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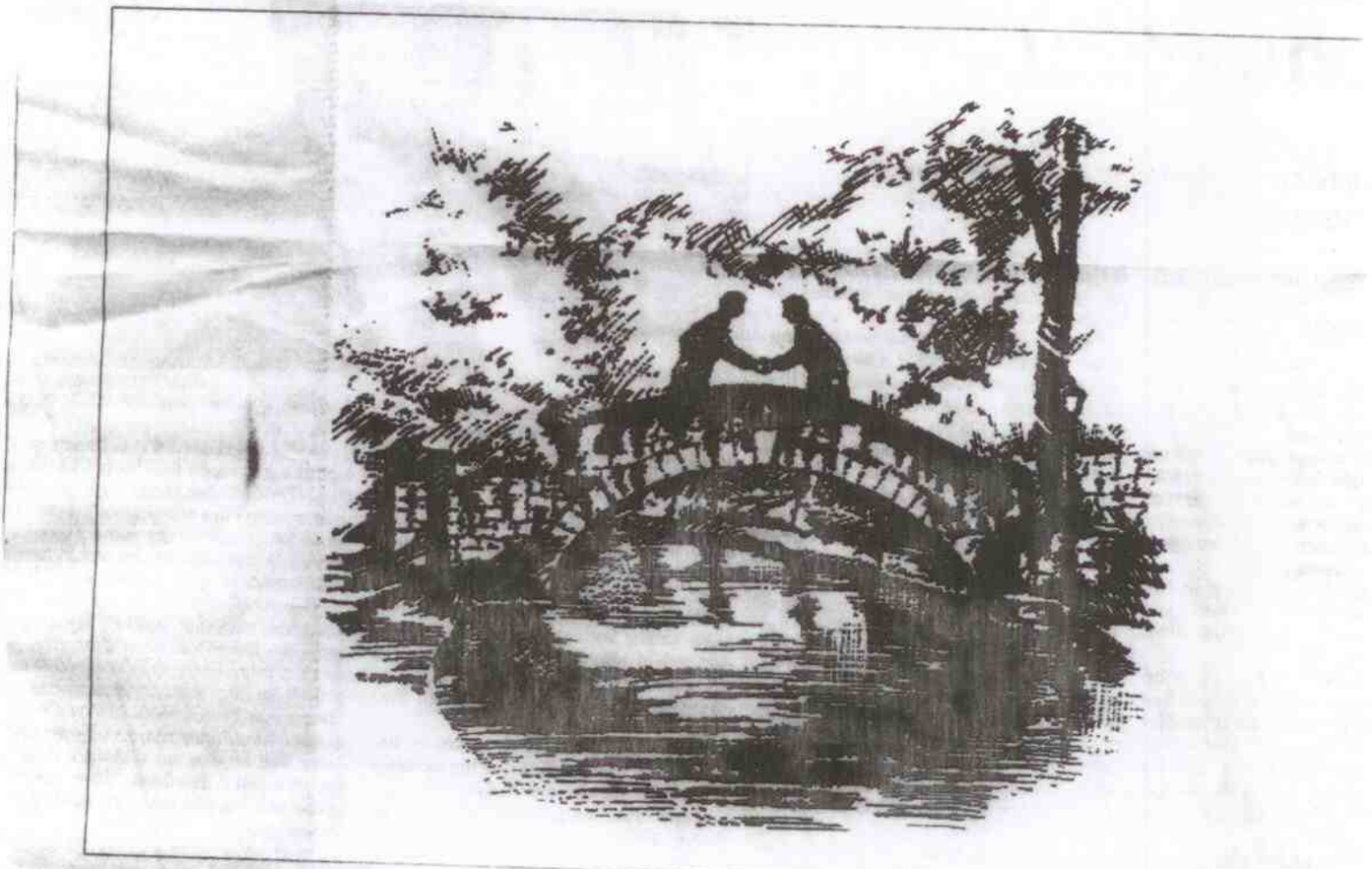

The High Road

In Achieving Settlement, Mediators Should Not Sacrifice Ethics

By Richard A. Zitrin

As someone who's worked as a mediator for almost 20 years, I'm a passionate advocate of the process. As someone who's been teaching legal ethics for 20 years, I believe just as passionately in the ethical obligations of lawyers. But I know from experience that when it comes to the ethics of mediators, many neither know nor understand some of the fundamental principles which should guide their conduct.

I recently had an experience as attorney for a party in mediation which brought this home in dramatic fashion. I use it here to illustrate some basic ethical rules which all mediators should — but don't always — follow.

Recently, my co-counsel and I were representing a woman in a sex discrimination case against a large company. Our case was consolidated with a class of women who also alleged discrimination. The mediator spent months trying to bring the class action to settlement. He continued to mediate as the case trailed for trial, and ultimately achieved a tentative agreement, pending class member acceptance and judicial approval.

He then mediated our case, but to no avail; our client and the defendant remained far apart. We told the judge we were ready for trial, but the defendant objected, arguing that our case should be continued until after the final fairness hearing on the settlement. The judge told us to brief the issue of our trial date.

The merits of our motion are beside the point here. What is the point is what we found when we exchanged pleadings on the issue.

Included in the defendant's opposition was a declaration of the mediator on the pleading paper of the opposing law firm. My jaw dropped open as I read the caption styled, as if to remove any doubt as to neutrality, "Declaration of [Mediator] in Support of Defendants' Opposition to Plaintiff's Motion."

In the declaration, the mediator discussed at some length why our client's early trial date could jeopardize the class settlement, because either the trial of our case or the attendant publicity "could unduly influence class members when they are considering whether to file an objection to the settlement."

In one single document, this mediator managed to violate three basic precepts of mediation ethics. But in a world where mediator ethics can take a back seat to settlement at all costs — and in which at least one large alternative dispute resolution organization claims to have no standard ethics code — such behavior, while outrageous, is unfortunately not unique.

Let's examine each of the mediator's three major mistakes. First, he violated his neutrality. Nothing is more important to a mediator than maintaining neutrality at all costs. This is the first principle taught at any mediation training. Without it, the entire process is jeopardized. Indeed, mediators are even called "neutrals."

Mediators simply can't take sides. Even where power imbalances occur — most often in domestic relations mediation, where one party, perhaps unrepresented by counsel, is being overwhelmed by the other to the point where the mediator fears that a result may not be "fair" — experts in mediation ethics almost uniformly agree that they must remain neutral. University of San Francisco law dean Jay Folberg, who has written several books on mediation, says that any other course means "using your thumb to level the scales," a technique that accomplishes little except destroying the mediator's neutrality.

A mediator's responsibilities — to the parties and the process, protected by neutrality and confidentiality — must never be encumbered by personal goals.

Unlike gut-wrenching domestic situations, this case presented a much easier call. Yet the mediator overtly took sides by drafting a declaration to be used by one side against the other. Strike one.

If there is any mediation requirement more clear than the obligation of neutrality, it is the duty of confidentiality. This duty is so important that California has an Evidence Code Section, 1152.5, that ensures confidentiality over all documents, evidence and "communications, negotiations, or settlement discussions." This should make it impossible for a mediator to use such communications as the basis for a declaration.

In our particular case, the mediator declared that he based his opinions on his knowledge of our case. He gained this knowledge only through his position as mediator. Taking what he had learned in confidence and describing it to the court in any form, much less under oath in a sworn declaration, was a clear violation of confidentiality.

Lest there be any doubt, Evidence Code Section 1152.6, passed in 1995, specifically admonishes mediators that they "may not file ... any declaration or findings of any kind by the mediator, other than a required statement of agreement or nonagreement." Strike two.

Somewhat more subtle than the obvious issues of neutrality and confidentiality is the effect that ego plays in mediation. All mediators have ego invested in the process, no matter how they may try to avoid it. This ego is most clearly manifested when it comes to settling a case. This is understandable. Settlement is the very reason mediators are hired in the first place.

In our illustrative example, this mediator forgot that settling the case, in and of itself, was not his only goal. He lost sight of the fact that neutrality and confidentiality can never be sacrificed to forge or maintain a settlement.

But he compounded these errors by assuming that information about our client's case "could unduly influence class members when they are considering whether to file an objection to the settlement." By this statement, he not only got his own ego involved in protecting "his" settlement, but claimed, with what can only be described as hubris, to know what was best for passive class members he had never even met.

When I focused on ego and mediation ethics four years ago in an article for California Lawyer, I found that most mediators said settling a case was not their only goal. Tony Piazza, now of San Francisco and Maui, a strong-willed mediator famed for his "settle-at-all-costs" reputation, told me settling was secondary to assisting the parties to do what's best for themselves. Dean Folberg told me it would be dangerous for mediators to feel that they "win" only when they obtain settlements. And Gary Freedman of Mill Valley, dean of domestic relations mediators, argued eloquently that it is not his job to settle cases, but rather to allow the parties to "reach a certain quality of dealing with each other."

Freedman put it clearly and succinctly: Mediators are not guardians of a settlement but "guardians of the process." In this respect was our mediator most sorely lacking. Strike three.

When I wrote for California Lawyer four years ago, there were no ethical standards for mediators except the general guidelines of the Society of Professionals in Dispute Resolution for "neutrals," applied to both mediators and arbitrators, despite their very different jobs. Now that's begun to change.

The American Arbitration Association, American Bar Association and SPIDR, working in concert, spent over two years developing what are now called the Model Standards of Conduct for Mediators. Among those standards are rules covering "self-determination," or the parties' control of the process; "impartiality"; conflicts of interest; confidentiality; and "the quality of the process."

Even these standards, while a vast improvement from five years ago, tend to be vague and aspirational, particularly when compared to the Rules of Professional Conduct which govern the behavior of lawyers. Of more help may be the increasing number of statutes, like our Evidence Code sections, which have the authority to be more directly prohibitive. But legislation tends to be quite narrow, and — as we experienced — can simply be ignored with little remedy available.

The AAA-ABA-SPIDR rules, though they serve as a floor, not a ceiling, are at least a start. All mediators would be well-advised to go significantly beyond these minimum standards to ensure that — as mediators often say — "the parties own the process."

This is more than a mere empty expression. It means that the mediator's responsibilities — to the parties and the process, protected by neutrality and confidentiality — are never encumbered by personal goals, even when these goals may include protecting the biggest settlement of one's career.

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