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Authorities

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Team 4 Presentation
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- Deborah S. Ballati & Patricia H. Thompson, *When Mediation Conduct Goes Wrong*, JAMS (Oct. 27, 2022).

- Randa M. Trapp, *Why Ethics Matter in Mediation*, Daily Journal (Dec. 17, 2021), https://www.dailyjournal.com/mcle/1096-why-ethics-matter-in-mediation.

- Russell Korobkin, *Behavioral Ethics, Deception, and Legal Negotiation*, 20 Nev. L.J. 1209 (2019-2020).

- Michael Moffitt, *Settlement Malpractice*, 86 U. Chi. L. Rev. 1825 (2019).

- Keith N. Hylton, *Selling Out: An Instrumentalist Theory of Legal Ethics*, 34 The Georgetown Journal of Legal Ethics 19 (2021).

- James J. Alfini, *Mediation as a Calling: Addressing the Disconnect*

between Mediation Ethics and the Practices of Lawyer Mediators, Alt. Disp. Resol. Y.B. 84 (2014).

- Joan Wong, *Prisons are Packed because Prosecutors are Coercing Plea Deals. And, Yes, It's Totally Legal* (NBC News Aug. 8, 2019), https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna103420.

- Charles R. Mendez, *Deflating Autonomy*, 66 S. C. L. Rev. 401 (2014).

California Rules of Professional Responsibility

Rule 1.2 Scope of Representation and Allocation of Authority
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(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. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.4 Communication with Clients
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;

(2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and

(4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.
(c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.

(d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

Rule 1.4.1 Communication of Settlement Offers
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A lawyer shall promptly communicate to the lawyer's client:

(1) all terms and conditions of a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and

(2) all amounts, terms, and conditions of any written* offer of settlement made to the client in all other matters.

(b) As used in this rule, "client" includes a person* who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

Comment
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.

California Rules of Court

Rule 3.854. Confidentiality

(a) Compliance with confidentiality law
A mediator must, at all times, comply with the applicable law concerning confidentiality.

(b) Informing participants of confidentiality
At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings.

(c) 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.

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.

(h) Settlement agreements
Consistent with (d), a mediator may present possible settlement options and terms for discussion. A mediator may also assist the parties in preparing a written settlement agreement, provided that in doing so the mediator confines the assistance to stating the settlement as determined by the parties.

Model Standards of Conduct for Mediators
American Arbitration Association, American Bar Association, Association for Conflict Resolution (2005)

Standard I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party selfdetermination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

Standard V. CONFIDENTIALITY

A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

Statutes

Cal. Evidence Code § 958.
There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

Cal. Evidence Code § 1119.
Except as otherwise provided in this chapter:

(a) 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.

(b) 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.

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

Case Law

Revelation of Confidences to Defend in Malpractice

- *Cassel v. Superior Court* (2011) 51 Cal.4th 113: In *Cassel*, a client brought action against attorneys who represented him in mediation for malpractice, breach of fiduciary duty, fraud, and breach of contract. The attorneys moved in limine under the mediation confidentiality statutes to exclude all evidence of communications between attorneys and client that were related to the mediation, including matters discussed at the pre-mediation meetings and private communications among client and attorneys while the mediation was under way. The California Supreme Court held that attorneys' mediation-related discussions with client were confidential and, therefore, were neither discoverable nor admissible for purposes of proving claim of legal malpractice. "[M]ediation confidentiality statutes do not create a 'privilege' in favor of any particular person. Instead, they serve the public policy of encouraging the resolution of disputes by means short of litigation. The mediation confidentiality statutes govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context." *Id.* at 132 (internal citations omitted).

- *O&C Creditors Group, LLC v. Stephens & Stephens XII, LLC* (2019) 42 Cal.App.5th 546, 564: A former client brought suit against a former partner of counsel who had initially represented client in lawsuit against client's property insurer, seeking declaratory judgment that partner and partner's limited liability company (LLC), as assignees of counsel's attorney fee lien, were not entitled to enforce attorney fee lien provision of contingent retainer agreement, which authorized counsel to claim 40% contingency fee, against proceeds of settlement of client's suit against insurer. Assignees filed cross-complaint against client to recover unpaid legal fees and against insurer and insurer's attorneys based on claim that they settled insurance dispute in contravention of counsel's attorney fee lien. Client answered, asserting claim for offset based on legal malpractice by counsel.

  "'The wording of [Evidence Code] section 958 is broad, but case law has clarified that the exception is limited to communications between the lawyer charging or charged with a breach of duty, on the one hand, and the client charging or charged with a breach of duty, on the other.' The instant case involves the novel scenario in which a third party purchases a litigation claim and purports to stand in the shoes of the attorney in defending itself against the client's claim of breach of duty. Setting aside for a moment the third-party purchase aspect, . . . the disputed attorney fee claim falls squarely within the literal terms of Evidence Code section 958. Had [the client] sued [the attorney], [the client] would have been unable to prevent the disclosure of documents relevant to issues of any alleged breach arising out of the lawyer-client relationship. Similarly, had [the attorney] cross-complained or raised affirmative defenses regarding the absence of a signed retainer agreement and/or any malpractice claim, under the plain language of Evidence Code section 958, the attorney-client privilege would not apply to those communications. Both by disputing the amount of attorney fees owed to [the attorney] and by claiming malpractice, [the client] put in issue the validity of the lawyer-client relationship itself.

Under these circumstances, it would be fundamentally unfair for [the client] to invoke the privilege to prevent [the attorney] from defending himself." *Id.* at 563-64.

Law Review and Professional Articles

Tanya Cohen, Erik G. Helzer, & Robert A. Creo, *Honesty Among Lawyers: Moral Character, Game Framing, and Honest Disclosures in Mediation*, Negotiation J. (Spring 2022), https://onlinelibrary.wiley.com/doi/10.1111/nejo.12394.

- "Lawyers have broad discretion in deciding how honestly to behave when negotiating. We propose that lawyers' choices about whether to disclose information to correct misimpressions by opposing counsel are guided by their moral character and their cognitive framing of negotiation. To investigate this possibility, we surveyed 215 lawyers from across the United States, examining the degree to which honest disclosure is associated with lawyers' moral character and their tendency to frame negotiation in game-like terms—a construal of negotiation that we label game framing. We hypothesize that the more that lawyers view negotiation through a game frame—that is, the more they view negotiation as an adversarial context with arbitrary and artificial rules—the less honest they will be in situations in which honest disclosure is not mandated by professional rules of conduct."

Deborah S. Ballati & Patricia H. Thompson, *When Mediation Conduct Goes Wrong*, JAMS (Oct. 27, 2022), https://www.jamsadr.com/blog/2022/when-mediation-conduct-goes-wrong.

- "Conduct that shows bias (e.g., acting condescendingly, ignoring a position, gaslighting someone's concerns, treating one person or side with more respect than another) frustrates that expectation. Similarly, if a mediator appears to exercise control or influence over the proceeding to steer it in favor of one of the participants, the mediator's effectiveness may be compromised."

Randa M. Trapp, *Why Ethics Matter in Mediation*, Daily Journal (Dec. 17, 2021), https://www.dailyjournal.com/mcle/1096-why-ethics-matter-in-mediation.

- "Both lawyer and client should approach mediation with a different mindset: It is not about winning or losing; it is about resolution. To get to resolution, there needs to be a clear understanding that neither par ty will get everything they want in mediation. Thus, both sides must be prepared to give up something, to compromise."

- "Studies show people are more apt to accept an outcome in which they had some level of control. The alternative, going to trial, is risky. Some liken it to a roll of the dice. It is difficult to predict what a judge or jury will do in trial."

- "Attorneys also have ethical obligations in mediation. Chief among them is their obligation of good-faith participation in mediation."

- "If the goal of mediation is to settle your case with your client feeling well-served throughout the process; with your integrity intact, which could lead to referrals from opposing counsel and possibly the opposing party; and with the mediator thinking that

you were thoroughly prepared, a keen advocate, reasonable and ethical, then you have done your client, yourself and the legal profession a great service.

Russell Korobkin, *Behavioral Ethics, Deception, and Legal Negotiation*, 20 Nev. L.J. 1209 (2019-2020), https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1832&context=nlj.

- *See* Section II, The Uncertain Ethics of Deception in Negotiation.

- E.g. "A 'half-truth' is a statement or set of statements that is literally accurate but omits relevant information in a way that is likely to lead the listener to draw factually incorrect conclusions. The deceptive effect results from the application of generally accepted linguistic conventions. From a deontological perspective, competing arguments can be made regarding the ethics of half-truths. From one perspective, it seems that a half-truth should be treated the same as a lie. Words lack any inherent meaning. They are functional vehicles for communicating information, and they serve this function not alone, but in conjunction with context and social convention. If lying is wrong because it undermines social trust and interferes with social cooperation, an assertion intended to imply false facts is just as unethical as an assertion that explicitly states false facts." *Id.* at 1232.

Michael Moffitt, *Settlement Malpractice*, 86 U. Chi. L. Rev. 1825 (2019), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/Moffitt_ART_Final.pdf.

- *See* Section III.A. Lawyer-as-Settlement-Advisor: Helping Clients to Weigh the Prospects of Settlement.

- "Properly understood, a lawyer has three distinct but related roles with respect to her client's decision-making about settlement. The lawyer must understand her client's interests—the 'needs, desires, concerns, and fears' that motivate negotiators' decisions, akin to what the Model Rules describe as the 'objectives of representation.' She must communicate the implications of any potential settlement—what the negotiation literature refers to as 'options'—with a specific eye toward the ways in which that settlement option intersects with the client's interests. And she must provide the client with a candid and accurate picture of litigation's risks, costs, and opportunities. A lawyer's mishandling of any of these represents—or at least should represent—both a breach of the lawyer's ethical duties and a clear instance of professional malpractice."

Keith N. Hylton, *Selling Out: An Instrumentalist Theory of Legal Ethics*, 34 The Georgetown Journal of Legal Ethics 19 (2021), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=3441&context=faculty_scholarship.

- *See* Section IV.F. Selling Out.

- "Selling Out: For any legal right that the victim values, the lawyer can always do better by selling out the victim to the injurer than by arranging a mutually beneficial rights waiver. The only case in which the lawyer could not gain by selling out the victim is when the victim is indifferent to or burdened by the right."

James J. Alfini, Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, Alt. Disp. Resol. Y.B. 84 (2014).

- "During the past two decades we have witnessed an explosion of interest in mediation among judges and lawyers. Many court-sponsored mediation programs have been put into place in both state and federal courts across the country and their efficacy is now being assessed.'2 With the advent of these institutionalized, court-sponsored mediation programs, we have also witnessed an increasing interest on the part of the legal community in not only representing parties in this alternative forum, but also in developing mediation skills and adding the role of the mediator to their legal practices. That is, lawyers have begun to colonize the mediation field. I would argue that with the increased use of lawyer mediators in court- sponsored mediation programs, we are now witnessing an erosion of the traditional model of mediation that requires a firm commitment to party self-determination."

- "First is the reduced role in mediation for the parties. This, of course, goes to the heart of party self-determination. Nancy points out that the need for many parties to be present in a mediation has diminished because, in the context of civil, non-family cases, the 'defendants do not control the funds that will be necessary to settle the case.' The real party in interest is often an insurance company. So, in many of these cases it is the parties' attorneys who attend the mediation sessions and negotiate on behalf of the parties. Even where the parties do possess settlement authority, there seems to be a trend toward having the agents of the parties, namely the attorneys, be the principal bargainers during a mediation. Why? Because it is more efficient to do it that way. The attorneys have the necessary expertise, detachment, and even the flexibility to guide the process toward a settlement. There are negotiation theorists who would support this reduced role for the parties because it results in a more efficient bargaining process, but this reduced role for disputants is inconsistent with procedural justice (or process fairness) as most of us would define it - the opportunity to have a voice, and to have this voice considered and treated with dignity and respect. The problem I have with this reduced role of the parties is that it not only mutes the parties, but it moves us back toward an adjudicatory model that is more lawyer-centric than party-centric. This development is inconsistent with mediation's core value of party self-determination."

Joan Wong, Prisons are Packed because Prosecutors are Coercing Plea Deals. And, Yes, It's Totally Legal (NBC News Aug. 8, 2019), https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna103420.

- "Why are people so eager to confess their guilt instead of challenging the government to prove their guilt beyond a reasonable doubt to the satisfaction of a unanimous jury?

  The answer is simple and stark: They're being coerced.

  Though physical torture remains off limits, American prosecutors are equipped with a fearsome array of tools they can use to extract confessions and discourage people from exercising their right to a jury trial. These tools include charge-stacking (charging more

or more serious crimes than the conduct really merits), legislatively-ordered mandatory-minimum sentences, pretrial detention with unaffordable bail, threats to investigate and indict friends or family members, and the so-called trial penalty – what the National Association of Criminal Defense Lawyers calls the 'substantial difference between the sentence offered prior to trial versus the sentence a defendant receives after trial.'"

Charles R. Mendez, Deflating Autonomy, 66 S. C. L. Rev. 401 (2014).

- "Attorneys have the special role of providing access to the law. Attorneys also have specialized skill and knowledge, which enables them to assist individuals in executing their goals within the legal system. In doing so, attorneys are increasing individual autonomy and providing a societal good. As Webb pronounces it, "lawyers are an essential corollary to any meaningful self-determination." The lawyer's function is to ensure, in a neutral way, that a client is afforded all the liberties the law provides. Monroe Freedman adds that the law exists to protect a client's autonomy, and without the help of an attorney, an ordinary person cannot exercise the autonomy in which the system of law entitles that individual. Therefore, a lawyer's commitment is first and foremost to the client's autonomy. Lawyers have the unique task of being neutral legal helpers that assist citizens in gaining access to the law. Freedman suggests that for a lawyer to act professionally, and even morally, the lawyer must maximize his client's autonomy and advise clients of all of their legal rights. Doing anything less would be depriving the clients of their autonomy."

- "As David Wilkins points out, traditional legal ethics discourse rested on many assumptions about the typical interaction between a lawyer and a client, assumptions that lacked accuracy. The traditional view presumed a relationship between an unsophisticated, individual client, and a skilled, dedicated solo practitioner who zealously represents that client within the bounds of the law. This traditional view, however, was oversimplified and incomplete. It conveniently categorized all attorneys and clients as the same. In actuality, there are notable and dramatic differences depending on the nature of the relationship and the circumstances of the representation. As a consequence, client autonomy within the attorney-client relationship may not be characterized in a general manner. Its role depends upon the circumstances of the representation and cannot be made into a blanket assumption. One cannot assume that lawyers who represent corporate clients enhance autonomy the same way that lawyers who represent individual clients do. In either case, however, common ground may be found in client decision-making."

- "The rationale behind the traditional model is that the professional is skilled and trained, possessing extensive knowledge of an extremely complicated subject, while the client is incapable of actively and meaningfully participating due to the client's limited understanding. The traditional model affirmed a form of paternalism in which the client's best interests were served by allowing the professional to take full charge of all decision-making, and the client to sit back and defer, consent, and cooperate with the professional."