Mediation Advocacy: Tips on How to Effectively Represent Clients During Mediation

Presented by

Judge Edward C. Moss (Retired)
&
Wesley Parks

Thursday
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12 Noon

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(he/him/his)
Mediation, Arbitration, Private Judging
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Judge Edward Moss (retired) was a District Court Judge for Broomfield and Adams counties for 16 years before his retirement in 2020. He received his undergraduate degree from the University of California, Santa Barbara after which he served in the U.S. Army as an armor platoon leader and armor company executive officer. Judge Moss received his legal training at Southwestern University School of Law in Los Angeles and at the Georgetown Law Center in Washington, D.C. He was a judicial intern at the U. S. Supreme Court and then served as a law clerk to Judge Sherman Finesilver in the U.S. District Court in Denver. He was in private practice for more than 25 years, primarily in the areas of oil and gas, real estate, family law, and commercial litigation. Before being appointed to the bench, Ed was named a Metro-Denver Volunteer Lawyer of the Year and was the mayor of Westminster, Colorado. He is a long-time member of the Colorado Bar Association Ethics Committee (Chair, 2016-17). Ed was on the faculty of the 2013 National College on Judicial Ethics in Chicago and was the keynote speaker in 2015. Currently, he is "of counsel" with the Denver law firm of Ciancio Ciancio Brown, P.C. where his practice is limited to mediation, arbitration, and private judging.

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Wesley Parks is a Mediator and Attorney, and the owner of Parks Mediation. He is contract mediator for the Colorado Office of Dispute Resolution and the Colorado Department of Education. He teaches Mediation and Negotiation, and Alternative Dispute Resolution as an adjunct professor at the University of Denver - Sturm College of Law. He continues to practice law as Special Counsel with Cohen & Cohen, P.C., in Denver. Wesley mediates disputes in the areas of family law, special education, bankruptcy, probate, personal injury, HOA, and civil litigation matters. He is the current Chair of the Colorado Bar Association – Alternative Dispute Resolution Section. Wesley frequently volunteers at Court Mediation Services in Denver County and Metro Volunteer Lawyers. He was a 2021 Denver Bar Association *Pro Bono* All Stars award recipient. He enjoys tennis, hiking, and skiing during his leisure time.

AGENDA

TOPIC	TIME
Opening Remarks and Introductions	12:00 pm to 12:05 pm
Mediator and Mediation Advocate Ethics • *Model Standards of Conduct for Mediators* • *Colorado Dispute Resolution Act:* ▪ *§ 13-22-302(2.5), C.R.S.: Mediation Communications* ▪ *§ 13-22-307, C.R.S.: Confidentiality* ▪ *Yaekle v. Andrews, 195 P.3d 1101 (Colo. 2008)* ▪ *Tuscany Custom Homes, LLC v. Westover (Colo. App. 2020)* • *Model Rules of Professional Conduct* ▪ *Rule 4.1* ▪ *Rule 3.3*	12:05 pm to 12:35 pm
Choosing and Preparing a Mediator: Questions to Consider for the Mediation Advocate	12:35 pm to 12:50 pm
Mediation Preparation Checklist	12:50 pm to 1:00 pm
Pre-Mediation Statement, Memorandum, or Brief	1:00 pm to 1:10 pm
Caucus Checklist	1:10 pm to 1:20 pm
MOU Checklist and Template	1:20 pm to 1:30 pm
The Benefits of the Joint Session	1:30 to 1:40 pm
Questions and Answers	1:40 pm to 1:50 pm
Adjourn	1:50 pm

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MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION
(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators 2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] Both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

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[1] The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

[2] Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

[3] The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

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

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

   2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where

appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

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

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator

competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

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

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

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

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

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

COLORADO DISPUTE RESOLUTION ACT

§ 13-22-301, C.R.S. *et seq.*

Excerpts

§ 13-22-302, C.R.S. Definitions

(2.4) "Mediation" means an intervention in dispute negotiations by a trained neutral third party with the purpose of assisting the parties to reach their own solution.

(2.5) "Mediation communication" means any oral or written communication prepared or expressed for the purposes of, in the course of, or pursuant to, any mediation services proceeding or dispute resolution program proceeding, including, but not limited to, any memoranda, notes, records, or work product of a mediator, mediation organization, or party; except that a written agreement to enter into a mediation service proceeding or dispute resolution proceeding, or a final written agreement reached as a result of a mediation service proceeding or dispute resolution proceeding, which has been fully executed, is not a mediation communication unless otherwise agreed upon by the parties.

(4) "Mediator" means a trained individual who assists disputants to reach a mutually acceptable resolution of their disputes by identifying and evaluating alternatives.

(7) "Settlement conference" means an informal assessment and negotiation session conducted by a legal professional who hears both sides of the case and may advise the parties on the law and precedent relating to the dispute and suggest a settlement.

§ 13-22-307, C.R.S.: Confidentiality

(1) Dispute resolution meetings may be closed at the discretion of the mediator.

(2) Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or a mediation organization, unless and to the extent that:

(a) All parties to the dispute resolution proceeding and the mediator consent in writing; or

(b) The mediation communication reveals the intent to commit a felony, inflict bodily harm, or threaten the safety of a child under the age of eighteen years; or

(c) The mediation communication is required by statute to be made public; or

(d) Disclosure of the mediation communication is necessary and relevant to an action alleging willful or wanton misconduct of the mediator or mediation organization.

(3) Any mediation communication that is disclosed in violation of this section shall not be admitted into evidence in any judicial or administrative proceeding.

(4) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a mediation service proceeding or dispute resolution proceeding.

(5) Nothing in this section shall prevent the gathering of information for research or educational purposes, or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, mediation service, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

CASE LAW

Yaekle v. Andrews, 195 P.3d 1101 (Colo. 2008)

Based on appeal of two separate cases to the Colorado Supreme Court:

Fact Summary Case 1

In first case, shareholder filed suit against other shareholder over ownership dispute of corporation. The District Court, Jefferson County, Margie L. Enquist, J., granted defendant's motion for judicial enforcement of revised settlement agreement. Plaintiff appealed. The Court of Appeals, 169 P.3d 196, affirmed, determining that requirements of Dispute Resolution Act had been met for judicial enforcement of settlement agreement. Petition for certiorari was filed.

Fact Summary Case 2

In second case, property owner filed suit against neighboring property owners concerning an easement that gave him access across neighboring owners' property, alleging breach of contract and seeking specific performance of settlement agreement allegedly reached by parties as result of mediation. The District Court, Routt County, Paul R. McLimans, J., issued judgment on the pleadings in favor of defendants. Plaintiff appealed. The Court of Appeals, 2007 WL 1366293, affirmed. Petition for certiorari was filed.

Holdings

(1) Provision of Dispute Resolution Act outlining a process by which parties can turn an agreement reached during mediation into an enforceable court order does not abrogate common law principles of contract formation, but merely provides a method for turning a mediated settlement agreement into an enforceable order of court; disapproving, *National Union Fire Ins. Co. of Pittsburgh v. Price*, 78 P.3d 1138;

(2) For purposes of statute protecting mediation communications as confidential, "mediation communications" are limited to those made in the presence or at the behest of the mediator;

(3) Negotiations between shareholders subsequent to mediation of their dispute over ownership of corporation resulted in formation of binding settlement agreement; and

(4) Alleged agreement outlined by mediator at conclusion of mediation session between property owner and his neighbors was a "mediation communication" protected by confidentiality provision of Dispute Resolution Act.

Tuscany Custom Homes, LLC v. Westover*, *et al.*, 490 P.3d 1039 *(Colo. App. 2020)

Home builder brought breach-of-contract action against its customers. Customers joined as third-party defendants, prospective purchasers of home from customers. After parties participated in mediation, builder filed motion to enforce settlement agreement, and prospective purchasers joined motion. The District Court, Larimer County, Thomas R. French, J., granted motion. Customers appealed.

Holdings

(1) Mediator's email outlining terms of contract allegedly formed during mediation was "mediation communication" under the Dispute Resolution Act;

(2) Customers did not invite trial court's alleged error of considering draft agreement by submitting their nearly identical draft agreement to the court;

(3) Customers were not judicially estopped from challenging on appeal the admissibility of draft settlement agreement;

(4) Draft agreement was prepared at mediator's behest and thus was a confidential mediation communication under the Dispute Resolution Act;

(5) Draft agreement was inadmissible as evidence offered of an alleged oral settlement agreement reached during a mediation proceeding; and

(6) Evidence was insufficient to support trial court's finding that parties formed enforceable contract at mediation session.

Reversed and remanded.

MODEL RULES OF PROFESSIONAL CONDUCT

Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comments to Rule 4.1

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Rule 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

© The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comments to Rule 3.3

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a) (3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be

inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in

the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Rule 1.0(m): Definition of Tribunal

"Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Rule 2.4: Lawyer Serving As Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comments to Rule 2.4

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitrators in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties

involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Choosing and Preparing a Mediator:
Questions to Consider for the Mediation Advocate*

Note: When you or your client applies for an ODR mediator, you will get an "automatic" referral. ODR assigns their roster of mediators on a rotational basis. You CAN contact ODR roster mediators directly, asking for the ODR rate, and, thereby, choose your mediator.

1. Does your firm, organization, agency or client have a preferred, go-to mediator? Do you have a preferred, go-to mediator?

   Pause and critically evaluate. Consider presenting more than one mediator to your client. Also, have one or two in reserve, since the other side may have an objection to your preferred mediator.

2. Have you mediated with the mediator before?

   (a) If not, have you researched them online and by vetting them with other attorney colleagues?
   (b) Have they been involved in any post-mediation litigation?
   (c) Have their credentials as an attorney or therapist (or other professional license or practice) been subjected to discipline?

3. Does the mediator have (or need to have) familiarity with the subject matter and general principles of law involved in the case (also known as "subject-matter expertise")?

   Because:

   (a) It will take too long for them to get up-to-speed without it;
   (b) Your client will be unhappy/distrust the mediator without it;
   (c) It is really a difficult/complicated area of the law or facts;
   (d) It is a relatively new area of law;
   (e) The mediator will need it to design the process;
   (f) Litigation experience (as judge or attorney) will be helpful; and
   (g) Can any deficiency in subject-matter expertise be "cured" by technical assistance? Ex.: tax or engineering expert. Is the mediator willing? Is the other party willing? Who will pay for or provide such assistance?

4. Does the mediator have the necessary mediation process expertise?

   Because:

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(a) There will be a large number of participants;
(b) There will be a large number of documents or other evidence;
(c) Detailed interim reports or summaries will be required;
(d) The parties will need special handling (for example, power imbalances, disabilities, etc.);
(e) Online dispute resolution techniques will be needed: Many (if not most) mediations are scheduled on Zoom. Is your mediator skilled in using breakout rooms, sharing documents, and trouble-shooting video and audio problems? Do they use an automated document signature app to make signing documents easier?
(f) Third parties (members? the public? the press?) will need to be involved or informed;
(g) Expert witnesses and/or other objective persons or processes will be used; and
(h) Can any deficiency in the mediator's process expertise be "cured" by technical assistance? Co-mediation or tech support? Is the mediator willing? Is the other party willing? Who will pay for or provide such assistance?

5. Does the mediator need to have certain personal traits?

Because:

(a) Diversity is an issue, sensitivity, preference in case – race, ethnicity, gender, age, etc.;
(b) Being local is a positive or, in the alternative, needs to be avoided for perception of neutrality;
(c) A participant has had a negative experience with a prior mediator with certain personal traits; or
(d) A personal trait will match or complement participants' (warmth, humor, patience, detail-orientation, comfort with financial issues, etc.). Will the mediator's personal style benefit you and your client or counter possible negatives from any participants?

6. Does the mediator pose possible conflict of interest issues?

(a) For you, your firm, your client or for the other side's attorney, firm or client?
(b) Are any conflicts "curable" with a waiver from all concerned? Will such a waiver set up a possible challenge to any settlement agreement?

7. Does the mediator have the necessary mediation training and education? Has the mediator maintained their mediation process competence through education and/or practice?

(a) Are there any third parties (such as a court, agency, insurance policy, etc.) involved in the case or are there prior agreements between the parties which require certain qualifications, trainings, certifications, or memberships of the mediator?
(b) Are they competent in Zoom, Adobe, Docu-sign, etc.? Have they had training in mediating online; not just the technicalities but the different interpersonal aspects of not being in person?

8. Does the mediator have the ability to commit the time and focus necessary to competently

mediate your case?

(a) Is the case likely to require extensive document review or preparation for the mediator?
(b) Is the case likely to require additional time or days of mediation? Within what deadlines and with what degree of flexibility?
(c) Will the mediator be required to travel any significant distance to the mediation?
(d) Does the mediator have personal circumstances which may impact their ability to competently mediate your case within the necessary time frame? Mediators should evaluate their own competence (temporary or otherwise) to mediate each case brought to them. However, you should make an independent assessment in light of information of which you are aware.

9. Does the mediator need a preferred mediation style (evaluative, facilitative, or transformative)?

(a) Do you or your client prefer a certain style? For example, your client wants a mediator who will give an assessment of the case at some point in the mediation. Or you believe that the mediator needs to allow the parties to engage in more dialogue than usual due to an ongoing relationship in order to gain conflict resolution skills for future disputes. Despite their preference, can the mediator be flexible in their style? For example, can a facilitative or transformative mediator provide direct feedback and assessment to the parties? Can an evaluative mediator release control of the agenda and discussion to the parties to increase their ability to explore their feelings and concerns?

MEDIATION PREPARATION CHECKLIST
By Wesley Parks

I. BENEFITS OF PREPARATION

A. Amount of attorney and client preparation directly correlates with increased lawyer and client satisfaction with mediation.

(1) Wissler Study (2010), an empirical study on 644 mediated cases found the more prepared the lawyer and client were before mediation resulted in:

(a) Increases in client's and lawyer's perceived fairness
(b) Increases in client's perceived mediator impartiality
(c) Increases in client's perceived lack of coercion
(d) Increases in client's perceived party involvement and self-determination
(e) Increases in lawyer's perceived fairness
(f) Increases in lawyer's ability to evaluate case from both sides of the dispute

(2) Less client and lawyer preparation consistently correlated with less favorable assessments of the mediation process.

B. A systematic approach to mediation preparation results in better client outcomes in mediation.

C. Mediation preparation increases trial readiness should mediation result in impasse.

II. PREPARING FOR MEDIATION

A. Meet with your client before mediation, *more than once if necessary*

B. Provide litigation risk assessment (*i.e.* why mediation is worth a shot)
(1) Reality check
(2) Limitations on evidence/testimony
(3) Time needed for trial

C. Explain the mediation process

(1) Discuss that mediation is voluntary and confidential
(2) Discuss caucusing
(3) Discuss mediator role, attorney role, and client role
(4) Discuss differences between the adversarial process and mediation
(5) Educate the client about the mediator
(6) Review mediation fees

D. Develop an interest-based central theme of the case from your client's perspective

(1) The central theme should arise from the core issue of the dispute
(2) Use the central theme to assist your client in focusing on assigned tasks during the mediation

E. Discuss your client's goals and underlying interests

(1) Determine what your client wants to get out of the mediation
(2) Consider if there are outside interests that could impact settlement such as protecting reputation/settlement confidentiality, future personal or business relations, minimizing legal costs, time savings, etc.

F. Discuss any impediments to settlement that may arise during the mediation

(1) Ensure all stakeholders with settlement/decision-making authority will be present
    (a) Identify the right participants
    (b) Step outside the four-corners of the case
    (c) Consider Co-Defendant or Co-Plaintiff positions

(2) Discuss impediments from opposing party's perspective

(3) Consider interpersonal dynamics

G. Develop negotiating aspiration and reservation points, that are reasonable

(1) Ask, "Why is this reasonable?"
(2) Discuss with your client the pros and cons of lessening extreme anchor points/reservation points

H. Prepare an offer and concession plan

(1) Discuss timing of presenting offers/concessions
(2) Determine your client's BATNA
(3) Explain to your client that these parameters can be fluid and change during the mediation

I. Prepare exhibits that support your position

(1) Consider demonstrative exhibits that reduce volume
(2) Consider objective criteria, such as case law with similar facts or expert opinions based on similar facts, to support your position

J. Review your clients' legal rights

(1) Analyze whether the offer and concession plan comport with your client's legal rights
(2) Counsel your client on any rights may be waived
(3) Educate the client regarding the difference between a memorandum of understanding and a settlement agreement
(4) Educate the client regarding how any memorialized settlement will be binding contractually, and when the agreement will become a court order

K. Prepare opening statement

(1) Attorney shall communicate the main factual and legal arguments using persuasion
(2) Client shall communicate central theme and goals of the mediation

L. Discuss task sharing with client

(1) Attorney shall continue to persuade the mediator that his or her view of the legal merits is correct
(2) Client shall communicate underlying interests and emphasize importance of meaning settlement discussions

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PRE-MEDIATION STATEMENT, MEMORANDUM, OR BRIEF
By Wesley Parks

I. INITIAL MATTERS TO CONSIDER

A. What law applies to the pre-mediation statement/memo/brief?

(1) § 13-22-307(2), C.R.S. protects "any communication provided in confidence to the mediator or a mediation organization."
(2) Local rules;
(3) Rule 408, C.R.E. unless used for bias, prejudice, or negating contention of undue delay;
(4) Uniform Mediation Act
    a. Passed: D.C.; HI; ID; IL; IA; NE; NJ; OH; SD; UT; VT; WA; MA; NY
    b. Pending: GA (introduced 2021)
(5) 28 U.S.C. § 652, Alternative Dispute Resolution Act for federal courts; and/or
(6) Other administrative or regulatory law

B. What does the mediator want to review before the session?

(1) Current disposition of the underlying court case
(2) Facts about the underlying dispute
(3) Law supporting disputants' positions
(4) Impediments to settlement
(5) Initial settlement offer

C. How should the document be formatted?

(1) Mediator preferences on style and/or length (usually 5-10 pages)
(2) Professional letter
(3) Memorandum
(4) Brief

D. What should be included as attachments?

(1) Exhibits
(2) Pleadings

(3) Other objective criteria supporting your client's position

E. Who will receive the document?

(1) The mediator only
(2) The parties and the mediator
(3) Also consider how recipients may impact content

F. What is the deadline for submission?

(1) Mediator deadlines
(2) Court deadlines
(3) Also consider early submission in complex matters
(4) Submit no later than one week before mediation, preferably two weeks before mediation

II. CONTENT OF PRE-MEDIATION STATEMENT, MEMORANDUM, OR BRIEF

A. Summary of facts

(1) Tell a story with the facts from a central theme
(2) Describe the parties
(3) Describe the dispute
(4) Emphasize facts that support your client's interest-based central theme

B. Description of stakeholders

(1) Provide the a list of persons or entities who have a stake in the outcome of the case
(2) Provide names and contact information
(3) Describe each player's position within the dispute
(4) Provide information regarding who will attend the mediation
(5) Provide names and contact information of legal counsel or other representatives who will be present at the mediation

C. Procedural history

(1) Provide a brief synopsis of the case history

(2) Provide a brief synopsis of the current status of the case
(3) Provide any information that may affect timing of settlement
(4) Provide any information regarding availability of necessary information needed for settlement

D. Core Legal Matters

(1) Describe the core legal matters central to the dispute
(2) Explain how your client's facts support a specific legal conclusion, in general terms
(3) Provide a summary of the evidence that supports your legal conclusion
(4) Not necessary to provide detailed legal analysis

E. History of settlement exploration

(1) Inform the mediator of any partial agreements
(2) Inform the mediator of past settlement discussions between the parties and/or counsel
(3) Inform the mediator of current or ongoing settlement discussions between the parties and/or counsel
(4) Provide reasons, if known, as to why the parties were unable to settle the dispute themselves

F. Impediments to settlement

(1) Consider impediments from both sides
(2) Consider personalities and/or health of disputants
(3) Consider underlying conflicting interest
(4) Consider whether all stakeholders will be present
(5) Any other issues that may lead to impasse

G. Strengths and weaknesses of opposing party's case

(1) Emphasize facts that support your client's strengths that also show the opposing party's weakness
(2) Do not overlook the opposing party's strengths

H. Strengths and weaknesses of your client's case

(1) Consider a telephone call to mediator to discuss the weakness of your client's case if there are issues with you sharing this with the opposing party and/or your client
(2) Discuss you client's weakness with your client to determine what, if anything, your client is willing to disclose in writing

I. Underlying interests

(1) Discuss your client's need-based interests
    a. Basic needs: security/safety
    b. Psychological needs: relationships, prestige, self-esteem
    c. Self-fulfillment: achieving potential, future success
(2) Assess whether there are outside interests that may influence the outcome of the mediation
(3) Inform the mediation of common interests between parties that may facilitate settlement

J. Settlement Proposal

(1) Establish negotiating aspiration points and reservation points for each issue with your client
(2) Formulate a reasonable settlement proposal within the spectrum of your aspiration points and reservation points for every issue
(3) Support the reasonableness of your initial settlement proposal with objective criteria
(4) Consider a settlement proposal that is not your "best case scenario" to show good faith

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CAUCUS CHECKLIST*

1. **How to prepare your client:**

(a) Explain what a "caucus" is – a private meeting with your client, you and the mediator while the other side is in another room. Usually, caucus occurs after everyone has met together (in joint session). Everything said in caucus and all documents presented are held in confidence by the mediator, unless we ask the mediator to share something with the other side. There is no real time limit, but the other side will be waiting for their turn with the mediator or for everyone to return to joint session.

(b) Explain that you may be more relaxed, friendly or forthcoming with the mediator during caucus because it is confidential and it's the proper time/environment to engage the mediator more personally.

(c) Explain that you and your client will plan what the two of you will say and what information or documents you will share with the mediator in caucus.

(d) Explain that being 100% transparent while the mediator is in the room may not be your strategy.

(e) Agree upon signals or phrases between you and your client so that you will know when the other wants to say something, wants the person speaking to stop speaking or if it is time for a private meeting between the attorney and the client (or "break") without the mediator.

(f) Explain that you will make sure that the mediator will check with both of you to determine what is shared with the other side- if anything.

(g) Explain that the mediator can call a caucus or either side can. Explain that you will be in charge of calling the caucus and setting the agenda for the caucus for your side.

(h) Explain that purposes of caucus can be:

(1) to personalize your side for the mediator;
(2) describe and discuss difficult issues which are present in the dispute and may be contributing to impasse;
(3) to ask the mediator for feedback on what is and is not working in your side's interaction with the other side;
(4) to ask if they have see any information gaps that could be filled to make settlement

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more likely; and

(5) to present some possible solutions and get mediator's feedback on likelihood of success.

2. **How to prepare the mediator:**

(a) Explain to the mediator what you anticipate you may need to caucus about.

(b) Describe for the mediator your preference for their interaction with your client in caucus.

(c) Inform the mediator regarding how much "scripting" or "crafting" of the message between sides that you would prefer.

3. **How to prepare yourself**:

(a) Consider what "triggers" from the other side or arising from the dialogue that may prompt you to ask for a caucus.

(b) In reviewing your preparation of your client (above) develop and discuss with your client your possible goals for caucus so that they know what to expect. role plays for caucus discussions and signals you will give them in caucus.

4. **When to ask for a caucus**:

(a) Recognize that many mediations are in continuous caucus after opening statements from both sides.

(b) Recognize that a break (with just you and your client) may address many of the reasons below to ask for a caucus (if you don't need the mediator in the room).

(c) When both sides have opened and you want to warn the mediator of a problem or limitation.

(d) When you have been given an offer by the other side.

(e) When you are about to give an offer (or counter-offer) to the other side.

(f) When an impactful and (perhaps) unanticipated fact or strategy has been presented by the other side.

(g) When your client is becoming upset or agitated and you need a break (you could just meet with your client without the mediator).

(h) When the mediator seems to be directing the mediation into an area that you think will not be productive.

(i) When the other side is on a roll and perhaps has you or your client "on the ropes" and you want to pause for reflection or to slow their momentum.

(j) When you need clarification from the mediator regarding an aspect of the mediation.

(k) If you call the caucus, be able to explain to the mediator (once you and your client are alone with them) what you would like to talk about or accomplish. Regardless of who called the caucus – you should ask the mediator if they have questions, points to discuss or feedback.

5. **How to respond if the mediator calls a caucus**:

(a) If it seems like a good idea, don't resist.

(b) If it seems premature – ask the mediator if waiting a bit might be okay because you want to share more information, ask for more information, have more discussion between the parties about an issue, etc. Ask what the mediator's agenda in the mediation might be. This can be in private or in front of the group.

(c) If you agree to the caucus- you might ask the other side to think about some issue or prepare to share some information when you return (i.e., homework).

6. **How to respond if the other side calls a caucus**

(a) Use the time productively to debrief the mediation so far with your client, and give them an opportunity to take a psychological break from the tensions of mediation.

(b) Use the time to prepare questions or proposals and to do factual or legal research.

(c) Prepare for your caucus with the mediator. Prepare your agenda for recognizing that your agenda may change after the mediator conveys information or an offer from the other side.

(d) Discuss your goals for caucus with your client so that you are on the same page when the mediator returns.

(e) When the mediator returns, you may ask the mediators about what happened in the other side's caucus; what the other side is thinking, concerned about, their rationales for positions; However, realize that the mediator may have nothing to share with you from the other side, and confidentiality may preclude them answer your questions.

7. **What to do in your caucus**

(a) Always begin with asking the mediator if they information or questions for you. If they have returned from a caucus with the other side, they will likely have an offer for you. If so, you will want to hear it and then you might want to have a private break with your client before discussing the offer with the mediator.

(b) Let the mediator know what your agenda (or goals) are for the caucus.

(c) If you or your client have a concern regarding the process, how the other side is behaving or responding, or if you would like to let the mediator know how your client is reacting or feeling, you can discuss it in the caucus. Be sure to decide if you want the mediator to be free to communicate this information the other side.

(d) Caucus can give the mediator an opportunity to get to know your client and to better understand their concerns and needs. This will help them do a better job of explaining your client's perspective to the other side.

(e) You can ask the mediator for feedback on your questions, proposals, approach or strategy in the mediation. They may be willing to give you feedback and helpful suggestions. This can provide you with useful information about how the other side is responding to you.

(f) Give the mediator your proposal or counter-proposal. To the degree you feel comfortable, give the mediator your reasons for asking for information, refusing a proposal for the other side, or for your proposal. You don't have to give every reason you and your client have, but it helps the mediator to explain and clarify to the other side. Recognize that these rationales (or expressions of interests) may be responded to by the other side in their next proposals or questions.

(g) If you need more information from the other side, you can work with the mediator to craft the questions and the reasons that you want or need that information.

(h) Before ending the caucus, be sure that the mediator knows what you want them to say to the other side and what they should not share (keep confidential). It is very useful for the mediator to "script" or repeat to you what they intend to say. Frequently, you or your client will refine or correct their statement. Sometimes, hearing your questions or proposals summarized by a third party triggers ideas and clarifications.

(i) You can give the mediator "conditional" and "sequential" proposals. For example, you

can say, "We would like to pay daycare costs on a 40-60% base. However, if they pay for summer camp, we will go to 50-50 on daycare." You need to be clear with the mediator on how you want them to present this. All at once or only after they have agreed to pay for summer camp? If your client is (ultimately) willing to pay 50%, but wants you to start with 40%, most mediators will prefer to offer the 40% to the other side and then come back to you for the "release" of your 50%.

(j) If you or the mediator decide that the parties should go back into joint session, be sure to clarify whether you will take over your side's message or if you want the mediator to give your proposals or questions.

MEMORANDUM OF UNDERSTANDING CHECKLIST

By Wesley Parks

- ☐ Legal names of the parties entering into the agreement
- ☐ Date of agreement
- ☐ Date of mediation
- ☐ Mediator name
- ☐ Purpose of the agreement
- ☐ Essential terms of the agreement
- ☐ Duration of agreement
- ☐ Time limitations on execution of agreement
- ☐ Liability for failure to perform
- ☐ Mechanism for resolving disputes that arise in drafting final settlement agreement
- ☐ Future dispute resolution regarding settlement agreement
- ☐ Effective date as contract
- ☐ Effective date as court order
- ☐ Enforcement procedures
- ☐ Severability
- ☐ Integration
- ☐ Release
- ☐ Bilateral signatures and counsel

TEMPLATE MEMORANDUM OF UNDERSTANDING

By Wesley Parks

This Memorandum of Understanding ("MOU") is entered between [legal name of party] and [legal name of party] on [date]. On [date], the parties attended mediation conducted by [name of mediator]. The parties [fully/partially] resolved the issues related to their dispute during the mediation and hereby memorialize in writing the essential terms and conditions of settlement in this MOU as follows:

ESSENTIAL TERMS AND CONDITIONS OF AGREEMENT

1. Settlement Amount. [legal name of party] shall pay to [legal name of party] the amount of [$ amount] in good funds in the form of a [check, money order, cash, etc.] on or before [date]. Payment shall be made to the order of [legal name of party] and [hand delivered, mailed] to [address] and [postmarked] on or before the due date. [Enter any other settlement amount and/or payment details.]

2. [Enter any and all other essential terms and conditions of agreement.]

3. Severability. If any term or other provision of this Settlement Agreement is invalid, illegal or incapable of being enforced by any rule of law or public policy, all other conditions and provisions of this Settlement Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner adverse to any party.

4. Mutual Release. The parties agree to the above terms and conditions, in full satisfaction of all claims in connection with the Complaint. Each party agrees to mutually release the other, their heirs, representatives, principals, successors, agents, employees, officers and directors of all claims, known or unknown, arising from or relating to the Complaint.

5. Dismissal of Court Actions with Prejudice. All pending legal actions related to this dispute shall be promptly dismissed with prejudice and without attorney fees or costs to either side.

6. Mediator as Scrivener. The parties agree and acknowledge that the mediator in assisting the parties in coming to the agreement set forth in this MOU, has acted solely as a scrivener, and not as legal counsel or legal advisor for either side. The parties agree and acknowledge that they have had a full and complete opportunity to consult with independent legal counsel of their choice prior to signing this MOU.

7. Full Agreement. This MOU is intended as the complete integration of the agreement between the parties concerning the matters negotiated between them during mediation and incorporated in this MOU. Any prior or contemporaneous addition, deletion, or other amendment to this MOU shall not be enforceable unless memorialized in writing and executed by the parties. Any subsequent notation, renewal, addition, deletion, or other amendment to this MOU shall not be enforceable unless memorialized in writing and executed by the parties.

8. The parties agree that final settlement documents shall be drafted by the parties' respective legal counsel in accordance with the essential terms and conditions of the agreement set forth in this MOU.

9. The parties agree to complete and sign all final settlement documents on or before [date]. The parties further agree that the inability to reach agreement on the final form or content of the final settlement documents shall not invalidate the essential terms and conditions of the agreement set forth in this MOU, which may be fully enforced according to its terms.

10. If the parties are unable to agree upon the final form and content of future contemplated settlement documents, this MOU shall be considered the final settlement of the dispute and may be fully enforced as a complete settlement agreement in accordance with Colorado law.

Party Name Date	Party Name Date
APPROVED AS TO FORM:	APPROVED AS TO FORM:
Attorney for _____ Date	Attorney for _____ Date

BENEFITS OF THE JOINT SESSION CHECKLIST
By Wesley Parks

- ☑ Face-to-face negotiations yield outcomes that are different from caucusing only, and joint sessions encourage joint problem solving.
- ☑ Joint sessions provide an opportunity to build the trust necessary for settlement.
- ☑ Clients may benefit from seeing negotiation strategies firsthand without the filter of the mediator.
- ☑ Joint sessions may improve relationships and assist in modeling effective communication.
- ☑ Parties may develop empathy for one another from telling their stories directly to each other.
- ☑ The joint session can assist in instilling doubt in entrenched positions and generate movement towards settlement.
- ☑ The joint session can help create an agenda for the negotiation, highlight goals of the mediation, and underscore why it's important to achieve joint goals.
- ☑ The joint session promotes social interaction and provides a human dimension to the dispute.
- ☑ The joint session can move the parties from fight-or-flight mode and into problem-solving mode.
- ☑ Attorneys can benefit from the joint session by presenting their perspective on the case to the opposing party and deflating overconfidence in entrenched positions.
- ☑ Attorneys can benefit by observing how opposing counsel plans to present the case to the court.
- ☑ Brainstorming solutions and engaging in creative problem-solving are easier in a joint session.
- ☑ The joint session can be used to ensure the mediator has conveyed caucus messages accurately.

- ☑ A joint session often saves time and reduces the need for the mediator to relay messages back-and-forth between the parties.

- ☑ A joint session often can break negotiation snags and reveal common underlying interests that may lead to resolution of the dispute.

- ☑ The joint session can give attorneys an opportunity to observe the opposing party without the formality of a deposition.