

Ethical Advocacy In Mediation: You May Need A New Plan

By **Jeff Kichaven** -- Law360 -- April 23, 2018, 3:06 PM EDT

The purpose of this article is to warn lawyers that much of their conduct in mediation may violate Rule 1.1, ABA Model Rules of Professional Conduct (in California, Rule 3-110, Rules of Professional Conduct), and to suggest how lawyers can make their mediation advocacy more ethical and more effective at the same time.

Here's the problem: Lawyers too often delegate to mediators tasks which clients are entitled to have professionals with a duty of undivided loyalty — their own lawyers — perform, and which the ethical rules require those lawyers to perform. The solution?

Lawyers must understand which tasks they must perform themselves, then perform those tasks.

To understand this fully, we will explore the governing rules, lawyers' obligations to their clients under those rules, how lawyers' conduct in mediation commonly violates those obligations and how lawyers can do better.

The Rules

The ABA's model governing rule is straightforward: "A lawyer shall provide competent representation to a client."^[1] The California analog is similar: "A member shall not intentionally, recklessly or repeatedly fail to perform legal services with competence."^[2] The official discussion of rule 3-110 makes clear that "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents."



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The Obligations

Flowing from these rules, what obligations do lawyers have in the delegation of client responsibilities to others and the supervision of those others' work?

The California Supreme Court described those obligations well in *Moore v. State Bar*.^[3] In that case, David Moore was a lawyer hired to represent a client in what appears to have been a collection action. Moore delegated virtually all responsibility for the matter to another attorney, who was suspended from practice at the relevant times. The second lawyer ignored the file. The client ended up with a default judgment against him. Moore had his license suspended for 90 days.

Here's why:


The court initially held a lawyer to "professional obligations of service and protection to a client."^[4] Those obligations are largely non-delegable. The court rejected Moore's assertion that he hired the second lawyer to assist and "had the right to rely upon [the second lawyer's] integrity and ability."^[5]

In the key sentence of the opinion, the court chastised Moore for relying on another so completely: "(Moore) thus mistakenly places himself in the position of his client rather than in that of his client's lawyer."^[6]

What was Moore obligated to do? The court continues: "It was (Moore) who had accepted [the client] and it was upon (Moore) that [the client] was entitled to rely for the required legal service for which he had advanced costs and a retainer."^[7]

This language leaves open the next question to which we must turn: What is within the scope of the "required legal service" a lawyer herself is required to provide?

In 1990, the California Supreme Court answered that question in *Morgan v. State Bar*.^[8] There, Morgan was disbarred for practicing law while still under suspension for previous misconduct. The court held:



The practice of law includes not only appearing in a court of law but also the giving of legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court. ... Similarly, we conclude that engaging in negotiations with opposing counsel regarding settlement ... constitutes the practice of law.[9]

In short, when clients hire lawyers, they are entitled to have lawyering tasks performed by their lawyers, the professionals who must “conform to professional standards.”[10]

Lawyers may not delegate lawyering tasks without supervision, and surely may not delegate lawyering tasks without supervision to someone who does not conform to a lawyer’s professional standards. So problems arise when a mediator is assigned, or is allowed to seize, lawyering tasks.

Even if the mediator is a lawyer, when she functions as a mediator she does not function as your client’s lawyer and does not conform to the same professional standards as you do. You owe your client a duty of undivided loyalty.[11]

The mediator (whether a lawyer or not) owes your client no such duty; the mediator is hired by both sides, is compensated by both sides, works for both sides. While the mediator’s professional standards may not always be settled or clear, one thing is sure: The mediator’s professional standards are not the same as yours. A lawyer may not delegate lawyering tasks without supervision to a mediator, or allow a mediator to seize those tasks.

The Violations

Lawyers’ conduct in mediation commonly violates these obligations, and therefore violates ethical rules, in at least three ways: Lawyers delegate, or allow mediators to seize, unsupervised authority to draft confidentiality agreements; to engage in settlement negotiations with opposing counsel; and to draft settlement agreements.



Confidentiality agreements

When was the last time you drafted, or negotiated, a mediation confidentiality agreement? Probably never. Commonly, the mediator gives you her preprinted form at the beginning of the mediation day. You don't read it, you just sign.

Yet we know from *Morgan v. State Bar* that “the preparation of legal instruments and contracts by which legal rights are secured” is a lawyering task. And the mediation confidentiality agreement is just such a document. It secures — or, more frequently, forfeits — your client's legal rights. When you blithely sign whatever the mediator puts under your nose, can you honestly say that you have discharged your ethical obligation to supervise the mediator adequately, or even at all?


The forfeiture of legal rights you commonly agree to in a mediator's standard confidentiality agreement can be substantial, and prejudicial to your client, in at least two ways.

First, you may forfeit the ability to hold the mediator accountable for malpractice. Mediators commonly slip prospective waivers of liability into confidentiality agreements, a la this: “The participants hereby agree that the Mediator has no liability for any act or omission in connection with or arising out of the mediation.”

This has nothing to do with confidentiality. It just forfeits rights your client otherwise may have. What's the chance you would include this forfeiture in a confidentiality agreement you drafted yourself? What's the chance you would allow this forfeiture to remain in a confidentiality agreement whose preparation you adequately supervised?

Second, you may forfeit contract-based defenses — fraud, duress and mistake — to the enforcement of mediated settlement agreements. This was the situation in which the famous Winklevoss twins found themselves when they settled their securities litigation against Mark Zuckerberg.[12]

The twins asserted that Zuckerberg had misled them, at the mediation, about the value of their [Facebook](#) shares, and opposed enforcement of the mediated settlement agreement on grounds of fraudulent inducement. In the absence of the mediator-drafted confidentiality



agreement, Rule 408, Federal Rules of Evidence, would have governed, and the twins would have been allowed to introduce their evidence of the alleged fraud. But the mediator induced everyone to sign a confidentiality agreement which provided that “(n)o aspect of the mediation shall be relied upon or introduced as evidence in any arbitral, judicial or other proceeding.”[13]

The district court excluded the proffered evidence and enforced the settlement agreement, and the Ninth Circuit affirmed. Query: Did the twins’ lawyers fulfill their ethical obligations to represent their clients competently when they delegated to the mediator, unsupervised, responsibility for a confidentiality agreement which prejudiced their clients so badly?


Negotiations with opposing counsel

How often does your mediation start with your mediator (or a receptionist) escorting you to Conference Room East, and the other side to Conference Room West, and never the twain do meet? How often does the mediator ferry all offers and demands back and forth? You never quite know how faithfully the mediator is reporting your message to them or theirs to you.

How often does the mediator school you as to what your next number really has to be? And, finally, how often does the mediator lay down the law that once the number reaches a certain point, you have to take the deal? Isn’t mediation of this type starting to sound like, under the forbidden standard of *Moore v. State Bar*, you are placing yourself in the position of your client rather than your client’s lawyer? It’s hard to find any part of the negotiations with opposing counsel which you are conducting yourself.

The problems with mediation of this type are not merely abstract, they are quite concrete. Consider the oft-discussed hypothetical where the plaintiff’s bottom line and the defendant’s top dollar overlap. For example, a plaintiff’s bottom line is to take anything over \$80, a defendant’s top dollar is to pay anything under \$100. Obviously, this case should settle. But where?

A lawyer is obligated to push the number as close to their end of the range as possible. A mediator is not. If a mediator tells this plaintiff the best he can get her is \$80 or tells this



defendant the best he can get her is \$100, the case settles and the problems are obvious. The mediator may have picked a number that benefits a repeat-player or otherwise-favored client; the mediator may have a bias or prejudice, conscious or subconscious, for or against one side or another (opportunistic plaintiffs? stingy insurance companies?); or the mediator may have opera tickets that night and just want to get out of there once he gets the other side to the minimally-acceptable point in your zone of possible agreement.

The lawyers may have been able to do better for their clients. But they didn't even try. Responsibility for the negotiation has been abandoned to the mediator. How can these lawyers say they have discharged their duty to represent, to act on behalf of, their clients competently?


Settlement agreements

How often does your mediation end with your mediator springing a settlement agreement on you, as full-blown as Athena from the brow of Zeus? In defense of this practice, mediators commonly say they are lawyers too; they know all about whatever kind of case is being mediated and how these cases typically settle; they have seen a million settlement agreements and know, often better than the lawyers, what these settlement agreements should say; there's no need to waste time letting a bunch of contentious lawyers draft something from scratch; and everyone is entitled to the benefit of the fruits of the mediator's lawyering skills.


Actually, no.

Clients are entitled to the benefits of their own lawyers' lawyering skills. Those are the lawyers the clients have hired to perform lawyering tasks on their behalf. From the mediator, everyone is entitled to the benefits of mediation skills. Mediation skills are different than lawyering skills, and to be a mediator is different than being a lawyer.


Were it otherwise, every lawyer would be a good mediator, and we know that's not so. Because being a mediator is different than being a lawyer, non-lawyers can (and do!) serve as mediators at very high levels of skill. It's also why mediators who are also lawyers can serve as mediators without violating certain fundamental rules of legal ethics, such as the



prohibition against lawyers working for both sides to the same lawsuit.



Lawyers are generally competent to prepare their own settlement agreements. It's likely that not only the mediator, but also the lawyers, have worked on similar cases before and have precedent forms of settlement agreements on their laptop computers. With the mediator as a chaperone, lawyers are usually able to work collaboratively enough to produce a settlement agreement.



And not every term of a settlement agreement is cookie-cutter. Some, such as the scope of a release or the extent of a confidentiality obligation, are frequently customized. What if the mediator's "standard" language does not protect your client? It can be an uphill fight to eliminate language the mediator has blessed as "standard."

When the lawyers work together to draft these terms, they eliminate the risk that the mediator's language will prejudice their ability to produce an agreement that protects their client. As with confidentiality agreements, a mediator-drafted settlement agreement mistakenly places a lawyer in the position of their client rather than in the position of their client's lawyer.

The safest harbor for lawyers is never to allow a mediator to hold the pen or touch the keyboard when it's time to draft the settlement agreement. Even if the mediator is coaching or suggesting language, the ultimate decision as to the language to include will then belong to the lawyers, who appropriately will be the settlement agreement's authors.

The Cure

The cure is obvious. In mediations, to discharge your ethical obligations to your clients, lawyers must neither delegate nor allow mediators to seize inappropriate responsibilities. When lawyers do delegate responsibilities to mediators, lawyers must make sure they are supervising the mediator, not the other way around.

Lawyers should not blithely sign whatever confidentiality agreement a mediator puts under their nose. Lawyers themselves should conduct as much of the face-to-face settlement negotiations as possible, and when they delegate to the mediator the task of face-to-face



communication, lawyers should make sure they are supervising the mediator.

Lawyers should always draft their own settlement agreements. Then, lawyers are engaging in good mediation, in which the mediator is facilitating the lawyers' negotiation. This is in contrast to bad mediation, in which lawyers rely excessively on the mediator to negotiate for them.


The dividing line between ethical and unethical conduct by lawyers in mediation will depend on all the facts and circumstances and will be a matter of degree. This much, though, is pretty clear: If the mediator drafts a nonnegotiable confidentiality agreement, if you have no face-to-face communication with anyone from the other side and if the mediator drafts a nonnegotiable (or even awkward-to-negotiate) settlement agreement, you're probably on the wrong side of that line.

Finally, why should we bother with this as an ethical issue at all? After all, your state bar disciplinary cops are not likely to raid your mediation or haul you up on charges for excessive delegation of responsibility to mediators. Fear of getting caught, though, is not the reason most lawyers follow the ethical rules.

While Model Rule 1.1 and California Rule 3-110 hold lawyers to a standard of competence, almost all lawyers I know hold themselves to a standard of excellence. The best lawyers won't play cute with these rules and test their boundaries. The best lawyers will want to stay well within these rules and make sure they provide excellent and ethical representation to their clients. To accomplish that, the best lawyers will perform lawyering tasks themselves, and not delegate excessive or unsupervised responsibility for those tasks to mediators.

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[1] Rule 1.1, ABA Model Rules of Professional Conduct.



[2] Rule 3-110(A), California Rules of Professional Conduct.

[3] *Moore v. State Bar*, 62 Cal.2d 74 (1964).

[4] 62 Cal.2d at 75.

[5] *Id.* at 77.

[6] *Id.*

[7] *Id.* at 80.

[8] *Morgan v. State Bar*, 51 Cal.3d 598 (1990).

[9] *Id.* at 604, internal quotes and citations omitted.

[10] *Crawford v. State Bar*, 54 Cal.2d 659, 667-86 (1960).

[11] ABA Model Rule 1.7, Comment 1; Rules 3-300 and 3-310, California Rules of Professional Conduct; *Flatt v. Superior Court*, 9 Cal.4th 275, 286 (1994).

[12] *Facebook v. Connect U*, 640 F.3d 1034 (2011).

[13] *Id.* at 1041.