

SAN FERNANDO VALLEY BAR ASSOCIATION AND LOS ANGELES COUNTY BAR ASSOCIATION PROBATE SETTLEMENT OFFICER TRAINING PROGRAM

THURSDAY, APRIL 30, 2015
Stanley Mosk Courthouse Room 222

Registration 12:30 PM | Program 1:00 PM–4:00 PM
Recognition Ceremony and Bench-Bar Mixer 4:00 PM–5:00 PM

- ▶ PROBATE SETTLEMENT CONFERENCE PROGRAM
OVERVIEW AND COURT EXPECTATIONS
Judge David J. Cowan and Charles Shultz
- ▶ MOCK CONSERVATORSHIP SETTLEMENT
CONFERENCE
*Commissioner Brenda Penny, John E. Rogers,
LeAnne Maillian and Stuart Zimring*
- ▶ AVOIDING AGEISM AT MEDIATION
Judge James A. Steele, Ret.
- ▶ ETHICAL RED FLAGS IN SETTLEMENT
CONFERENCES
Clark Byam and Rita Diaz
- ▶ NEEDS OF UNREPRESENTED PERSONS
Yolande Erickson and Bertha Sanchez Hayden
- ▶ TIPS ON CLOSING THE DEAL
Judge Joseph S. Biderman, Ret.
- ▶ RECOGNITION OF CURRENT PROBATE
SETTLEMENT OFFICERS
*Presiding Judge Carolyn B. Kuhl and Assistant
Presiding Judge Daniel J. Buckley*
- ▶ PROBATE BENCH-BAR MIXER

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. By attending this seminar, attorneys earn 3 hours of MCLE (2 hours General, .5 hours Ethics, .5 hours Elimination of Bias).

Probate Settlement Conference Overview and Court Expectations

Judge David J. Cowan and Charles A. Shultz

Why Participate

- Court ADR Program Eliminated
- Court Caseloads Increasing
- Helps Free up Judicial Resources
- Exposure to Community
- Enhance Reputation
- Hone/Expand Skills

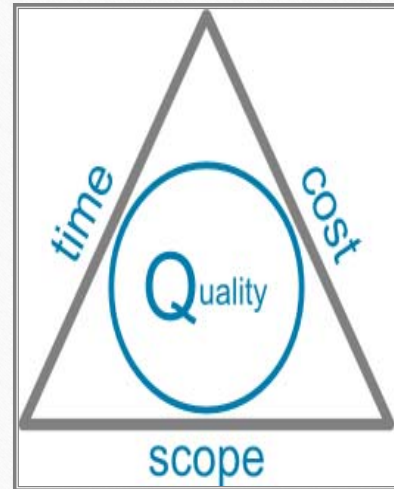


Mechanics of Mediation Program

- General program information and forms can be found at <https://www.sfvba.org/Member%20Resources/probateconfpanel.aspx>
- Contact Elizabeth Post at SFVBA to sign up for a day to serve
 - Try not to sign up for service on a date you have a hearing
 - if you have to ask for priority, you cannot tell the court why, even if asked – cannot give the impression that the court is favoring you
 - If you later develop conflict try to reschedule
 - If you have to reschedule, it is your responsibility to find a replacement
 - Only contact Elizabeth Post after exhausting all other avenues

- Bring Settlement Agreement form and Confidentiality Agreement forms to Court
 - Before mediation, all parties should sign Confidentiality Agreement
 - If matter is settled, Settlement Program Settlement Agreement should be used
- Parking - Lot 26 or Lot 17, both located at 1st and Olive. Lot 17 requires prepayment (reimbursed with validation), Lot 26 does not require prepayment. Get validation from Room 203.
- On day of mediation, meet outside Department 5
- Be prepared to make a general announcement in the hall or in Department 5 requesting who is there for mediation
- Court staff not responsible for program – **DO NOT** expect them to figure out problems
- Issues can be addressed to Judge Cowan in Dept. 79 if absolutely necessary

- Conference rooms in the back of the cafeteria are reserved for mediation program
- Commitment is 3 hours – parties expectation is only to participate for 3 hours – strive to complete mediation in that time frame – also may have more than one mediation to attend to so try to budget accordingly
- After day of service, complete and submit Post Conference Survey to be found on SFVBA website (requested, not required)
- Report any issues to Probate Committee or Elizabeth Post



Best Practices (recommendations not requirements)

- Check sign up book in advance of service date
 - Contact attorneys in advance to ask them to provide summary or settlement briefs
 - Hard files are not maintained by court. While parties may have been advised to bring briefs, they may not have them
- Be open minded
 - try to think outside the box (be creative)
- Don't be afraid to be bearer of bad news

- Try to formulate a game plan early to budget time
 - consider joint session to explain process (not required, some parties don't want to see each other to start)
 - if separate, try to keep introduction or first meeting to 15 minutes each side
- Ask parties their expectations and whether they want you to be facilitative, evaluative or some combination
- Use your experience with other mediators to find best approach for you

Q&A

RECOGNIZING AND ELIMINATING AGE BIAS

**Hon. James A. Steele (Ret.)
ADR Services, Inc.**

AGE BIAS = “AGEISM”

Coined by Robert Neil Butler to describe discrimination/bias against seniors.

- prejudicial attitudes towards older people, old age, and the aging process;
- discriminatory practices against older people; and
- institutional practices and policies that perpetuate stereotypes about older people.

AGEISM = BIGOTRY

Big·ot·ry

/ˈbɪɡətrē/

Bigotry is a state of mind where a person strongly and unfairly dislikes other people, ideas, etc. Some examples include personal beliefs, race, religion, national origin, gender, disability, sexual orientation, socioeconomic status, or other group characteristics.

Wikipedia

**"Ageism robs seniors of choice,
independence, dignity
and negatively impacts their
quality of life"**

Assisted Living Foundation of America

COMMON STEREOTYPES

- Older Americans aren't creative or productive in their later years.
- Seniors spend lots of time sleeping
- Most, if not all, seniors will ultimately suffer dementia as they age

Positive Also?

According to some social scientists,
AGEISM may:

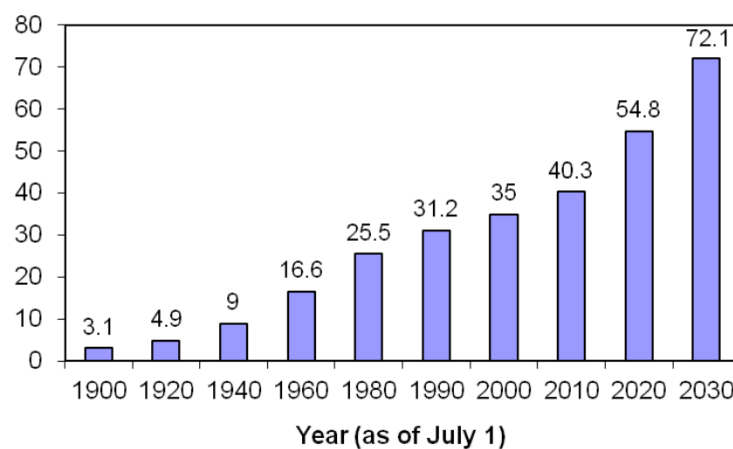
- Be explicit or implicit;
- Be positive or negative;
- Apply to young or old.

FACT

- Our population is aging;
- Older Americans will become a larger and larger proportion of the population over time



**Figure 1: Number of Persons 65+,
1900 - 2030 (numbers in millions)**



ACCUMULATED WEALTH

Older Americans have held, now hold, and will continue to hold, a much greater share of overall wealth than younger Americans



GENERATIONAL COMPARISON

- Net Worth of a Typical Head of Household over 65 is now 47 times that of a 35 year old Head of Household
- The wealth gap is now >2X what it was in 2005
- The wealth gap is now 5X the 10:1 disparity of 25 years ago

YET...

2009 Estimated Annual
financial loss by victims of
elder financial exploitation:

\$2.9 Billion



Physical Elder Abuse

One study estimated that 1 in 10 seniors has been subject to physical abuse

A 1998 study indicated 500,000 reports

A New York State Elder Abuse Prevalence Study found that for every case known to programs and agencies, 24 were unknown.



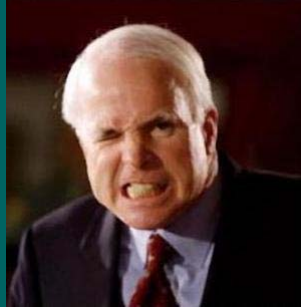
HARSH REALITY

Among those who may suffer elder
abuse, bias and discrimination are

...EACH OF US!



By 2050, even **Justin Bieber** will face
this harsh reality!



What happens to us as we age?

Possible Negative Consequences Associated With Aging

- Declining health
- Loss of loved ones
- Reliance upon strangers
- Vulnerability to crime and abuse
- Rejection by society and even family
- Marginalization/being deemed unimportant
- Loss of Independence
- Loss of ability to communicate

Physical and Mental changes

- Ambulation
- Memory
- Vision
- Hearing
- Verbal communication; and/or
- Writing/notating



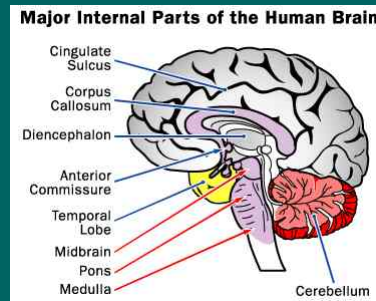
Causes:

the natural aging process,
disease, injuries, or as a result of
the emotional or psychological
reaction to illness

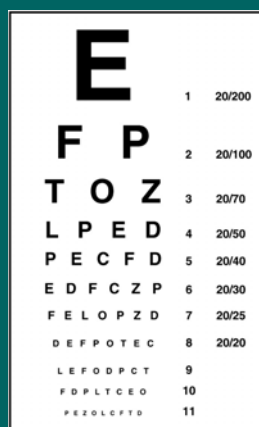


Memory Problems

- Stroke
- Physical Injury
- Malnutrition
- Dehydration
- Thyroid problems
- Prescription or other drug use



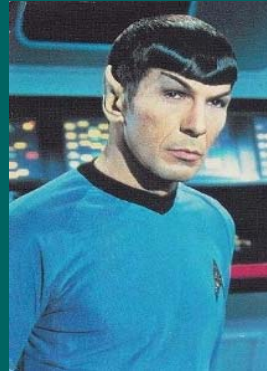
Vision Problems



- Presbyopia
- Cataracts
- Macular degeneration
- Glaucoma
- Retinal damage due to diabetes

Hearing Problems

- Accumulated ear wax in outer ear canal
- Ear infections
- Noise
- Stroke



Oral Communication Problems (i.e., "a failure to communicate")



- Injury
- Stroke
- MS
- ALS
- Parkinson's Disease
- Dementia
- Lung disease

Written Communication Problems



- Injury
- Stroke
- MS
- ALS
- Parkinson's Disease
- Dementia
- Alcoholism
- Arthritis

What can we do as Settlement
Officers to address some of
these conditions?



Ambulation

- Consider available locations
- Ensure transportation availability
- Provide nearby waiting area or travel between locations yourself



Vision

- Adequate lighting
- Large print/writing
- Avoid backlighting problems

Hearing

- Speak slowly/Enunciate
- Maintain eye contact
- Use assistive listening devices
- Use short sentences
- Eliminate background noise
- Beware of back-lighting



Capacity

DPCDA (Pr. Code)
Applies in and out of court



Provides standards to:

- Execute a will or trust
- Marry or enter into DP
- Make medical decisions
- Manage finances

Capacity (cont'd)



DPCDA (Pr. Code)

Pr. C 812 requires:

Ability to

understand/appreciate rights,
duties, consequences, risks
and benefits

And to communicate the
decision

Capacity to Make A Will



Must appreciate:

- Nature of testamentary act
- Nature of property
- Relationships to living family members and others who will be affected by will

Incapacity

Must establish a deficit in mental functions

- Alertness/Attention
- Information processing
- Thought processes

Must be correlation between deficit and act in question [Pr. C § 811(a)]

LEGAL PROTECTIONS



Criminal Elder Abuse Laws

PENAL CODE § § 368-368.5

Provides for additional terms of incarceration based on infliction of unjustified pain or suffering, age of the victim and other circumstances

Civil Elder Abuse Laws

- “Elder Abuse” Defined in W&I Code: “Elder Abuse and Dependent Adult Civil Protection Act”
- Can be physical, neglect, financial, abandonment, isolation, etc.
- Any behavior resulting in harm, pain or mental suffering
- Intent not required
- compensatory, punitives and atty. fees/costs

CACI 3100: FIN. ABUSE

- Refers back to W&I Code § **15610.30**
- 65 or > or dependent adult
- Took or assisted in taking for a wrongful use
- Substantial factor in harm suffered

Age Discrimination in Employment

FEHA = primary Ca. law re housing, employment, pub. accommodation
Protected Age = 40 or >

Employment: If litigated civilly, can recover \$ damages, emotional distress, punitives, and atty's fees/costs

Also federal ADEA Act re employment

**MOST OF ALL, REMEMBER IT'S
ONLY A MATTER OF TIME...**



"We start our sometimes tedious,
sometimes exciting, oftentimes sad
and stressful march to the grave
the moment we're born, so it
might as well be a march worth
remembering."

Donna Lynn Hope

Thank You!



Hon. James A. Steele (Ret.)

ADR Services, Inc.

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Email: judgesteele@ADRServices.org

ETHICAL ISSUES FACING MEDIATORS

by
Clark R. Byam
Rita M. Diaz
HAHN & HAHN LLP

1. Confidentiality

- a. Evidence Code section 1119
- b. Applicability to mediators (California Rules of Court, Rule 3.850 et. seq.)
- c. Applicability to attorneys for parties
 - (1) *Amis v. Greenberg Traurig*, 2015 WL 1245902 [Cal. Ct. App. Mar. 18, 2015] (malpractice plaintiff cannot circumvent mediation confidentiality by advancing inferences about his former attorney's acts/omissions during a mediation, for *inter alia*, attorneys would be unable to rebut inference by producing evidence of advice actually given);
 - (2) *Cassell v. Superior Court* (2011) 51 Cal.4th 113 (attorneys' mediation-related discussions with client were confidential and therefore neither discoverable nor admissible for purposes of proving malpractice)

2. Conflicts

- a. California Rules of Professional Conduct, Rule 3-310
- b. Avoiding appearance of seeking monetary gain
- c. Continuing mediation

3. Duties and Obligations of Lawyers for Parties

- a. Briefs
- b. Timeliness
- c. Truthfulness
 - (1) Business and Professions Code section 6068(d); Rules of Professional Conduct Rule 5-200(B).

- (2) *Foxgate v. Homeowners' Association, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1 (mediator precluded from reporting lawyers' misconduct to trial Judge due to policy of preserving confidentiality of mediations; the Supreme Court did not agree with the Court of Appeal's decision to fashion an exception to the rule for bad faith in mediation, holding that the Legislature has decided that confidentiality encourages parties to mediate without concern that another party or mediator might later assert that what a party said during mediation constitutes "a bad faith failure to participate in mediation.")

4. Hypothetical #1 and #2

5. Questions/Answers

West's Annotated California **Codes**

Evidence Code (Refs & Annos)

Division 9. **Evidence** Affected or Excluded by Extrinsic Policies (Refs & Annos)

Chapter 2. Mediation (Refs & Annos)

West's Ann. Cal. Evid. Code § 1119

§ 1119. Written or oral communications during mediation process; admissibility

Currentness

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.

Credits

(Added by Stats. 1997, c. 772 (A.B. 939), § 3.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1997 Addition

Subdivision (a) of **Section** 1119 continues without substantive change former **Section** 1152.5(a)(1), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See **Section** 120 ("civil action" includes civil proceedings). In addition, the protection of **Section** 1119(a) extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation.

Subdivision (b) continues without substantive change former **Section** 1152.5(a)(2), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See **Section** 120 ("civil action" includes civil proceedings). In addition, subdivision (b) expressly encompasses any type of "writing" as defined in **Section** 250, regardless of whether the representations are on paper or on some other medium.

Subdivision (c) continues former ~~Section~~ 1152.5(a)(3) without substantive change. A mediation is confidential notwithstanding the presence of an observer, such as a person evaluating or training the mediator or studying the mediation process.

See ~~Sections~~ 1115(a) ("mediation" defined), 1115(c) ("mediation consultation" defined). See also ~~Section~~ 703.5 (testimony by a judge, arbitrator, or mediator).

For examples of specialized mediation confidentiality provisions, see Bus. & Prof. Code §§ 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes); Code Civ. Proc. §§ 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); Fam. Code §§ 1818 (family conciliation court), 3177 (child custody); Food & Agric. Code § 54453 (agricultural cooperative bargaining associations); Gov't Code §§ 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (land use); Ins. Code § 10089.80 (earthquake insurance); Lab. Code § 65 (labor disputes); Welf. & Inst. Code § 350 (dependency mediation). See also Cal. Const. art. I, § 1 (right to privacy); *Garstang v. Superior Court*, 39 Cal.App.4th 526, 46 Cal.Rptr.2d 84, 88 (1995) (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson). [1997-98 Annual Report, 27 Cal.L.Rev.Comm. Reports App. 5 (1997)].

West's Annotated California Codes

California Rules of Court (Refs & Annos)

Title 3. Civil Rules (Refs & Annos)

Division 8. Alternative Dispute Resolution (Refs & Annos)

Chapter 3. General Rules Relating to Mediation of Civil Cases (Refs & Annos)

Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases
(Refs & Annos)

Cal. Rules of Court, Rule 3.850
Formerly cited as CA ST TRIAL CT Rule 1620

Rule 3.850. Purpose and function

Currentness

(a) Standards of conduct

The rules in this article establish the minimum standards of conduct for mediators in court-connected mediation programs for general civil cases. These rules are intended to guide the conduct of mediators in these programs, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process and the courts. For mediation to be effective, there must be broad public confidence in the integrity and fairness of the process. Mediators in court-connected programs are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence.

(b) Scope and limitations

These rules are not intended to:

- (1) Establish a ceiling on what is considered good practice in mediation or discourage efforts by courts, mediators, or others to educate mediators about best practices;
- (2) Create a basis for challenging a settlement agreement reached in connection with mediation; or
- (3) Create a basis for a civil cause of action against a mediator.

Credits

(Formerly Rule 1620, adopted, eff. Jan. 1, 2003. Renumbered Rule 3.850 and amended, eff. Jan. 1, 2007.)

Cal. Rules of Court, Rule 3.850, CA ST CIVIL RULES Rule 3.850

Current with amendments received through 1/1/15

West's Annotated California Codes

California Rules of Court (Refs & Annos)

Title 3. Civil Rules (Refs & Annos)

Division 8. Alternative Dispute Resolution (Refs & Annos)

Chapter 3. General Rules Relating to Mediation of Civil Cases (Refs & Annos)

Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases
(Refs & Annos)

Cal.Rules of Court, Rule 3.851
Formerly cited as CA ST TRIAL CT Rule 1620.1

Rule 3.851. Application

Currentness

(a) Circumstances applicable

The rules in this article apply to mediations in which a mediator:

- (1) Has agreed to be included on a superior court's list or panel of mediators for general civil cases and is notified by the court or the parties that he or she has been selected to mediate a case within that court's mediation program; or
- (2) Has agreed to mediate a general civil case pending in a superior court after being notified by the court or the parties that he or she was recommended, selected, or appointed by that court or will be compensated by that court to mediate a case within that court's mediation program. A mediator who is not on a superior court list or panel and who is selected by the parties is not "recommended, selected, or appointed" by the court within the meaning of this subdivision simply because the court approves the parties' agreement to use this mediator or memorializes the parties' selection in a court order.

(b) Application to listed firms

If a court's panel or list includes firms that provide mediation services, all mediators affiliated with a listed firm are required to comply with the rules in this article when they are notified by the court or the parties that the firm was selected from the court list to mediate a general civil case within that court's mediation program.

(c) Time of applicability

Except as otherwise provided in these rules, the rules in this article apply from the time the mediator agrees to mediate a case until the end of the mediation in that case.

(d) Inapplicability to judges

The rules in this article do not apply to judges or other judicial officers while they are serving in a capacity in which they are governed by the Code of Judicial Ethics.

(e) Inapplicability to settlement conferences

The rules in this article do not apply to settlement conferences conducted under rule 3.1380.

Credits

(Formerly Rule 1620.1, adopted, eff. Jan. 1, 2003. Renumbered Rule 3.851 and amended, eff. Jan. 1, 2007. As amended, eff. July 1, 2007; Jan. 1, 2009; Jan. 1, 2010.)

Editors' Notes

ADVISORY COMMITTEE COMMENT

Subdivision (d). Although these rules do not apply to them, judicial officers who serve as mediators in their courts' mediation programs are nevertheless encouraged to be familiar with and observe these rules when mediating, particularly the rules concerning subjects not covered in the Code of Judicial Ethics such as voluntary participation and self-determination.

Cal. Rules of Court, Rule 3.851, CA ST CIVIL RULES Rule 3.851

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Title 3. Civil Rules (Refs & Annos)

Division 8. Alternative Dispute Resolution (Refs & Annos)

Chapter 3. General Rules Relating to Mediation of Civil Cases (Refs & Annos)

Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases
(Refs & Annos)

Cal.Rules of Court, Rule 3.852
Formerly cited as CA ST TRIAL CT Rule 1620.2

Rule 3.852. Definitions

Currentness

As used in this article, unless the context or subject matter requires otherwise:

- (1) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.
- (2) "Mediator" means a neutral person who conducts a mediation.
- (3) "Participant" means any individual, entity, or group, other than the mediator taking part in a mediation, including but not limited to attorneys for the parties.
- (4) "Party" means any individual, entity, or group taking part in a mediation that is a plaintiff, a defendant, a cross-complainant, a cross-defendant, a petitioner, a respondent, or an intervenor in the case.

Credits

(Formerly Rule 1620.2, adopted, eff. Jan. 1, 2003. Renumbered Rule 3.852 and amended, eff. Jan. 1, 2007.)

Editors' Notes

ADVISORY COMMITTEE COMMENT

The definition of "mediator" in this rule departs from the definition in Evidence Code section 1115(b) in that it does not include persons designated by the mediator to assist in the mediation or to communicate with a participant in preparation for the mediation. However, these definitions are applicable only to these rules of conduct and do not limit or expand mediation confidentiality under the Evidence Code or other law.

The definition of "participant" includes insurance adjusters, experts, and consultants as well as the parties and their attorneys.

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Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases
(Refs & Annos)

Cal.Rules of Court, Rule 3.853
Formerly cited as CA ST TRIAL CT Rule 1620.3

Rule 3.853. Voluntary participation and self-determination

Currentness

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.

Credits

(Formerly Rule 1620.3, adopted, eff. Jan. 1, 2003. Renumbered Rule 3.853 and amended, eff. Jan. 1, 2007.)

Editors' Notes

ADVISORY COMMITTEE COMMENT

Voluntary participation and self-determination are fundamental principles of mediation that apply both to mediations in which the parties voluntarily elect to mediate and to those in which the parties are required to go to mediation in a mandatory court mediation program or by court order. Although the court may order participants to attend mediation, a mediator may not mandate the extent of their participation in the mediation process or coerce any party to settle the case.

After informing the parties of their choices and the consequences of those choices, a mediator can invoke a broad range of approaches to assist the parties in reaching an agreement without offending the principles of voluntary participation and self-determination, including (1) encouraging the parties to continue participating in the mediation when it reasonably appears to the mediator that the possibility of reaching an uncoerced, consensual agreement has not been exhausted and (2) suggesting that a party consider obtaining professional advice (for example, informing an unrepresented party that he or she may consider obtaining legal advice). Conversely, examples of conduct that violate the principles of voluntary participation and self-determination include coercing a party to continue participating in

the mediation after the party has told the mediator that he or she wishes to terminate the mediation, providing an opinion or evaluation of the dispute in a coercive manner or over the objection of the parties, using abusive language, and threatening to make a report to the court about a party's conduct at the mediation.

Notes of Decisions (1)

Cal. Rules of Court, Rule 3.853, CA ST CIVIL RULES Rule 3.853
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Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases
(Refs & Annos)

Cal.Rules of Court, Rule 3.854
Formerly cited as CA ST TRIAL CT Rule 1620.4

Rule 3.854. Confidentiality

Currentness

(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.

(d) Use of confidential information

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

Credits

(Formerly Rule 1620.4, adopted, eff. Jan. 1, 2003. Renumbered Rule 3.854, eff. Jan. 1, 2007.)

Editors' Notes

ADVISORY COMMITTEE COMMENT

Subdivision (a). The general law concerning mediation confidentiality is found in Evidence Code sections 703.5 and 1115-1128 and in cases interpreting those sections. (See, e.g., *Foxgate Homeowners' Association, Inc. v. Bramalea*

California, Inc. (2001) 26 Cal.4th 1; *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155; and *Gilbert v. National Corp. for Housing Partnerships* (1999) 71 Cal.App.4th 1240.)

Notes of Decisions (1)

Cal. Rules of Court, Rule 3.854, CA ST CIVIL RULES Rule 3.854

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Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases
(Refs & Annos)

Cal.Rules of Court, Rule 3.855

Formerly cited as CA ST TRIAL CT Rule 1620.5

Rule 3.855. Impartiality, conflicts of interest, disclosure, and withdrawal

Currentness

(a) Impartiality

A mediator must maintain impartiality toward all participants in the mediation process at all times.

(b) Disclosure of matters potentially affecting impartiality

(1) A mediator must make reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially, and must disclose these matters to the parties. These matters include:

(A) Past, present, and currently expected interests, relationships, and affiliations of a personal, professional, or financial nature; and

(B) The existence of any grounds for disqualification of a judge specified in Code of Civil Procedure section 170.1.

(2) A mediator's duty to disclose is a continuing obligation, from the inception of the mediation process through its completion. Disclosures required by this rule must be made as soon as practicable after a mediator becomes aware of a matter that must be disclosed. To the extent possible, such disclosures should be made before the first mediation session, but in any event they must be made within the time required by applicable court rules or statutes.

(c) Proceeding if there are no objections or questions concerning impartiality

Except as provided in (f), if, after a mediator makes disclosures, no party objects to the mediator and no participant raises any question or concern about the mediator's ability to conduct the mediation impartially, the mediator may proceed.

(d) Responding to questions or concerns concerning impartiality

If, after a mediator makes disclosures or at any other point in the mediation process, a participant raises a question or concern about the mediator's ability to conduct the mediation impartially, the mediator must address the question or concern with the

participants. Except as provided in (f), if, after the question or concern is addressed, no party objects to the mediator, the mediator may proceed.

(e) Withdrawal or continuation upon party objection concerning impartiality

In a two-party mediation, if any party objects to the mediator after the mediator makes disclosures or discusses a participant's question or concern regarding the mediator's ability to conduct the mediation impartially, the mediator must withdraw. In a mediation in which there are more than two parties, the mediator may continue the mediation with the nonobjecting parties, provided that doing so would not violate any other provision of these rules, any law, or any local court rule or program guideline.

(f) Circumstances requiring mediator recusal despite party consent

Regardless of the consent of the parties, a mediator either must decline to serve as mediator or, if already serving, must withdraw from the mediation if:

- (1) The mediator cannot maintain impartiality toward all participants in the mediation process; or
- (2) Proceeding with the mediation would jeopardize the integrity of the court or of the mediation process.

Credits

(Formerly Rule 1620.5, adopted, eff. Jan. 1, 2003. Renumbered Rule 3.855 and amended, eff. Jan. 1, 2007.)

Editors' Notes

ADVISORY COMMITTEE COMMENT

Subdivision (b). This subdivision is intended to provide parties with information they need to help them determine whether a mediator can conduct the mediation impartially. A mediator's overarching duty under this subdivision is to make a "reasonable effort" to identify matters that, in the eyes of a reasonable person, could raise a question about the mediator's ability to conduct the mediation impartially, and to inform the parties about those matters. What constitutes a "reasonable effort" to identify such matters varies depending on the circumstances, including whether the case is scheduled in advance or received on the spot, and the information about the participants and the subject matter that is provided to the mediator by the court and the parties.

The interests, relationships, and affiliations that a mediator may need to disclose under (b)(1)(A) include: (1) prior, current, or currently expected service as a mediator in another mediation involving any of the participants in the present mediation; (2) prior, current, or currently expected business relationships or transactions between the mediator and any of the participants; and (3) the mediator's ownership of stock or any other significant financial interest involving any participant in the mediation. Currently expected interests, relationships, and affiliations may include, for example, an intention to form a partnership or to enter into a future business relationship with one of the participants in the mediation.

Although (b)(1) specifies interests, relationships, affiliations, and matters that are grounds for disqualification of a judge under Code of Civil Procedure section 170.1, these are only examples of common matters that reasonably could raise a question about a mediator's ability to conduct the mediation impartially and, thus, must be disclosed. The absence of particular interests, relationships, affiliations, and section 170.1 matters does not necessarily mean

that there is no matter that could reasonably raise a question about the mediator's ability to conduct the mediation impartially. A mediator must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under (b)(1).

Attorney mediators should be aware that under the section 170.1 standard, they may need to make disclosures when an attorney in their firm is serving or has served as a lawyer for any of the parties in the mediation. Section 170.1 does not specifically address whether a mediator must disclose when another member of the mediator's dispute resolution services firm is providing or has provided services to any of the parties in the mediation. Therefore, a mediator must evaluate such circumstances under the general criteria for disclosure under (b)(1)--that is, is it a matter that, in the eyes of a reasonable person, could raise a question about the mediator's ability to conduct the mediation impartially?

If there is a conflict between the mediator's obligation to maintain confidentiality and the mediator's obligation to make a disclosure, the mediator must determine whether he or she can make a general disclosure of the circumstance without revealing any confidential information, or must decline to serve.

Cal. Rules of Court, Rule 3.855, CA ST CIVIL RULES Rule 3.855

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Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases
(Refs & Annos)

Cal. Rules of Court, Rule 3.856
Formerly cited as CA ST TRIAL CT Rule 1620.6

Rule 3.856. Competence

Currentness

(a) Compliance with court qualifications

A mediator must comply with experience, training, educational, and other requirements established by the court for appointment and retention.

(b) Truthful representation of background

A mediator has a continuing obligation to truthfully represent his or her background to the court and participants. Upon a request by any party, a mediator must provide truthful information regarding his or her experience, training, and education.

(c) Informing court of public discipline and other matters

A mediator must also inform the court if:

- (1) Public discipline has been imposed on the mediator by any public disciplinary or professional licensing agency;
- (2) The mediator has resigned his or her membership in the State Bar or another professional licensing agency while disciplinary or criminal charges were pending;
- (3) A felony charge is pending against the mediator;
- (4) The mediator has been convicted of a felony or of a misdemeanor involving moral turpitude; or
- (5) There has been an entry of judgment against the mediator in any civil action for actual fraud or punitive damages.

(d) Assessment of skills; withdrawal

A mediator has a continuing obligation to assess whether or not his or her level of skill, knowledge, and ability is sufficient to conduct the mediation effectively. A mediator must decline to serve or withdraw from the mediation if the mediator determines that he or she does not have the level of skill, knowledge, or ability necessary to conduct the mediation effectively.

Credits

(Formerly Rule 1620.6, adopted, eff. Jan. 1, 2003. Renumbered Rule 3.856, eff. Jan. 1, 2007.)

Editors' Notes

ADVISORY COMMITTEE COMMENT

Subdivision (d). No particular advanced academic degree or technical or professional experience is a prerequisite for competence as a mediator. Core mediation skills include communicating clearly, listening effectively, facilitating communication among all participants, promoting exploration of mutually acceptable settlement options, and conducting oneself in a neutral manner.

A mediator must consider and weigh a variety of issues in order to assess whether his or her level of skill, knowledge, and ability is sufficient to make him or her effective in a particular mediation. Issues include whether the parties (1) were involved or had input in the selection of the mediator; (2) had access to information about the mediator's background or level of skill, knowledge, and ability; (3) have a specific expectation or perception regarding the mediator's level of skill, knowledge, and ability; (4) have expressed a preference regarding the style of mediation they would like or expect; or (5) have expressed a desire to discuss legal or other professional information, to hear a personal evaluation of or opinion on a set of facts as presented, or to be made aware of the interests of persons who are not represented in mediation.

Cal. Rules of Court, Rule 3.856, CA ST CIVIL RULES Rule 3.856

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Chapter 3. General Rules Relating to Mediation of Civil Cases (Refs & Annos)

Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases
(Refs & Annos)

Cal.Rules of Court, Rule 3.857
Formerly cited as CA ST TRIAL CT Rule 1620.7

Rule 3.857. Quality of mediation process

Currentness

(a) Diligence

A mediator must make reasonable efforts to advance the mediation in a timely manner. If a mediator schedules a mediation for a specific time period, he or she must keep that time period free of other commitments.

(b) Procedural fairness

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

(c) Explanation of process

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.

(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.

(e) Recommending other services

A mediator may recommend the use of other services in connection with a mediation and may recommend particular providers of other services. However, a mediator must disclose any related personal or financial interests if recommending the services of specific individuals or organizations.

(f) Nonparticipants' interests

A mediator may bring to the attention of the parties the interests of others who are not participating in the mediation but who may be affected by agreements reached as a result of the mediation.

(g) Combining mediation with other ADR processes

A mediator must exercise caution in combining mediation with other alternative dispute resolution (ADR) processes and may do so only with the informed consent of the parties and in a manner consistent with any applicable law or court order. The mediator must inform the parties of the general natures of the different processes and the consequences of revealing information during any one process that might be used for decision making in another process, and must give the parties the opportunity to select another neutral for the subsequent process. If the parties consent to a combination of processes, the mediator must clearly inform the participants when the transition from one process to another is occurring.

(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.

(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.

(j) Manner of withdrawal

When a mediator determines that it is necessary to suspend or terminate a mediation or to withdraw, the mediator must do so without violating the obligation of confidentiality and in a manner that will cause the least possible harm to the participants.

Credits

(Formerly Rule 1620.7, adopted, eff. Jan. 1, 2003. Renumbered Rule 3.857 and amended, eff. Jan. 1, 2007.)

Editors' Notes

ADVISORY COMMITTEE COMMENT

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

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.

One question that frequently arises is whether a mediator's assessment of claims, defenses, or possible litigation outcomes constitutes legal advice or the practice of law. Similar questions may arise when accounting, architecture, construction, counseling, medicine, real estate, or other licensed professions are relevant to a mediation. This rule does not determine what constitutes the practice of law or any other licensed profession. A mediator should be cautious when providing any information or opinion related to any field for which a professional license is required, in order to avoid doing so in a manner that may constitute the practice of a profession for which the mediator is not licensed, or in a manner that may violate the regulations of a profession that the mediator is licensed to practice. A mediator should exercise particular caution when discussing the law with unrepresented parties and should inform such parties that they may seek independent advice from a lawyer.

Subdivision (i). Subdivision (i)(2) is not intended to establish any new responsibility or diminish any existing responsibilities that a mediator may have, under the Americans With Disabilities Act or other similar law, to attempt to accommodate physical or mental disabilities of a participant in mediation.

Cal. Rules of Court, Rule 3.857, CA ST CIVIL RULES Rule 3.857
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Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases
(Refs & Annos)

Cal.Rules of Court, Rule 3.858
Formerly cited as CA ST TRIAL CT Rule 1620.8

Rule 3.858. Marketing

Currentness

(a) Truthfulness

A mediator must be truthful and accurate in marketing his or her mediation services. A mediator is responsible for ensuring that both his or her own marketing activities and any marketing activities carried out on his or her behalf by others comply with this rule.

(b) Representations concerning court approval

A mediator may indicate in his or her marketing materials that he or she is a member of a particular court's panel or list but, unless specifically permitted by the court, must not indicate that he or she is approved, endorsed, certified, or licensed by the court.

(c) Promises, guarantees, and implications of favoritism

In marketing his or her mediation services, a mediator must not:

(1) Promise or guarantee results; or

(2) Make any statement that directly or indirectly implies bias in favor of one party or participant over another.

(d) Solicitation of business

A mediator must not solicit business from a participant in a mediation proceeding while that mediation is pending.

Credits

(Formerly Rule 1620.8, adopted, eff. Jan. 1, 2003. Renumbered Rule 3.858, eff. Jan. 1, 2007.)

West's Annotated California Codes

California Rules of Court (Refs & Annos)

Title 3. Civil Rules (Refs & Annos)

Division 8. Alternative Dispute Resolution (Refs & Annos)

Chapter 3. General Rules Relating to Mediation of Civil Cases (Refs & Annos)

Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases
(Refs & Annos)

Cal. Rules of Court, Rule 3.859
Formerly cited as CA ST TRIAL CT Rule 1620.9

Rule 3.859. Compensation and gifts

Currentness

(a) Compliance with law

A mediator must comply with any applicable requirements concerning compensation established by statute or the court.

(b) Disclosure of and compliance with compensation terms

Before commencing the mediation, the mediator must disclose to the parties in writing any fees, costs, or charges to be paid to the mediator by the parties. A mediator must abide by any agreement that is reached concerning compensation.

(c) Contingent fees

The amount or nature of a mediator's fee must not be made contingent on the outcome of the mediation.

(d) Gifts and favors

A mediator must not at any time solicit or accept from or give to any participant or affiliate of a participant any gift, bequest, or favor that might reasonably raise a question concerning the mediator's impartiality.

Credits

(Formerly Rule 1620.9, adopted, eff. Jan. 1, 2003. Renumbered Rule 3.859 and amended, eff. Jan. 1, 2007.)

Editors' Notes

ADVISORY COMMITTEE COMMENT

Subdivision (b). It is good practice to put mediation fee agreements in writing, and mediators are strongly encouraged to do so; however, nothing in this rule is intended to preclude enforcement of a compensation agreement for mediation services that is not in writing.

Subdivision (d). Whether a gift, bequest, or favor “might reasonably raise a question concerning the mediator's impartiality” must be determined on a case-by-case basis. This subdivision is not intended to prohibit a mediator from accepting other employment from any of the participants, consistent with rule 3.858(d).

Cal. Rules of Court, Rule 3.859, CA ST CIVIL RULES Rule 3.859

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Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases
(Refs & Annos)

Cal. Rules of Court, Rule 3.860
Formerly cited as CA ST TRIAL CT Rule 1621

Rule 3.860. Attendance sheet and agreement to disclosure

Currentness

(a) Attendance sheet

In each mediation to which these rules apply under rule 3.851(a), the mediator must request that all participants in the mediation complete an attendance sheet stating their names, mailing addresses, and telephone numbers; retain the attendance sheet for at least two years; and submit it to the court on request.

(b) Agreement to disclosure

The mediator must agree, in each mediation to which these rules apply under rule 3.851(a), that if an inquiry or a complaint is made about the conduct of the mediator, mediation communications may be disclosed solely for purposes of a complaint procedure conducted pursuant to rule 3.865 to address that complaint or inquiry.

Credits

(Formerly Rule 1621, adopted, eff. Jan. 1, 2006. Renumbered Rule 3.860 and amended, eff. Jan. 1, 2007. As amended, eff. Jan. 1, 2011.)

Editors' Notes

OFFICIAL FORMS

2015 Electronic Pocket Part Update

<Mandatory and optional Forms adopted and approved by the Judicial Council are set out in West's California Judicial Council Forms Pamphlet.>

Cal. Rules of Court, Rule 3.860, CA ST CIVIL RULES Rule 3.860

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West's Annotated **California** Codes

Rules of the State Bar of **California**(Refs & Annos)

California Rules of **Professional Conduct**(Refs & Annos)

Chapter 3. **Professional** Relationship with Clients

Prof.Conduct, **Rule 3-310**

Rule 3-310. Avoiding the Representation of Adverse Interests

Currentness

(A) For purposes of this rule:

- (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;
- (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;
- (3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

- (1) The member has a legal, business, financial, **professional**, or personal relationship with a party or witness in the same matter; or
- (2) The member knows or reasonably should know that:
 - (a) the member previously had a legal, business, financial, **professional**, or personal relationship with a party or witness in the same matter; and
 - (b) the previous relationship would substantially affect the member's representation; or
- (3) The member has or had a legal, business, financial, **professional**, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
- (4) The member has or had a legal, business, financial, or **professional** interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

- (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
 - (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
 - (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.
- (D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.
- (E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.
- (F) A member shall not accept compensation for representing a client from one other than the client unless:
- (1) There is no interference with the member's independence of **professional** judgment or with the client-lawyer relationship; and
 - (2) Information relating to representation of the client is protected as required by Business and **Professions** Code section 6068, subdivision (e); and
 - (3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
 - (a) such nondisclosure is otherwise authorized by law; or
 - (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

DISCUSSION

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other **rules** and laws may preclude making adequate disclosure under this **rule**. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and **Professions** Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by **rule** 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, § 962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

Credits

(Adopted Nov. 28, 1988, eff. May 27, 1989. As amended, eff. Sept. 14, 1992; March 3, 2003.)

West's Annotated California Codes

Business and Professions Code(Refs & Annos)

Division 3. Professions and Vocations Generally (Refs & Annos)

Chapter 4. Attorneys (Refs & Annos)

Article 4. Admission to the Practice of Law (Refs & Annos)

West's Ann.Cal.Bus. & Prof.Code § 6068

§ 6068. Duties of attorney

Effective: July 1, 2004

Currentness

It is the duty of an attorney to do all of the following:

- (a) To support the Constitution and laws of the United States and of this state.
- (b) To maintain the respect due to the courts of justice and judicial officers.
- (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.
- (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.
- (e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
- (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
- (f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.
- (g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.
- (h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.
- (i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the

Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(l) To keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

(o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, "against the attorney" includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

Credits

(Added by Stats.1939, c. 34, p. 355, § 1. Amended by Stats.1985, c. 453, § 11; Stats.1986, c. 475, § 2; Stats.1988, c. 1159, § 5; Stats.1990, c. 1639 (A.B.3991), § 4; Stats.1999, c. 221 (S.B.143), § 1; Stats.1999, c. 342 (S.B.144), § 2; Stats.2001, c. 24 (S.B.352), § 4; Stats.2003, c. 765 (A.B.1101), § 1, operative July 1, 2004.)

West's Annotated California Codes

Rules of the State Bar of California (Refs & Annos)

California **Rules** of **Professional Conduct** (Refs & Annos)

Chapter 5. Advocacy and Representation

Prof. Conduct, **Rule 5-200**

Rule 5-200. Trial Conduct

Currentness

In presenting a matter to a tribunal, a member:

- (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
- (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;
- (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;
- (D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and
- (E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

Credits

(Adopted Nov. 28, 1988, eff. May 27, 1989.)

Training for the Settlement Conference Officers in April 2015

Hypothetical No. 1

This case involves a trust where the parents have died, leaving three children: Pamela, John and Dave. Surviving parent died in 2013 and the trust provides that all the assets are to be sold and the proceeds distributed in equal shares to Pamela, John and Dave. Pamela named successor trustee, and no alternate named. Trustee has the discretion to either distribute the tangible property or sell it together with the house and distribute the proceeds equally.

Pamela does not get along with John. After being advised the house will sell quicker if the furnishings are removed, she hires a charitable institution that will take all furnishings out and give her a receipt for the same as a charitable donation. Charity lists value of the furnishings at \$4,000.

Pamela also retained a broker, a friend of hers, to sell the house. House listed at \$600,000 and sells for this price. After sale, an informal accounting is sent to her two brothers requesting approval of same and advising that per their approval, she would distribute the balance less \$25,000 for her trustee fees.

John objects to the accounting on the basis that (a) the tangibles should not have been gifted to a charity but should have been distributed among the three children and he claimed that the tangibles were actually worth closer to \$50,000; (b) the house was undersold for at least \$100,000 and that she should not have used a friend of hers as the broker; and (c) she should waive any right to any fee based on her failure to properly act as a trustee for the benefit of the beneficiaries.

Pamela then has her lawyer file an accounting with the Court for approval to which John again filed objections along the same lines as his prior objections. All three agree to try the pro

bono probate settlement program and both Pamela and John appear with their counsel. Dave appears without counsel.

In discussing the case separately with the individuals involved, or their counsel, the settlement conference officer (Rita) is advised by Dave that his primary objection was failure of Pamela to distribute the tangible personal property, which he said included some fishing poles and rifles he wanted, but that he would rely on the advice of Rita as to what he should agree to in the way of a settlement.

Pamela's counsel tells Rita the main reason John is objecting to accounting is because some years back when he was going through a divorce, Pamela sided with his wife, and John has never forgiven her.

John's counsel also states he has to start another trial in a week and if Rita gets Pamela to agree to resign as trustee and turn over the assets to an independent person the matter can probably be settled after his other trial is over. He suggests that Rita hold the funds as an interim acting successor trustee until such time as they resolve this matter. He doubts John will back off of his claims for the \$100,000 surcharge on the sale of the property and not having any fees go to Pamela as trustee as long as she is trustee. He thinks that once she is no longer in control of the assets that it could probably be settled later on and suggests that Rita be the person to mediate any subsequent meetings, even though it might be several months off.

In talking with Dave, Rita can smell liquor on his breath. Dave indicates he does not want this to go on any longer. He wants the whole thing resolved today and will just rely on Rita to get this thing solved between his brother and sister and to get some of the tangible property back.

Hypothetical #2

This case also involves a trust where parents have died, this time leaving two children: Karl and Candice. Karl and Candice became the Co-Trustees of the Trust upon the mother's death, the second to die. A few months prior to her death, the mother amended her Trust, the whole of which was revocable, leaving 75% of her estate to her caregiver Alma.

Karl and Candice filed a petition for instructions to invalidate the amendment benefitting Alma on the grounds of undue influence and lack of capacity and seeking to invoke the shifting presumption under Probate Code 21380.

The parties agree to try the pro bono probate settlement program. On the day of the mediation, Clark Byam is scheduled as the settlement officer. Neither party bring briefs.

First, Clark meets with Alma and her counsel. They explain that Alma took care of the decedent for over 10 years since her husband died, that Alma did everything for the decedent and that they were very close. They also tell Clark that the decedent had told Alma for several years prior to making the amendment that she wanted to leave Alma a portion of her estate and requested that Alma take her to a lawyer to amend her trust. Alma had known the lawyer for years so he was obviously reliable. Alma only did what the decedent asked of her. Alma's counsel also told Clark that he had not had time to draft discovery regarding the assets of the Trust but since Alma was so close to the decedent she knew the house was in the name of the Trust as well as an account at Morgan Stanley.

Then, Clark meets with Karl and Candice and their lawyer. They tell Clark that Alma is a gold digger, did not take good care of their mother often forgetting to give her medication and leaving her alone for hours while she went to get her nails done. When Clark asked about the assets, Karl and Candice informed Clark that the assets of the Trust include the decedent's residence worth about \$1 million, an account with Morgan Stanley out of which Alma helped the decedent write checks with about \$20,000 in cash and an offshore account with about \$3 million.. However, they tell him that Alma does not know about the offshore account and they just want to settle without that being disclosed.

ACHIEVING SUCCESS WITH PRO PER LITIGANTS

Probate
Settlement
Officer Training
Program

April 30, 2015



Presenters

Yolande P. Erickson, Esq.
Transitions Program Director

Bertha S. Hayden, Esq.,
Family Matters Program Manager

STRATEGIES

1. Put aside Stereotypes
2. Step into the Shoes of the Pro Per Litigant
3. Listen to their Story
4. Focus Issues: *Paint the Picture*
5. Set Priorities & Find Commonalities
6. Settlement: *It takes a village*
7. Why a trial is always a bad idea

1. PUT ASIDE STEREOTYPES

PUT ASIDE STEREOTYPES

Abraham Lincoln:

***“He who represents himself has a fool
for a client.”***

2. STEP INTO THE SHOES OF THE PRO PER LITIGANT

STEP INTO THE SHOES OF THE PRO PER LITIGANT

Overcoming alienation:

1. Underdog
2. Technical Terms
3. Procedural Nightmares

3. LISTEN TO THEIR STORY

LISTEN TO THEIR STORY

- Opportunity to tell their story
- Empowerment in being heard

4. FOCUS ISSUES: *PAINT THE PICTURE*

**FOCUS ISSUES:
*PAINT THE PICTURE***

- 1.** Clarify Issues
- 2.** Distinguish between legal and non-legal issues
- 3.** What is actually before the court

**5. SET PRIORITIES &
FIND COMMONALITIES**

SET PRIORITIES & FIND COMMONALITIES

1. What are the priorities?
2. What do we have in common?

**6. SETTLEMENT: *IT
TAKES A VILLAGE***

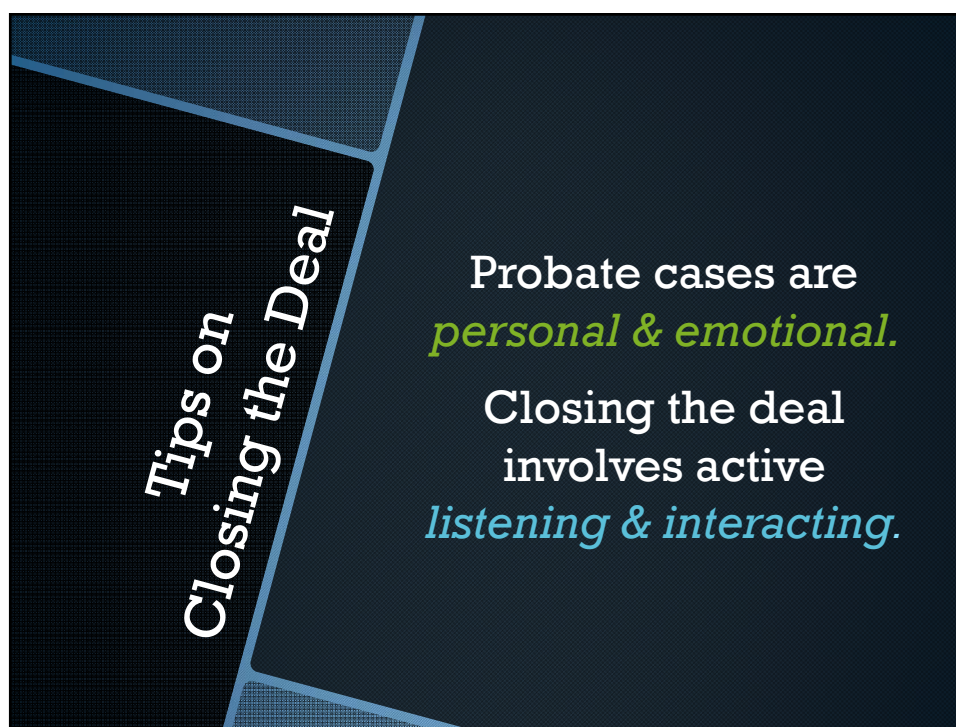
SETTLEMENT: *IT TAKES A VILLAGE*

1. Build Small Agreements
2. Getting to Yes starts with maybe
3. Get Buy-in from everyone, was it good for you?
4. The Problem Lawyer
5. Can't have a Forrest without the Trees

7. WHY A TRIAL IS ALWAYS A BAD IDEA

WHY A TRIAL IS ALWAYS A BAD IDEA

1. Trust us, it just is
2. The Reality of a Trial, especially
for a Pro Per



*5 Tools for
Closing the Deal*

1. LISTEN
2. REPEAT
3. ACKNOWLEDGE
4. EMPATHIZE
5. CONFRONT

THE PROBATE
ESTATE IS A
SHRINKING PIE:

Which is better?

Pie "A"



Pie "B"





IDENTIFY YOUR WARRIORS

Likely Litigation Matchups:
CHILDREN vs. _____

Children vs. Children, Children vs. Boyfriend/Girlfriend, Children vs. Attorney-in-fact, Children vs. Surviving Spouse (i.e. stepparent)

Note the recurring theme of "children"

They are most likely to have a sense of *entitlement*.

THE 3 MINDSET CATEGORIES OF PARTIES

Category 1

I WANT TO SETTLE.

- Recognizes the economic utility of settlement
- Understands the emotional utility of looking forward rather than backwards

This slide features a dark blue background with a lighter blue geometric pattern on the left side. The text is white and bold.

Category 2

I DON'T WANT TO SETTLE.

- May see little merit in adversary's position
- May view it as extortion against the estate
- May still be willing to settle if the economies of settling justify it and allow it to be viewed as a "win"

This slide features a dark blue background with a lighter blue geometric pattern on the left side. The text is white and bold.

Category 3

I WANT NOT TO SETTLE.

- Settlement doesn't compensate for the intangible benefits this party gets from continuing to litigate
- "If I'm not getting it, then neither are you!"

Targeting & Defusing Entitlement



A bequest is a gift. There is no right to a gift.

- If Mom left everything to the Humane Society, what would you have to complain about?
- Very often, the client's motivation to litigate is not that he/she didn't inherit, but that the other party did inherit.
- Why did Mom decide he/she was more worthy than I?

Overcoming Feelings of Exclusion



In many cases, the grieving process has been thwarted for one or more litigants.

- Exclusion from hospital/home/hospice during last illness
- Exclusion from the funeral
- Exclusion from wakes, sitting shiva, etc.
- Exclusion from the family home
- Deprivation of family keepsakes (e.g. photos)

A settlement is often necessary to complete the grieving process

MOVING TOWARDS BREAKING THE IMPASSE

Bracketing

Each side is looking at the relationship of their offer to that of the other side. Such relationship bargaining is not helpful to the mediation process.



After Several Rounds of Negotiation...

- Petitioner will come to certain level if Respondent will come to a certain level
- Negotiating between the brackets, typically called "negotiating" or "narrowing" the brackets
- A number of offers or counter-offers involving bracketing can get the parties to "yes" in an expedited fashion
- Even if not resolved, reinvigorates the process for further movement

Mediator's Proposal

In a negotiation,
"it's over."

In a mediation,
"it's just begun."

A mediator's proposal is the one "silver bullet" to assist the parties in resolving their case.

Mediator's Proposal

Beware – Use with a high level of discretion and only at the end of the negotiating process

- Cannot be a proposal of any one party. Rather, it must be that of the mediator
- Stretch - do not lose the chance of settlement
- Parties must be willing to accept the **concept** of a Mediator's Proposal

Mediator's Proposal

Mediator's Proposal could be comprised of just "the number" but may include specific terms and conditions:

- Include all material terms as a part of the Mediator's Proposal.
- Such terms include non-monetary remedies as well as monetary remedies.
- They include payment terms, releases, and dismissals.

Resetting the Table

Meet with
lawyers only or
parties only

Toughening the Reality Check

The mediator must emphasize the costs of litigation and the ensuing emotional toll to be paid. Different predictions made by attorneys on both sides must be put in perspective. When both attorneys claim an 80% expectation of success at trial something does not add up. Most people are risk adverse. There is often wisdom in taking a sure thing.

The credible mediator lets no risk go unnoticed.

Road to Resolution

No matter how long it takes we stay committed to the process until a resolution has been reached.

TEMPLATE FOR FULL SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is entered into by and between xxx. They are parties to this Agreement and are sometimes referred to individually as a "Party" and collectively as the "Parties."

FACTUAL RECITALS

- A. On May 21, 2014, the Executor filed xxx.
- B. On August 28, 2014, the Executor filed xxx.
- C. On August 28, 2014, Augustine xxx
- D. James was xx
- E. All disputes that are the subject of the above-stated Petitions are referred to in this Agreement as the "Dispute."
- F. Subject to the terms and conditions of this Agreement, the Parties hereby intend to settle and resolve fully the Dispute and to release the Executor with respect to the settlement of the Dispute.

AGREEMENT

WHEREFORE, for good and sufficient consideration, which the Parties confirm, the Parties agree as follows:

- 1. Recitals Incorporated by Reference. The recitals (Paragraphs A - F, above) are incorporated in this Agreement and are made a part of it.
- 2. Agreement regarding the Estate (of x) and the Conservatorship of the Estate of x: The Parties agree to the following terms:
 - (a) The Estate tax attributable to the residue of the Estate and the Plan will be apportioned among the beneficiaries as follows:
 - (b) The charitable bequest of the Will of x shall be paid out of the residue of the Estate.
 - (c) The Court will be requested to grant The Petition to Vacate as follows:
 - (d) The Executor in her capacity as Plan Administrator and Plan Committee member has determined that x
 - (e) The Court is requested to approve the Petition to x
 - (f) The Executor and her attorneys are each entitled to compensation in an amount not less than x
 - (g) With the exception of the Executor, all Parties shall bear their own attorneys' fees and costs.
 - (h) Each of the Parties, other than the Executor, jointly and severely indemnifies the Executor for any liability arising out of the apportionment of the estate tax and distribution of the residue in accordance with this Agreement.
 - (i) Any dispute arising out of this Agreement shall be submitted to Judge Aviva K. Bobb, Retired, for mediation and if not resolved by decision then by a CCP 638 reference.
- 3. Court Approval. The Parties will cooperate to obtain Court approval of any matters that require Court approval.
- 4. Release. Except with respect to the mutual rights and

obligations which arise from this Agreement, the Parties on behalf of themselves in all capacities and their respective attorneys, accountants, agents, representatives, predecessors, successors, heirs, spouses, children, beneficiaries, executors and assigns (collectively "Related Parties"), agree to and do fully release and discharge each other and each other's Related Parties from any and all claims, obligations, demands, expenses, costs or causes of action of any type, known or unknown, suspected or unsuspected, which any of them now owns or holds or at any time owned or held against each other and which arises from this Dispute.

5. Miscellaneous Provisions

This Agreement shall be governed by and construed in accordance with the laws of the State of California. The Parties agree to the jurisdiction of the Los Angeles Superior Court Probate Department to enforce this Agreement, if necessary. The Parties agree that each will be subject to the personal jurisdiction of the Court.

(b) If any action or other proceeding is brought for the enforcement of this Agreement or any of its terms, the prevailing Party shall be entitled to recover reasonable attorneys' fees and other expenses incurred in connection with such action or proceeding.

(c) The Parties declare and represent that no oral or written promises or agreements not herein expressed have been made by or to them with regard to the subject matter of this Agreement; that this Agreement contains the entire Agreement, oral and written, between and among the Parties with regard to the subject matter of this Agreement; and that this Agreement supersedes and replaces all prior negotiations, proposed agreements and agreements, whether oral or written, between and among the Parties with regard to the subject matter of this Agreement.

(d) This Agreement may not be amended in any respect except by a written document executed by the Parties or their authorized representatives.

(e) Counsel and/or Parties have negotiated, read and approved the language of this Agreement, which language shall be construed in its entirety according to its fair meaning and not strictly for or against any of the Parties, who have worked together in preparing the final version of this Agreement.

(f) This Agreement is entered into to avoid further difficult and protracted litigation and to resolve pending disputes among the Parties, and nothing contained herein is intended to nor does constitute an admission of liability by any Party to any other Party.

(g) Each of the Parties warrants and represents to the others that he or she has not prior to the execution and approval of this Agreement transferred, pledged, assigned or hypothecated his/her respective rights and claims in the Dispute and/or set forth in this Agreement.

(h) The headings contained in this Agreement are for reference purposes only and shall in no way affect the meaning or interpretation of it.

(i) This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument.

(j) A photocopy of this Agreement may be used in lieu of an original in any

action or proceeding brought to enforce or interpret this Agreement. Also, a signature page of this Agreement executed by any Party and sent via fax or email shall be binding as though it were an executed original.

(k) This Agreement shall be binding upon and inure to the benefit of the Parties, their respective agents, predecessors, successors, heirs, devisees, beneficiaries, spouses, children, executors, trustees, and assigns, wherever the context requires or permits, and all payments to or obligations of any of the Parties will pass to their respective heirs, beneficiaries, trustees, executors, or successors in interest should any of the Parties die before another Party learns of a potential breach of this Agreement by a deceased Party or before an action or other proceeding is brought by a Party for the enforcement of this Agreement or any of its terms.

(l) This Agreement is admissible in Court for purposes of its enforcement. WHEREFORE, the Parties execute this Settlement Agreement as of the earliest date written below by the Parties.

Stipulation for Settlement

Date: _____

IT IS HEREBY STIPULATED by and between the parties through the respective counsel or representative of each that the above- referenced case has been settled according to the terms memorialized herein below. This settlement document is intended by the parties to be binding and enforceable in court - in state court by motion pursuant to C.C.P § 664.6 and Evidence Code § 1123.

[illegible]

The terms, conditions and content of this stipulation are the product of the counsel and not the mediator, the parties acknowledge that the mediator serves only as scribe not originator. All relevant parties must sign below. Copies are acceptable in lieu of originals.

[illegible]