

MEDIATION ETHICS

Hypotheticals

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Hypothetical 1

As you approach the end of your career, you think it might be interesting and lucrative to act as a mediator. Among other things, you wonder whether you will have to disclose any past unrelated representations of any of the parties in mediations you are selected to handle.

Do mediators have to disclose unrelated past representations of, or adversity against, parties to mediations they handle?

YES

NO

Hypothetical 2

You attended law school, but were unable to pass the bar despite several attempts. You wonder whether you can represent parties in mediations despite being unable to practice law in the traditional sense.

Can nonlawyers represent parties in mediations without violating unauthorized practice of law statutes and regulations?

YES

NO

Hypothetical 3

Your law firm is looking for ways to increase its revenue. One of your partners suggests that perhaps your firm can establish a subsidiary to handle mediations.

May law firms establish subsidiaries to handle mediations?

YES

NO

Hypothetical 4

Over the years, you have shifted from being a trial lawyer to primarily representing your clients in employment law mediations and arbitrations. One of your clients just asked if you could represent it in a mediation scheduled to take place in a state where you are not licensed.

May you represent a client in a mediation taking place in a state where you are not licensed?

YES

NO

Hypothetical 5

One of your clients is interested in resolving a commercial dispute while spending as little money as possible. Among other things, your client suggests that he would be willing to hire you to handle the mediation, but not any litigation that could ensue if the mediation proves unsuccessful.

May you limit your representation to include your representation of a client only in a mediation, at which time you would withdraw from the representation if the mediation proves unsuccessful?

YES

NO

Hypothetical 6

One of your business clients just called to ask if you are willing to participate in what seems like an unusual arrangement. Your client is trying to resolve a contractual dispute with one of her customers. Under your client's proposed arrangement, both clients and both lawyers would agree to mediate a possible resolution of the dispute. If the mediation fails, both lawyers would agree to withdraw from representing their clients -- and the clients would have to retain new lawyers to litigate. This concept sounds intriguing to you, but you worry that your contractual agreement to withdraw in case of litigation would create an insoluble conflict with your duty of loyalty and diligence -- because you and the other lawyer would have an incentive to recommend settlement even if clients would be better served by litigating.

May you enter into the arrangement your client has proposed?

YES

NO

Hypothetical 7

You have been a litigator for about three years, and you have frequently withheld documents based on the work product doctrine -- which you know can protect documents "prepared in anticipation of litigation or for trial." A client just hired you to represent it in attempting to resolve a contractual dispute through mediation.

Can the work product doctrine protect documents prepared in preparation for a mediation?

YES

NO

Hypothetical 8

You represent the defendant in contentious litigation. You think that the judge's participation in settlement discussions might result in a favorable settlement for your client.

Can the presiding judge participate in settlement negotiations, such as caucused mediations?

YES

NO

Hypothetical 9

You have decided to give up practicing law and become a mediator, and you wonder what disclosures you will have to make to parties once you begin this new career.

Are there any statutes or regulations that dictate what type of disclosures mediators must make to the mediation parties as the mediation begins?

YES

NO

Hypothetical 10

You want to maintain your law license but spend more time acting as a mediator. You know that lawyers generally cannot engage in deceptive conduct, but you have read that mediators might be able to "close the deal" by relying on what some might call a "little white lie" presented to each side -- underestimating the value of the side's claim by overemphasizing the adversary's claim.

May lawyer-mediators engage in mild deception as part of their mediator duties?

YES

NO

Hypothetical 11

In your role as a mediator, you wonder whether you must keep one side's statements confidential from the other side. In some situations, you think that explicitly or implicitly disclosing those might facilitate the mediation.

Must mediators maintain the confidentiality of what they are told during the mediation process?

YES

NO

Hypothetical 12

Your litigation practice has increasingly involved your representation of parties in mediation. Over the past several years, you have come to admire one particularly successful mediator, and you have convinced your partners to offer her a job at your firm. However, she is currently handling a number of mediations in which your partners are representing one of the mediating parties.

May you offer a job to the mediator while she is handling your firm's clients' mediations?

YES

NO

Hypothetical 13

You gave up your law license many years ago, and you have been acting as a mediator ever since. It just dawned on you that your involvement in memorializing mediation parties' settlements might implicate unauthorized practice of law issues.

May nonlawyer mediators participate in drafting mediation parties' settlement agreements without implicating unauthorized practice of law issues?

YES

NO

Hypothetical 14

You decided to maintain your law license even though you spend most of your time as a mediator. Someone just suggested to you that your practice of writing up mediation parties' settlement agreements to resolve litigation constitutes your improper simultaneous representation of litigation adversaries.

May lawyer-mediators memorialize litigation adversaries' settlement agreements following a successful mediation?

YES

NO

Hypothetical 15

You are preparing for a mediation that you hope will resolve litigation that just started, and have posed several questions to a partner whose judgment you trust.

- (a) May you advise the adversary that you think that your case is worth \$250,000, although you really believe that your case is worth only \$175,000?

YES

NO

- (b) May you argue to the adversary that a recent case decided by your state's supreme court supports your position, although you honestly believe that it does not?

YES

NO

- (c) Your client (the defendant) has instructed you to accept any settlement demand that is less than \$100,000. If the plaintiff's lawyer asks "will your client give \$90,000?," may you answer "no"?

YES

NO

Hypothetical 16

You are trying to mediate a complex case involving both automobile liability policies and workers' compensation coverage. The lawyer representing your adversary seems confused about her client's right to subrogation in connection with proceeds of an uninsured motorist policy. You conclude that she does not understand the applicable law.

Must you disclose adverse law to your adversary?

YES

NO

Hypothetical 17

On behalf of your client in a mediation, you just made a \$100,000 offer to buy land from a farmer and his wife. You know that the farmer thinks that your client's offer contains a provision under which your client would assume an existing mortgage -- although the offer does not.

Must you disclose the fact that your client's offer does not include assumption of a mortgage?

YES

NO

Hypothetical 18

You are representing the seller in mediating a complicated dispute with a buyer. You are nearing the end of the mediation, and working on memorializing the agreement in a 50-page draft agreement. One provision indicates that buyer's sole remedy for seller's breach of a covenant not to compete is return of the consideration allocated in the agreement for the covenant not to compete. Near the end of the drafting process, the buyer amends another provision in the agreement so that only one dollar is allocated to consideration for the covenant not to compete -- which essentially renders the covenant meaningless (because seller's breach would at most result in one dollar of damages). When you advise your client of the buyer's mistake, she directs you to keep it secret.

Must you disclose the buyer's mistake to the buyer?

YES

NO

Hypothetical 19

You have been furiously exchanging draft agreements with a mediation adversary. You finally reached agreement on the last few provisions, which the adversary's lawyer says she will write up while you head home for an hour or two of sleep. When you returned to the mediation this morning to check what the other lawyer prepared, you realize that she left out an important term (favorable to her client) to which you had agreed during the final negotiation discussion.

(a) Must you advise your client of the adversary's mistake?

YES

NO

(b) Must you disclose the mistake to the adversary's lawyer?

YES

NO

Hypothetical 20

You represent a product manufacturer in mediating a product liability claim. You have advised your client that the plaintiff's lawyer is perhaps the most effective plaintiff's lawyer available to represent plaintiffs claiming injuries caused by your client's product. Your client has asked whether you can "sweeten the pot" in current mediation in return for a settlement agreement in which the plaintiff's lawyer agrees not to represent future plaintiffs against your client.

May you enter into a mediation settlement agreement that contains such a provision?

YES

NO

Hypothetical 21

You know that the attorney-client privilege protection can be very fragile, and you wonder about the waiver implications of disclosing privileged communications in a mediation.

(a) Does disclosing privileged communications to a mediation adversary waive the attorney-client privilege?

YES

NO

(b) Does disclosing privileged communications to a mediator waive the attorney-client privilege?

YES

NO

Hypothetical 22

You know from experience that the work product doctrine provides a more robust protection than the attorney-client privilege. However, given the inherently adverse nature of mediations, you wonder about the waiver implications of disclosing work product in that context.

- (a)** Does disclosing privileged communications to the adverse mediation party waive the work product?

YES

NO

- (b)** Does disclosing privileged communications to the mediator waive the work product?

YES

NO

Hypothetical 23

During your years as a lawyer, you always worried about malpractice claims. Now that you spend all your time mediating, you wonder whether you could be sued by one of the parties for some good faith mistake that you made during the mediation.

Do any statutes or regulations provide immunity to mediators?

YES

NO

Hypothetical 24

You recently mediated a case which came close to settling. One of the parties now wants to hire you as its lawyer, because they were impressed with the way you approached the issues. You had a good relationship with the other side as well, and you think that it might consent to your representation of one of the parties going forward.

As long as the other side consents, may you represent one of the parties after unsuccessful mediation?

YES

NO

Hypothetical 25

You know that mediators must maintain the confidentiality of any communications occurring during the mediation. However, you wonder whether some exception would allow you to defend yourself from a mediation party's claim against you.

May mediators disclose otherwise confidential mediation communications to defend themselves from a mediation party's claim.

YES

NO

Hypothetical 26

After several years of working as a lawyer for a child protective services agency, you have decided to leave the government and become a mediator. However, you worry that you might quickly face a horrible situation -- determining if you have a legal duty to report child abuse that comes to your attention in your role as mediator.

Must lawyer-mediators report child abuse?

YES

NO

Hypothetical 27

You decided to offer your services as a mediator, and have been considering the type of awkward situations that might arise. You have heard some unsettling stories about lawyer misconduct during mediations, and you wonder whether you might have a duty to report such misconduct to the bar.

Are lawyer-mediators required to report sufficiently egregious misconduct to the bar?

YES

NO

Hypothetical 28

You currently act as your firm's partner in charge of marketing. You have always thought that clients tend to hire individual lawyers because of their specific expertise and experience, rather than focus on a law firm's general reputation. You and your marketing director want to highlight your lawyers' areas of practice and expertise.

Assuming that these phrases are accurate, may you use the following phrases in your marketing materials:

(a) "Limits her practice to domestic relations matters"?

YES

NO

(b) "Specializes in domestic relations mediations"?

YES

NO

(c) "Certified specialist in mediations"?

YES

NO

Hypothetical 29

The firm's chairman has asked you to review your lawyers' website biographies to make sure they comply with applicable ethics rules.

(a) Can one of your lawyers call herself an "expert" in mediations?

YES

NO

(b) Can one of your lawyers describe himself as an "authority" on mediation rules?

YES

NO

Hypothetical 30

You have only been a mediator for several months, but now face an awkward dilemma. You know that mediation communications are confidential, but one participant is now relying on that general principle to prevent the other side from seeking enforcement of a settlement you reached last evening.

Is there an exception to the general mediation confidentiality duty for enforcing settlements?

YES

NO

Hypothetical 31

Late last evening, you reached a handshake settlement with the other side in a strenuous and exhausting mediation. You agreed to meet again this morning to hammer out the settlement agreement with the mediator's help. However, you were dismayed (and angry) when the other side's lawyer told you this morning that his client wants to renegotiate last evening's settlement. You wonder whether you can enforce the settlement agreement you reached last night.

May you enforce a settlement based on a mediation adversary's lawyer's representation?

YES

NO

Hypothetical 32

In a classic "no good deed goes unpunished" scenario, you were just sued by a client you recently represented in what everyone thought was a remarkably successful mediation. You wonder whether you can point to your state's mediation confidentiality statute in arguing that client's malpractice claim should be dismissed.

May you obtain dismissal of your former client's malpractice action by relying on the mediation confidentiality statute?

YES

NO