

Ethical Issues in Family Law Mediation
CBA Family Law Section
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1. Can (and should) friends or family members attend mediation? Can the mediator prevent third parties from attending or require third parties to leave during mediation?
2. May (and should) a CFI/PRE Report be provided to the mediator and may (and should) a mediator read the CFI/PRE Report if provided?
3. The difference between a mediator telling a party “everything you tell me is confidential” v. “unless you tell me otherwise I assume I can share everything you tell me with the other side.”
4. Duty of confidentiality and duty to report suspected child abuse or a party’s suicidal thoughts. A mediator is not a mandatory reporter unless the mediator falls under one of the categories in C.R.S. §19-3-304(2). A mental health professional acting as a mediator is a mandatory reporter under C.R.S. §19-3-304(2)(n).
5. An attorney making an offer v. the client making an offer. How actively should attorneys participate in mediation? The benefits of a mediator meeting with both attorneys during mediation.
6. The benefits and detriments of mediation with parties together. Does it make a difference if attorneys are present at the mediation? What if one party is pro se or elects not to have her/his attorney present?
7. You are the collaborative law professional who is the facilitator. During the course of the collaborative process, you develop concerns that one party is unable to understand the decisions she/he is facing or to participate in negotiating the outcome. What are your responsibilities?
8. You are the mediator. During the course of the mediation you develop concerns that one party is unable to understand the decisions she/he is facing or to participate in negotiating the outcome. What are your responsibilities?
9. Discussion of unbundled legal services by a party in mediation:

Pursuant to Ethics Opinion 101, a lawyer also may provide unbundled services in negotiations or mediation. When a lawyer knows that a party is represented by an opposing lawyer providing unbundled services in

settlement negotiations or mediation, then, pursuant to Colo. RPC 4.2, the lawyer should communicate only with the opposing lawyer providing unbundled services, and not the client, about settlement or mediation issues. If the case does not settle or resolve, and the lawyer has no reason to believe the representation by the opposing lawyer is continuing, then the lawyer may deal directly with the party on other issues. Further, if the lawyer has questions about whether he or she can communicate directly with the party who received unbundled services in the context of mediation or settlement negotiation, the lawyer should seek clarification or, if necessary, permission from the opposing lawyer who provided the unbundled services to communicate directly with that lawyer's client.

10. Competence in mediation: Does an attorney in a family law matter have an ethical duty when deciding whether to refer a client to an attorney-mediator v. a non-attorney mediator? What are the pitfalls to consider in this decision?

Right of Rescission: The parties sign an MOU that allows for a ten-day period for counsel to review the agreements and for renegotiation of provisions that an attorney deems "legally inadvisable." Is this an enforceable MOU? If the mediator created this language, can the mediator be called to the stand to ask why she/he inserted the provision?

11. Are there ethical concerns with a mediator creating a Separation Agreement or Parenting Plan rather than a Memorandum of Understanding? Does your answer change if the mediator is an attorney or a non-attorney?

12. Issues when the mediator is named arbitrator to resolve disputes in the creation of a Parenting Plan or Separation Agreement or to resolve disputes as to what was intended in the MOU.

13. What is the mediator's responsibility, if any, if the mediator recognizes that counsel (or the parties, if pro se) have failed to identify or recognize a material issue, and the mediator's responsibility, if any, if the mediator believes that the parties are agreeing to a blatantly unfair provision or a provision that is non-enforceable or not capable of being carried out. Does it matter if the provision is not merely unfair to one side, but legally incorrect or even illegal? Does it matter whether the mediation is all parties together or in separate rooms?

14. A party or the parties are represented by counsel but attend mediation without counsel. If agreements are reached, should the parties sign an MOU without counsel's input/review?