” Evidence
- *Mendones v. Cushman and Wakefield* (CA Sup. Cot. Case No. 23CV028772)
- Evaluation of Deepfakes
- Expert Witness Testimony

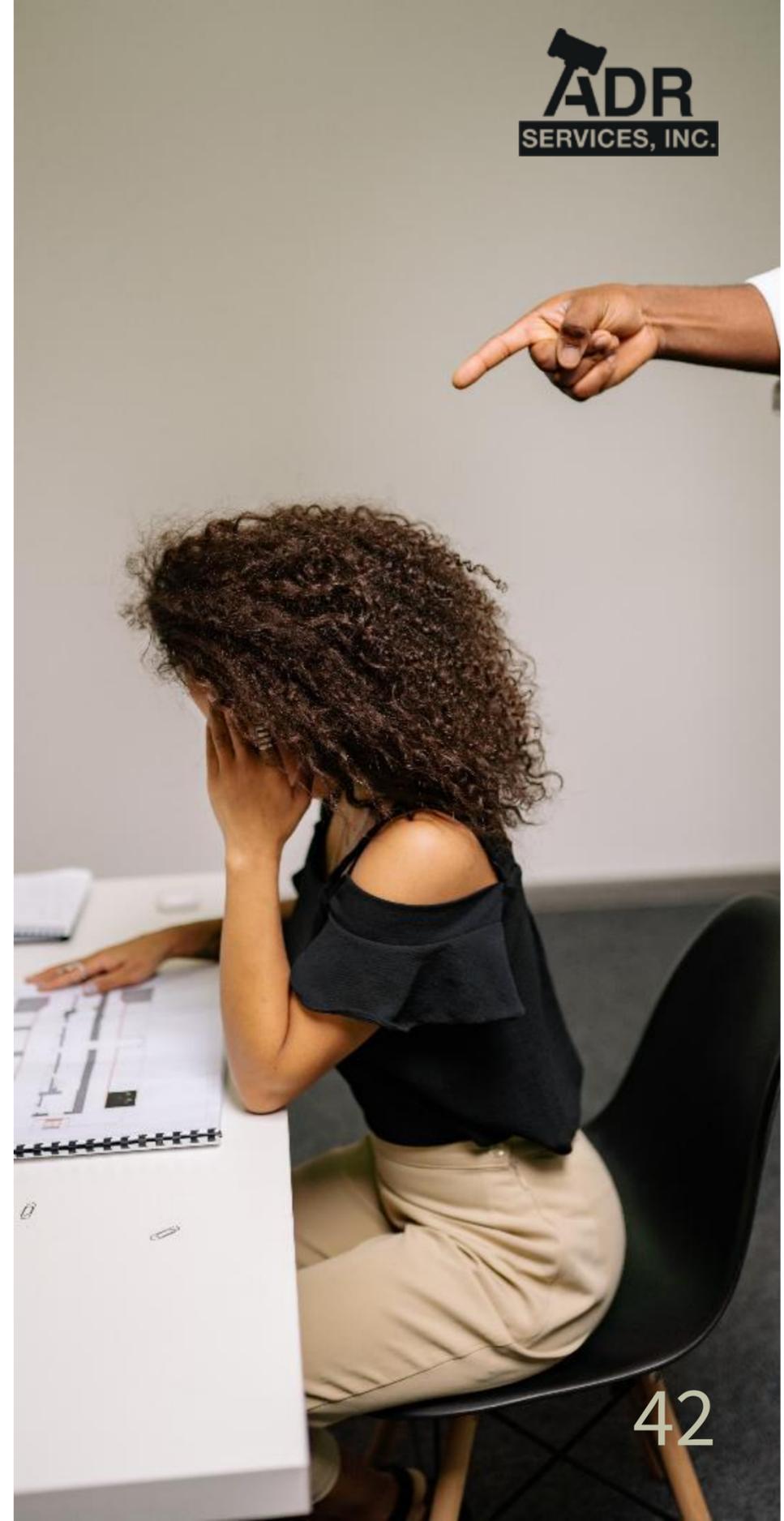
AI & SOCIAL MEDIA CONCLUSION

- Embrace Technology Without Sacrificing Integrity
- Be Wary Of Hallucinated Citations, Loss Of Confidentiality, Unverified Evidence And Deepfakes
- Lawyers Must Remain Competent And Transparent In Use Of AI
- Mediators, Arbitrators And Judges Must Remain Impartial And Control Decision-Making
- Humans Are Irreplaceable For Decisions About Fairness, Credibility And Justice.

PART
FOUR

8.3 THE “SNITCH” RULE

PRESENTED BY
EDWARD WEISS, ESQ.



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.

PURPOSE OF THE RULE

Purpose of the Rule: protection of the public and legal system by reporting misconduct that raises a substantial question of an attorney's honesty or trustworthiness or fitness.



8.3 SUMMARIZED

Took effect: August 1, 2023



Requires attorneys, under appropriate circumstances, and without undue delay, 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 (if litigation is pending and tribunal has jurisdiction to investigate (not a private arbitrator), or a tribunal with jurisdiction to investigate or act on misconduct

When?

- Without undue delay
- as soon as an attorney reasonably believes it will not cause material damage to a client's interests
- 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."

EXCEPTIONS & LIMITATIONS

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

- Information protected by **mediation confidentiality**.
- Information Protected from disclosure by the **attorney client privilege**.
- 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.”)

However, note that comment (2) to model rule 8.3 provides trial lawyers should seek client consent and disclosure where it would not substantially prejudice the interests of the client.

EXCEPTIONS & LIMITATIONS

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 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 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 inquiries 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).)

CONCERNS

**POSSIBILITY
OF ABUSE**

**REPORTING UNDER
THE GUISE IT IS
REQUIRED OR
APPROPRIATE WHEN
IT IS NOT FOR A
STRATEGIC
ADVANTAGE**

**CONCERN RULE
8.3 MAY REQUIRE
ATTORNEYS TO
ACT CONTRARY
TO CLIENT
INTERESTS**

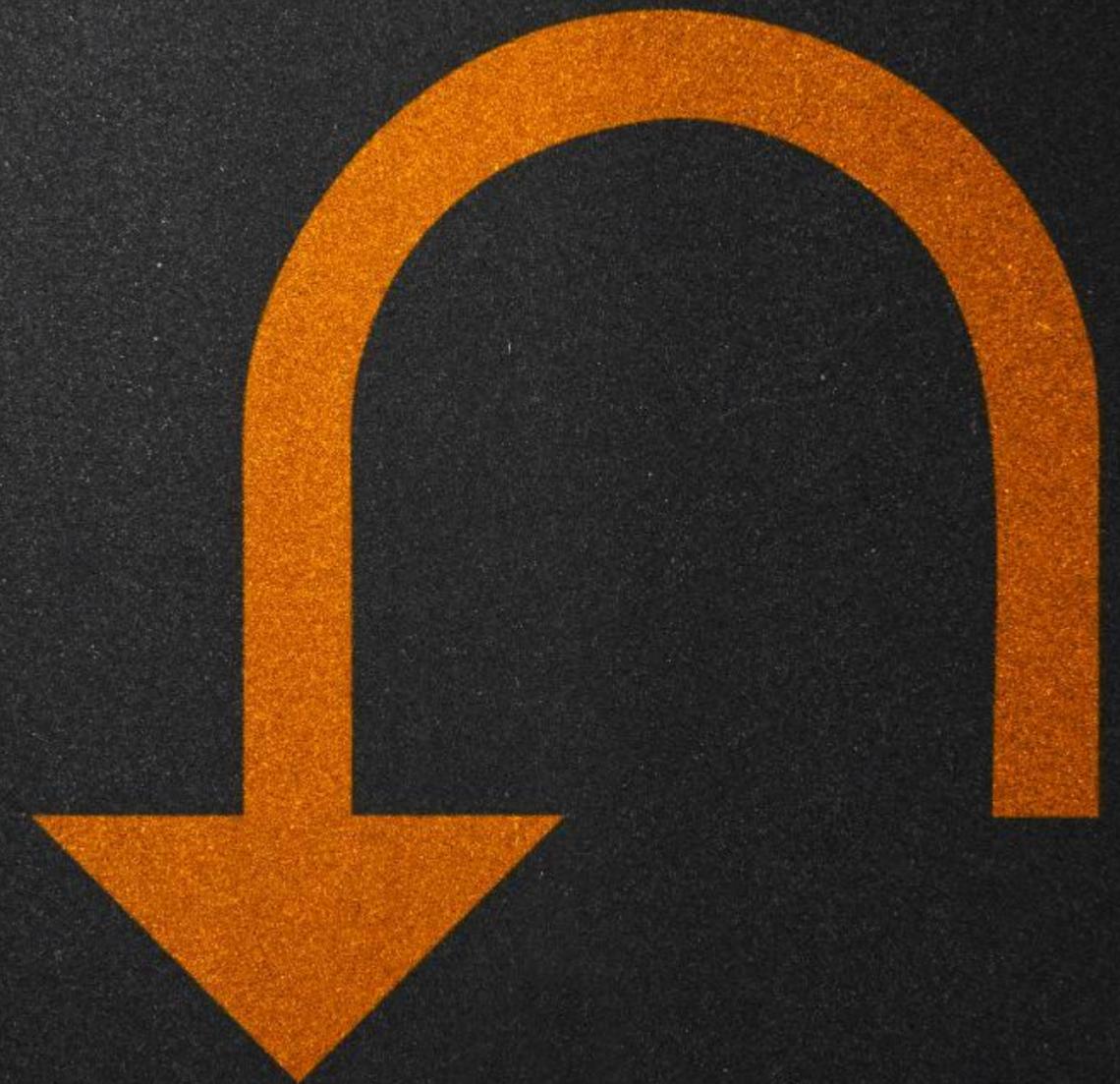
PENALTIES FOR FALSE REPORTS

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.



RETROACTIVE APPLICATION?

Yes – Took effect August 1, 2023, but if an attorney learns of reportable activity that occurred prior to that date, the conduct is reportable in accordance with the procedures and limitations that otherwise apply.



WHAT DOES THIS MEAN FOR MEDIATION?

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

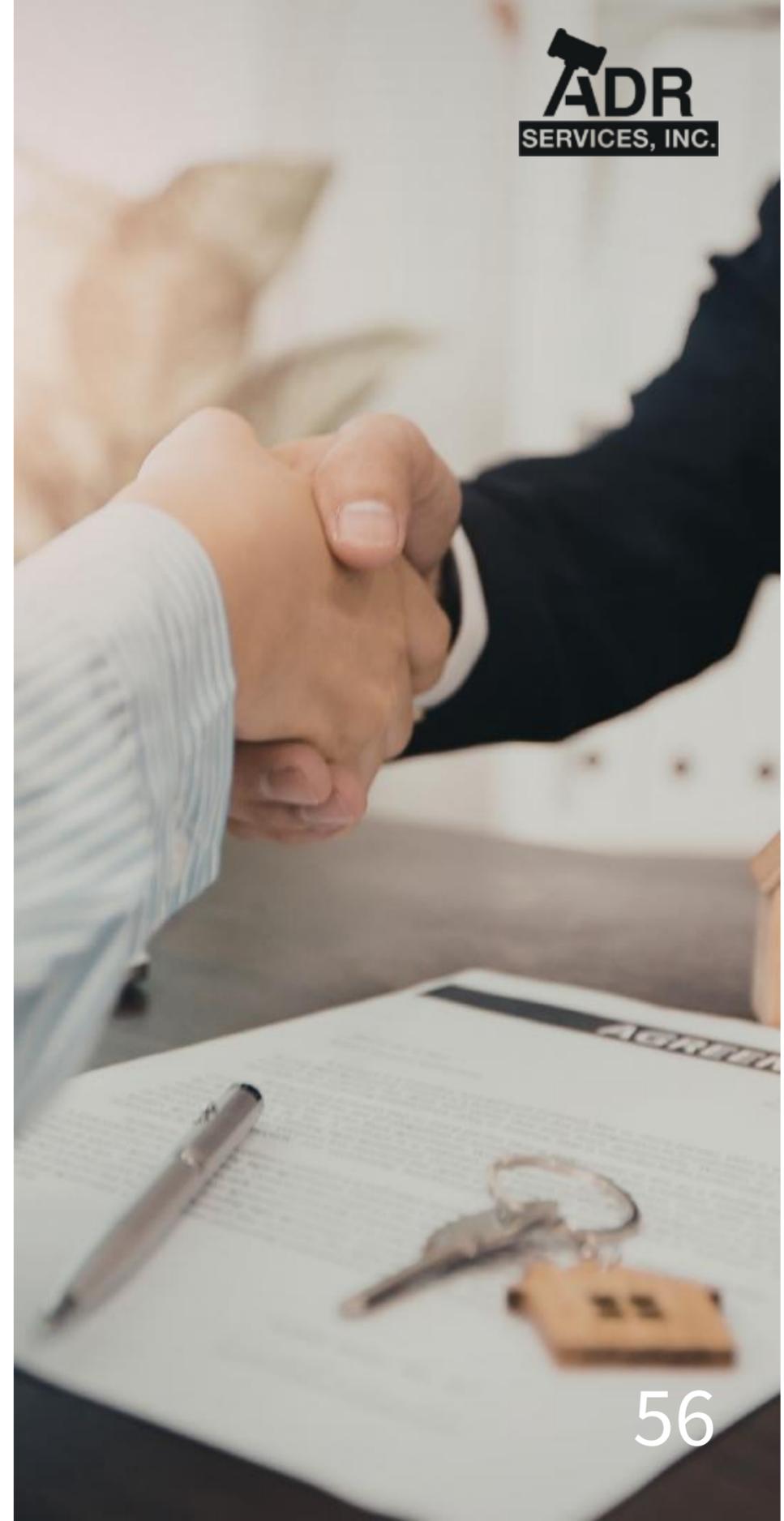
|SUMMARY

1. Mandatory
2. Knowledge requirement
3. Report: without undue delay
4. To whom: State Bar or a court or tribunal with authority to take action
5. Requires judgment
6. Mediation confidentiality and A/C privilege still applies

**PART
FIVE**

**LEGAL ETHICS IN
MEDIATION
SETTLEMENT
AGREEMENTS**

**PRESENTED BY
DEBRA BOGAARDS, ESQ.**



SETTLEMENT AGREEMENTS

*Evidence Code section 1123 makes settlement agreements admissible only if one of the below conditions is 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 MEDIATION OVER?

(Impacts Confidentiality)

FULLY
EXECUTED
WRITTEN
AGREEMENT

OR

10 DAYS WITH
NO
COMMUNICATI
ON BETWEEN
THE MEDIATOR
AND ANY OF
THE PARTIES

OR

AGREEMENT BY
PARTIES TO
TERMINATE
THE
MEDIATION

IS IT OK TO LIE TO THE MEDIATOR?

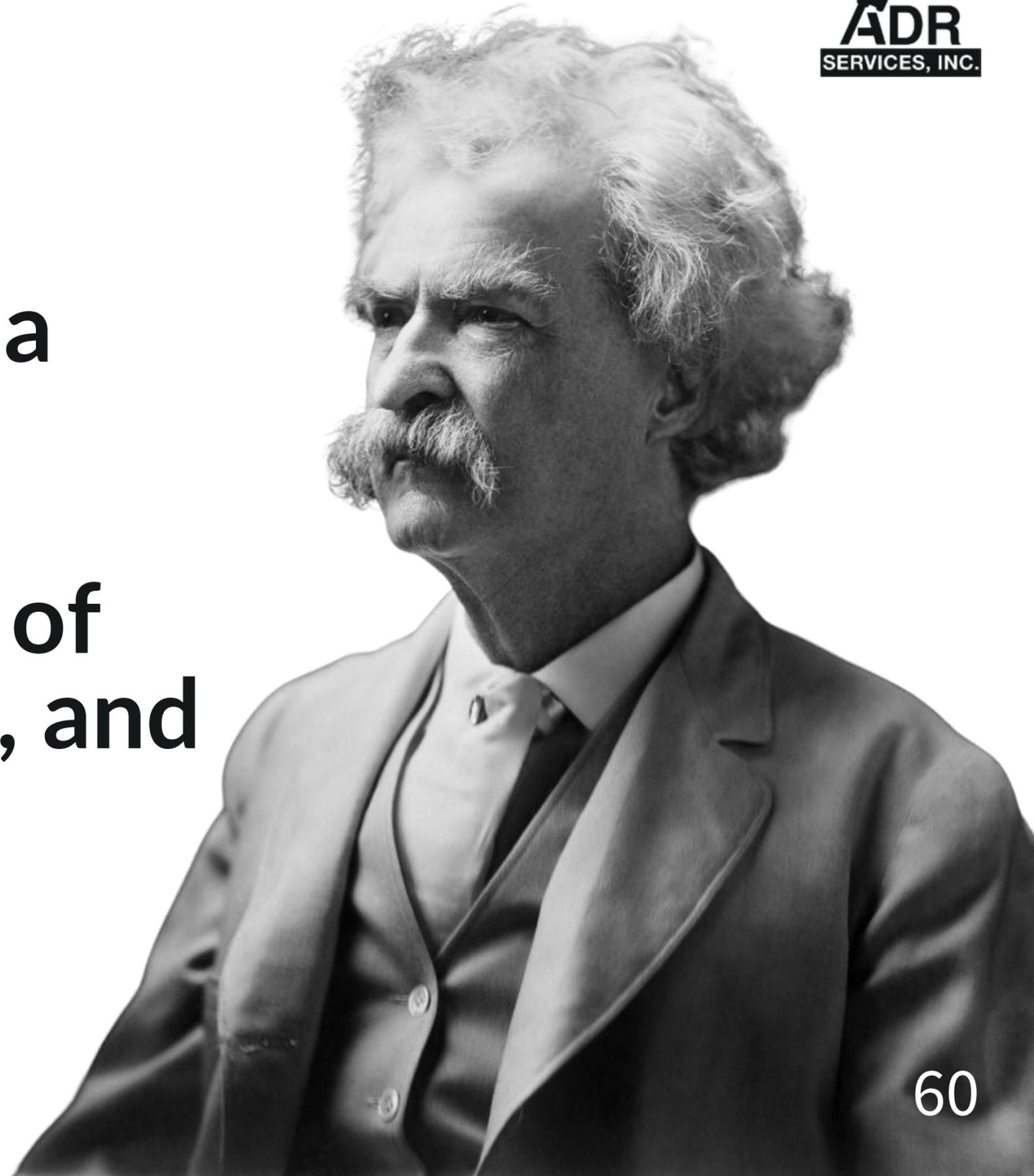
ABA Formal Opinion 518: A Lawyer's
Duties to Avoid Misleading
Communications When Acting as a
Third-Party Neutral Mediator



"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



CALIFORNIA RULES OF PROFESSIONAL CONDUCT: 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.

[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...

SEE ALSO: ABA Model Rules of Professional Conduct, Rule 4.1 Truthfulness In Statements To Others

IS IT KOSHER TO LIE?

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

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...

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?

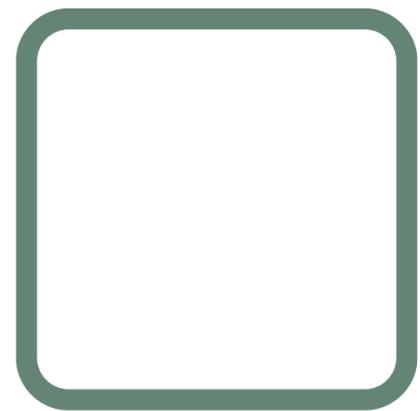


MEDIATOR NEUTRALITY & IMPARTIALITY

WHEN DOES
INFLUENCE
CROSS
NEUTRALITY
LINE?

DO
EVALUATIONS
OF A PARTY'S
CASE AFFECT
THE
MEDIATOR'S
PERCEIVED
IMPARTIALITY?

THE MEDIATOR'S PROPOSAL



YES



NO.

WHY I LIKE TO USE A MEDIATOR'S PROPOSAL

- Face-saving measure
- May give the insurance carrier time to ask for higher settlement authority
- May adjust plaintiff's unreasonably high expectations



WHAT SOME PEOPLE SAY ABOUT THE MEDIATOR'S PROPOSAL

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

INFORMED CONSENT IN SETTLEMENT AGREEMENTS

KEY ETHICAL PRINCIPLES:

- Attorneys must ensure parties provide informed consent to settlement terms
- CRPC 4.1
- Settlement Authority/
Policy Limits

ATTORNEY RESPONSIBILITIES:

- Providing clear explanation of terms (i.e. Confidentiality and non-disparagement)
- Avoiding undue influence

CASE LAW EXAMPLE:

- *Fair v. Bakhtiari*, 40 Cal. 4th 189 (2006)
Clarification on enforceability of mediation agreements

ENFORCEABILITY OF MEDIATION SETTLEMENT AGREEMENTS

STATUTORY REQUIREMENTS

- California Code of Civil Procedure (CCP) § 664.6: Requirements for entering settlement terms into a judgment.

BEST PRACTICES

- Ensuring agreements are in writing and signed by parties.
- Meeting statutory language for enforceability.
- Docusign/adobe sign acceptable

CASE LAW EXAMPLE:

- *Rael v. Davis*, 166 Cal. App. 4th 1608 (2008): Criteria for enforceability under CCP § 664.6.

OTHER RELEVANT CODE SECTIONS

Pushing clients into settlement agreements

- Rule 1.2 Scope of Representation and Allocation of Authority (a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued.

Global settlements; multiple party actions; non-class claims – mediating multiple cases at once eg

- Rule 1.8.7 Aggregate Settlements
- (a) A lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent.* The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person* in the settlement.
- (b) This rule does not apply to class action settlements subject to court approval.

Could impact authority to accept settlement proposals; extra layer of complication

- Rule 1.13 Organization as Client
- (a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement

ETHICAL CONCERNS AROUND COERCION

Avoiding Coercive Practices: Mediator neutrality and voluntary decision-making.

BEST PRACTICES

- Ensuring agreements are in writing and signed by parties.
- Meeting statutory language for enforceability.
- **DocuSign/adobe sign acceptable**

THANK YOU



Debra

Bogaards, Esq.

Mediator, Arbitrator, Referee

dbogaards@adrservices.com

Katy Jones:

katyteam@adrservices.com



Hon. Thomas

Goethals (Ret.)

Mediator, Arbitrator, Referee,
Appellate Consultant

justicegoethals@adrservices.com

Haward Cho:

haward@adrservices.com



John

Hanover, Esq.

Mediator, Arbitrator, Referee,
Special Master

jhanover@adrservices.com

Eve Thorstens:

eveteam@adrservices.com



Edward

Weiss, Esq.

Mediator, Arbitrator, Referee

eweiss@adrservices.com

Chelsea Mangel:

chelseateam@adrservices.com