

Ethics in Family Law Mediation

CBA Family Law Section
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A. Initiation of Mediation

Colorado Rules Professional Conduct 1.2 (a)

A lawyer shall abide by a client's decisions concerning the scope and objectives of representation ... and shall consult with the client as to the means by which they are to be pursued... A lawyer shall abide by a client's decision whether to settle a matter.

ABA Ethical Guidelines for Settlement Negotiations 3.1.2

The decision whether to pursue settlement discussions belongs to the client. A lawyer should not initiate settlement discussions without authorization from the client.

Committee Note: If the mediation is court-ordered, counsel should discuss "the significance of the court's directive and possible scope of negotiations with the opposing parties."

B. The Ethical Obligation to Discuss ADR

1. Colorado Rules of Professional Conduct

Rule 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

Comment to Rule 2.1

"When a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."

2. ABA Model Rules of Professional Conduct

Rule 1.4 Communication

(a) A lawyer shall: (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

Rule 2.1 (Comment)

[5] ... [W]hen a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

3. Discussion

“Is there an affirmative duty upon a lawyer to explain and detail ADR to a client? What if the lawyer does not advise a client concerning availability of ADR?”

One commentator has argued that a competent lawyer is duty bound to advise clients concerning ADR alternatives. Arnold, "Professional Responsibility in ADR," SB41 ALI-ABA 527. The argument could be made that failure to advise of ADR options is reflective of a less than competent attorney.

Is there an ethical violation in Colorado if an attorney does not advise a client as to ADR options? A violation of the last sentence of Rule 2.1 probably cannot lead to disciplinary action in and of itself. The question then is whether a change to "shall" in Rule 2.1 would create a different result. Though the word "should" is used, rather than shall, the clear intent of the rule is to have lawyers advise their clients of ADR options.”

Richard M. Borchers

Ethics In Mediation And Arbitration

<http://www.legalres.com/articles-ethicsinmediationandarbitration.pdf>

C. Mediator Conflict Disclosure

Colorado Model Standards of Conduct for Mediators II A.

The mediator shall advise all parties of any prior or existing relationship or other circumstances giving the appearance of or creating possible bias, prejudice, or partiality.

ABA Model Standards of Conduct for Mediators

II. 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.

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

III. C. A mediator shall disclose ... 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.

D. Material Disclosure

Colorado Rules of Professional Conduct 1.2 (d)

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent ...

Colorado Rules of Professional Conduct 3.4 (c)

A lawyer shall not: knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

Colorado Rules of Professional Conduct 3.4 (d)

A lawyer shall not: in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

Colorado Rules of Professional Conduct 4.1

ABA Model Rules of Professional Conduct 4.1

In the course of representing a client the 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 to a third person 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 Colorado and ABA Rules 4.1: [1] Omissions or partially true but misleading statements can be the equivalent of affirmative false statements.

Colorado Rules of Professional Conduct 8.4 (c)

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation...
- (d) engage in conduct that is prejudicial to the administration of justice.

ABA Ethical Guidelines for Settlement Negotiations 2.3

A lawyer's conduct in negotiating a settlement should be characterized by honor and fair-dealing.

CRCP 16.2 (e) (1) required disclosure

Parties to domestic relations cases owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case. The court requires that, in the discharge of this duty, a party must affirmatively disclose all information that is material to the resolution of the case without awaiting inquiry from the other party. This disclosure shall be conducted in accord with the duty of candor owing among those whose domestic issues are to be resolved under this Rule 16.2.

CRCP 16.2 (e)(4) supplemental disclosure

A party is under a continuing duty to supplement or amend any disclosure in a timely manner. This duty shall be governed by the provisions of C.R.C.P. 26(e).

CRCP 16.2 (j) Sanctions

E. Mediator's Duty if Impropriety

Colorado Model Standards of Conduct for Mediators V. H.

If the parties insist on pursuing an agreement that the mediator knows or should know is in violation of the law and has advised the parties of such, the mediator shall terminate the mediation.

ABA Model Standards of Conduct for Mediators VI (A) (4) & (C)

A mediator should promote honesty and candor between and among all participants...

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.

F. Counsel's Obligation to Withdraw

Colorado Rules of Professional Conduct 1.16

A lawyer ... shall withdraw from the representation of a client if:

(a)(1) the representation will result in violation of the Rules of Professional Conduct or other law.

(b)(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

ABA Ethical Guidelines for Settlement Negotiations 3.32

If a client directs the lawyer to act ... in a manner the lawyer reasonably believes is contrary to the attorney's ethical obligations ... the lawyer should counsel the client to pursue a different and lawful course of conduct. If a mutually agreeable and proper course of action does not arise from the consultation, the lawyer should determine whether withdrawal ... is mandatory or discretionary...

G. Putting Counsel ahead of Client

Colorado Rules of Professional Conduct 1.2 (a)

A lawyer shall abide by a client's decision whether to settle a matter.

ABA Ethical Guidelines for Settlement Negotiations 3.2.1 (Committee Note)

The client's entitlement to control over the objectives of the representation necessarily includes control over the ultimate decision whether to settle a matter.

Colorado Rules of Professional Conduct 1.7

A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (2) there is a significant risk that the representation ... will be materially limited by a personal interest of the lawyer.

Comment [8] to Rule 1.7: A conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.

Comment [10] to Rule 1.7: The lawyer's own interests should not be permitted to have adverse effect on representation of a client.

ABA Ethical Guidelines for Settlement Negotiations 2.1 (Committee Note)

A lawyer should not impede a settlement that is favored by a client ... and consistent with the law and ethical rules, merely because the lawyer does not agree with the client or because the lawyer's own financial interest in the case or that of another nonparty is not advanced to the lawyer's or nonparty's satisfaction.

ABA Ethical Guidelines for Settlement Negotiations 4.2.2

When an attorney's fee is a subject of settlement negotiations, a lawyer may not subordinate the client's interest in a favorable settlement to the lawyer's interest in the fee.

Committee Note: [Lawyers] must resolve tensions between the client's interest in an optimal recovery and their own interest in optimal compensation in favor of the client's interests.

H. Bad Faith

Counsel may not use mediation in bad faith. This includes delay, embarrassment or placing a burden on the opposing side; also includes representing that the client is interested in settlement when the mediation is used instead for discovery, delay, etc.

(See ABA Ethical Guidelines for Settlement Negotiations 4.3.1 and comments.)

I. Duty to Report

(1) Attorney duty to report

Colorado Rules of Professional Conduct 8.3 (a)

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(2) Non-attorney duty to report

(3) Confidentiality v. Mandatory Reporting

C.R.S. §13-22-307 (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.

C.R.S. §13-22-302

(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.

J. Parties with Diminished Capacity

- (1) Ongoing Diminished Capacity
- (2) Temporary Diminished Capacity
- (3) Inability to Continue Mediation (Anger/Stress/Emotion)

ABA Ethical Guidelines for Settlement Negotiations 3.4

A lawyer's general obligations when representing a client with diminished capacity or special needs - the obligations to maintain to the extent possible a normal client-lawyer relationship, and to protect the client when a normal relationship is impossible - apply equally to decisions respecting whether, how and on what terms to settle a dispute.

Committee Note: When a serious question arises as to whether the client has the capacity to direct the settlement process, the lawyer should seek to ascertain as reliably as is practicable the scope and limits of the client's capacity, taking into account that settlement of a dispute may permanently affect the client's rights and interests.

Issues:

- Is there a guardian or other individual legally authorized to make decisions?
- Should counsel seek appointment of a third party?
- Can the client adequately act in his or her own interests by making a reasonably-considered decision?

ABA Model Standards of Conduct for Mediators VI (A) (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.

Colorado Standards of Conduct for Mediators V. G.

If one of the parties is unable to participate in a mediation process for psychological or physical reasons, the mediator should postpone or cancel mediation until such time as all parties are able and willing to resume.

K. Settlement Documents

- (1) Timely return
- (2) Alteration

L. Enforcement of Agreements

Generally, there are two routes to establishing the enforceability of an agreement reached through mediation – statutory and common law.

a. Statutory – Two important provisions

C.R.S. §13-22-308. Settlement of Disputes

(1) If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

This section must be read in conjunction with:

C.R.S. §13-22-307. Confidentiality

(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: ...

GLN Compliance Grp, Inc. v. Aviation Manual Solutions, 203 P.3d 595 (Colo.App. 2008).

Decided October 16, 2008 (after the Court of Appeals Yaekle decision; prior to the Supreme Court's affirmation): Without a written document/signatures by the parties, a transcript of the mediation agreement is not admissible to establish a binding agreement.

See also: **National Union Fire Insurance Co. v. Price**, 78 P.3d 1138 (Colo.App. 2003).

See also: **In re Marriage of Barker**, 251 P.3d 191 (Colo.App. 2010): (Agreement reached in mediation to modify parenting time was placed on the record and adopted by the Court but not reduced to writing. Agreement was enforceable as the UMDA takes precedence over alternate dispute resolution statutes, the Court has authority to modify parenting time in the child's best interests, and the provisions of C.R.S. §14-10-104.5) ("The general assembly declares that the honoring and enforcing of those obligations and commitments made by both parties is necessary to maintaining a relationship that is in the best interest of the children of the marriage.").

b. Common Law Principles

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

Decided October 20, 2008, affirming the Court of Appeals decision:

As to Yaekle and Andrews: A settlement agreement can be governed by and found enforceable under common law contract principles. A “basic terms” written agreement was signed at mediation. The parties could not agree thereafter to the final terms. A binding agreement at common law was established during the parties’ negotiations in the months following the mediation session. Communication and conduct after the mediation process is admissible to demonstrate that an agreement has been reached.

As to Chotvacs and Lish: As there was no written agreement signed at mediation, mediation discussions were not admissible. Actions taken after mediation in conformity with the mediation discussions could not be the basis of a common law contract as the discussions during mediation were not admissible.

Cited in: E-21 Engineering, Inc., v. Steve Stock & Associates, Inc., No. 09CA1840 (Colo.App. August 5, 2010) and O’Neil v. Wolpoff Abramson, L.L.P., 210 P.3d 482 (Colo.App. 2009).

M. Mediation Confidentiality

C.R.S. §13-22-307. 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.

C.R.S. §13-22-302. Definitions

(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.

N. Mediation-Arbitration

C.R.S. §13-22-212. Disclosure by Arbitrator

(1) Before accepting an appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(2) An arbitrator shall have a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment that a reasonable person would consider likely to affect the impartiality of the arbitrator.

Resource Materials:

Colorado Dispute Resolution Act, C.R.S. §13-22-301, *et. seq.*

Colorado Arbitration Act, C.R.S. §13-22-201, *et. seq.*

Colorado Rules of Civil Procedure

Colorado Rules of Professional Conduct

Colorado Model Standards of Conduct for Mediators (1999)

Ethical Guidelines for Settlement Negotiations. American Bar Association Litigation Section (2002)

Mediators' Revised Code of Professional Conduct. Mediation Association of Colorado (1995)

Model Rules of Professional Conduct, American Bar Association.

Model Standards of Conduct for Mediators. American Bar Association, American Arbitration Association, Association for Conflict Resolution (1994, revised 2005).

Robbie M. Barr and William R. Gray: "Conducting Effective Settlement Negotiations." Colorado Judicial Conference, 2004.

Marcy G. Glenn: "Settlement Ethics." The Colo. Lawyer, Vol. 30, No. 12 (12/2001)

Lisa M. Horvath: "The Art and Science of Family Law Mediation: A Practitioner's Guide ." The Colo. Lawyer, Vol. 33, No. 2 (2/2004)

Charlie Meacham, Samantha Trahan, Bass Wallace, Jr.: "Ethical Rules Applied to Contract and Settlement Negotiations." Association of Corporate Counsel, Houston, November 13, 2012.

O. Russel Murray: "Arbitrator and Mediator Disclosure Obligations in Colorado." The Colo. Lawyer, Vol. 34, No. 9 (9/2005).