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**PROGRAM MATERIALS**  
**Program #3670**  
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## **Best Behavior: Effective Strategies for Avoiding Ethics Mistakes in Mediation**

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## Don't Cross the Line for Advocates and Neutrals

*Avoiding Ethics Mistakes in Mediation*

**Francine Friedman Griesing, Esq.**

# Your Presenter

Fran Griesing has over 40 years of experience representing clients in business transactions, commercial litigation, employment matters, and alternate dispute resolution. Fran serves as arbitrator and mediator in employment and business disputes and has extensive experience conducting proceedings remotely. She served as Chair of Litigation for City of Philadelphia Law Department Under Mayor Edward G. Rendell, former Governor of Pennsylvania. A highly-sought speaker and writer, she has taught at the college, law school and graduate level. Fran received many awards for professional accomplishment and civic engagement. She is an honors graduate of Binghamton University and the University of Pennsylvania Law School and admitted to practice in Arizona, New York, Pennsylvania, Utah and the United States Supreme Court.



# Scope of Program

- \* Discuss the ethical and professional obligations to clients as an advocate when preparing and representing them at mediation.
- \* Learn to prepare more effectively beyond just mastering the legal and factual issues and to memorialize a settlement for clients so it sticks.
- \* Understand as a neutral mediator your obligations as to competence and diligence and how to avoid overstepping the bounds of neutrality.
- \* Remember as a neutral mediator you do not represent the parties and should not provide legal advice.
- \* Discuss difference between permissible puffery for advocates and duties of truthfulness for mediators.
- \* Consider differences between in person and remote mediation and effective strategies for building rapport when mediating virtually.

# Why is this important?

## ✦ **Why:**

Most disputes are settled prior to trial or final proceeding. Pre-trial resolution saves time and expense, reducing risk, stress and uncertainty for parties.

## ✦ **Who:**

Anyone who participating in settlement negotiations, with or without a neutral facilitator, such as a judge or mediator, can benefit from strategies to avoid common mistakes that derail settlement or cross ethical lines.

## ✦ **Biggest Takeaway:**

- As an advocate, preparing for mediation and advocating effectively requires more than mastering relevant law and facts.
- As a neutral, even if you are an experienced jurist or arbitrator, mediation calls for different skills such as patience and assuring clarity as to your role.

# Selected ABA Rules

- Rule 1.1 Competence
- Rule 1.2 Scope of Representation
- Rule 1.3 Diligence, Rule 1.4 Communication, Rule 1.6 Confidentiality
- Rules 1.7-1.9 Conflicts
- Rule 1.13 Organization as a Client
- Rule 2.4 Lawyer Serving as Third-Party Neutral
- Rule 3.3 Candor to the Tribunal
- Rule 4.1 Truthfulness in Statements to Others
- Rule 7.1 Communications Concerning a Lawyer's Services
- Rule 8.4 Misconduct

# Selected ABA Opinions

- ABA Formal Opinion 06-439 –Lawyer’s Obligations of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation
- ABA Formal Opinion 518 –Lawyer’s Duties to Avoid Misleading Communications Acting as a Third-party Neutral Mediator

# ABA Model Standards of Conduct for Mediators.

- Preamble
- Standard I - Standard Determination
- Standard II - Impartiality
- Standard III - Conflicts of Interest
- Standard IV - Competence
- Standard V- Confidentiality
- Standard VI - Quality of the Process
- Standard VII - Advertising and Solicitation
- Standard VIII - Fees and Other Charges
- Standard IX - Advancement of Mediation Practice
- [https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf)

# CPR Mediation Procedures for all Participants

- \* CPR Procedures and Clauses Mediation Procedure protocols for parties mediating under CPR Dispute Resolution Services (“CPR Rules”).
- \* CPR Rule 4, Roles & Responsibilities, addresses the expectations for parties and counsel (4(a)) and for mediators (4(b)).

# CPR Mediation Procedures for Counsel and Parties

## ✦ CPR Rule 4(a) provides

- ✦ (i) Parties and counsel shall endeavor to prepare appropriately for the mediation, conducting reasonable factual inquiry to gain the broadest understanding of the facts which underly the dispute, objectively reviewing and evaluating known facts and stated legal positions, and considering the party's underlying needs and interests that could form the basis for a satisfactory resolution. Appropriate preparation includes considering the relational, cultural, and psychological components of the dispute and reasonable methods for managing those components to encourage settlement.
- ✦ (ii) Parties and counsel agree to enter mediation discussions with an open mind, a willingness to listen to alternative perspectives, and a commitment to a productive and constructive process.

# CPR Mediation Procedures for Mediators

- ✦ Note, CPR Rule 4(b)(i) requires mediators to follow ABA Model Standards and [CPR-Georgetown Commission on Ethics and Standards in ADR Proposed New Model Rule of Professional Conduct Rule 4.5 The Lawyer as Third-Party Neutral \(released in November 2022\)](#). (“CPR Model Rule”). Where there is a conflict, the CPR Model Rule governs.
- ✦ The CPR Model Rule covers Diligence and Competence (CPR Model Rule 4.5.1), Confidentiality (CPR Model Rule 4.5.2), Impartiality (CPR Model Rule 4.5.3), Conflicts of Interest (CPR Model Rule 4.5.4), Fees (CPR Model Rule 4.5.5), Fairness and Integrity of the Process (CPR Model Rule 4.5.6).

# Do These Rules Apply to Me?

- ✦ ABA Model Rules are a template on which states may base their own rules of professional conduct. The language may vary in your jurisdiction.
- ✦ Even if the language is the same, individual states may have different comments or interpretations.
- ✦ State law may also set requirements for mediation.
- ✦ Courts may have rules for court mandated mediation.
- ✦ Private mediation administrators may have their own rules.
- ✦ The parties may agree to terms under which disputes should be subject to mediation.

# Considerations for Mediators Beyond Rules

- How do you assess whether to accept a case for mediation?
- How do you assess, disclose and seek conflict waivers?
- How do you assure confidentiality?
- What should you request from counsel before mediation?
- How do you handle joint sessions? Pass on them? Why?
- How do you build rapport with parties to move towards resolution?
- Does it matter whether mediation is voluntary or court ordered?
- What is different about virtual mediation compared to in person session?
- What environment is ideal for supporting parties through the process?
- How do you support parties in memorializing any agreement they reach?

# Considerations for Advocates Beyond Rules

- Should you recommend that your client mediate if it is not court mandated?
- How do you select the right mediator for your client in this case?
- How do you prepare your client for the stress and downtime in mediation?
- How to protect your client during mediation and keep them comfortable?
- How can you be sure you don't overlook an important settlement term during mediation?
- How do you assure that a deal will be honored once the mediation is over?

# Key Mediation Phases to Consider

- Mediator Selection/Acceptance of Case - Competence and Conflicts; Communications Concerning a Lawyer's Services
- Preparation for Mediation-Confidentiality and Organization as Client
- Exchanging Information - Candor to the Tribunal and Truthfulness in Statements to Others
- Creating Environment Conducive to Reaching Resolution - Communications and Diligence
- Building Rapport with Party Decision makers - Communication and Diligence
- Memorializing a Deal that will Stick - Competence and Diligence

# Case Study – Mediator Selection

- This case involves age discrimination and retaliation claims by a 60-year-old male who claims he was belittled by his 38-year-old supervisor and junior colleagues at the Company where he worked for many years.
- The supervisor and others commented 60-year-old was "an old timer", "out of touch", "did not have fresh perspectives" and moved too slowly.
- When he raised issues with supervisor, he was excluded from meetings, and workload decreased. When he reported it HR, it got worse.
- The Company issued a Performance Improvement Plan with a 60-day probationary period, and then the company terminated him after 30 days for "not completing work fast enough".
- ✦ If you represent the employee, what are the considerations in mediator selection?
  - Age? Prior experience as advocate/neutral in similar matters? Side they represented? Years of experience?
  - Recommendations from others in your firm or other firms with similar practice?

# First Step: Lawyer Duties in Selecting a Neutral Mediator

- If you are counsel, the threshold consideration is selecting the right mediator for this case and this client.
- Failure to select an appropriate mediator may be a breach of duties under Rule 1.1 Competence.
  - Rule 1.1 provides:
    - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- It also implicates Rule 1.2 Scope of Representation.
  - Rule 1.2 provides:
    - (a) ... a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision on whether to settle a matter.

# First Step: Lawyer Duties in Selecting a Neutral Mediator

- **Communication under Rule 1.4** is also important in all aspects of representation.
- ✦ **Rule 1.4 provides:**
- ✦ (a) A lawyer shall:
  1. promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
  2. reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  3. keep the client reasonably informed about the status of the matter;
  4. promptly comply with reasonable requests for information; and
  5. consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**How do these apply to selecting a mediator for this case as counsel for the company? The individual?**

# Mediator Duties in Accepting a Mediation Engagement

- Many experienced lawyers decide that they want to serve as mediators because they have considerable legal experience. That is not enough. Important to have specialized training and get experience.
- See **Comments to Rule 1.1 Competence**
  - \* [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter ... Expertise in a particular field of law may be required in some circumstances.
  - \* [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.
- \* **Do these apply to lawyers serving as mediators? Are the parties your client?**
- \* **Rule 1.1 Competence: A lawyer shall provide competent representation to a client.**
- **Rule 7.1 Communications Regarding a Lawyer's Services**
  - A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

# Mediator Duties in Accepting a Mediation Engagement

- Under the [ABA Model Standards of Conduct for Mediators](#) (which may not apply in your situation) consider
  - [Standard II - Impartiality](#)
    - B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
  - [Standard III - Conflicts](#) - Discussed later
  - [Standard IV - Competence](#)
    - A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
  - [Standard VII - Advertising and Solicitation](#)
    - A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

# Case Study Preparing for Mediation

- A lawyer is representing a surviving spouse with two young children who lost their partner in a catastrophic construction accident where the contractor did not follow legal safety guidelines.
- Opposing counsel representing the contractor usually gets direction and authority from in house counsel, but the person responsible for failure to follow safety rules will attend and the two company representatives strongly disagree on the strength of the case.
- The individual surviving spouse is understandably distraught and routinely shares information with their best friend without regard to privilege or confidentiality. Spouse wants the best friend at mediation for moral support.
- This spouse has never been involved in a legal matter before nor mediation.
- Spouse's counsel desperately needs cash and wants settlement to collect their contingent fee. They are preoccupied and don't tell the client what to expect.
- Before mediation, the parties sign a confidentiality agreement as to anything shared in connection with mediation; spouse's friend is not asked to sign in advance or at mediation.
- Mediator does not confer with counsel in advance as to joint session and construction counsel makes a combative opening statement alienating the spouse.

# Preparing for Mediation for Advocates

- Counsel for both sides needs to assure that anyone present agrees to confidentiality. Failure to do so is a breach of [Rule 1.1 Competence](#) and [Rule 1.3 Diligence](#) and [Rule 1.4 Communication](#).
  - [Rule 1.3 Diligence](#)
    - A lawyer shall act with reasonable diligence and promptness in representing a client.
    - Comment [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.
    - [2] A lawyer's work load must be controlled so that each matter can be handled competently.
- Counsel for the Contractor must consider
  - [Rule 1.13 Organization as Client](#)
    - (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents
    - Comment [3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.
- Counsel need to consider [Rule 1.2 Scope of Representation](#) as to who decides whether to settle.

# Mediator Preparation

- Mediator should confirm in advance who will be attending the mediation and ensure there is agreement and consent of parties.
- If the mediator intends to have a law clerk/assistant attend, clear with parties in advance. Asking when they arrive puts them in an awkward position.
- Mediation agreement should be signed in advance and include confidentiality from all attendees. Should review at the joint session and assure all present sign on.
- Mediator should confer with counsel in advance as to any logistics or concerns. May consult with each side privately.
- Mediator should consult with counsel in advance on whether (1) joint session is advisable; and (2) counsel should make opening presentations. Evaluate the risk of alienating parties or escalating tension.
- Mediator should ask beforehand about bargaining history, last offer/demand.

# Mediator Preparation

- **ABA 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.

# Case Study: Exchanging Information

- Mediator asks parties to submit a Confidential memo with brief description of the dispute, legal issues, key documents and agreements.
- One side includes selected pages of deposition testimony, leaving out portions that would undermine their client's credibility.
- Other side attaches an agreement identified as the "Final" one, when there is a later signed amendment of the key issue, which it withholds.
- Each side submits legal analysis that does not include controlling law unfavorable to them.
- Mediator asked to disclose any relationships with parties or counsel or firms before retention, but after engaged and before mediation, Mediator's firm accepts one of the parties as a client. Mediator does not update their disclosures.

# Exchanging Information for Advocates

- Rule 3.3 Candor to 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.
- Is appearing before a mediator, a "Tribunal"? Not unless it is binding.
    - [Rule 1.0 Terminology](#)
    - (m) "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.
    - **Note, some jurisdictions may consider court annexed or even independent mediation a form of tribunal.**

# Exchanging Information for Advocates

- **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 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.
- **Comment [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. ...
- **Comment [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.
- Is provision of selected deposition excerpts improper?
- Is omitting the contract amendment improper?
- What about omitting unfavorable law directly on point?
- Do any of these fall within Comment 2 regarding negotiation?
- If otherwise permissible, are these misrepresentations/omissions competent representation in mediation?

# Exchanging Information for Neutrals

- [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 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.
- [Comment \[1\]](#) 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. ...
- [Comment \[2\]](#) 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.
- In most settings, mediators are not representing the parties as clients (except if law allows them to do so jointly to draft the agreement).
- Therefore, mediators are not protected by Comment 2.

# Exchanging Information for Neutrals

- Mediator must disclose conflicts/perceived conflicts; obtain waivers upfront.

- **Rules 1.7-1.9 Conflicts**

- Rule 1.7 Current Clients
- Rule 1.8 Current Clients Specific Rules
- Rule 1.9 Former Clients

“**A lawyer shall not represent** a client if the representation involves a ... conflict of interest. A ... conflict of interest exists if:

1. the representation of one client will be directly adverse to another client; or
2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”

Note, in some situations, clients can give informed consent, ideally in writing.

- **Rule 1.10 Imputation of Conflicts** - Firm conflicts are imputed to all at the firm, but waivers and walls may help.
- Mediator is generally not representing the parties as explained with limited exceptions is a deal is reached.

# Exchanging Information for Neutrals

- **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.

# Exchanging Information for Neutrals

- **ABA Standards II & III** are particularly important. Standard II-Impartiality discussed earlier.
  - **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.

# Case Study: Creating a Supportive Environment

- Former Judge in private mediation practice conducts mediation at his firm involving a business dispute between small private company and large public company. The process begins at 10 am and continues late into the evening.
- The Firm has a conference area, assigns each side its own room. The large public company and its big firm counsel (who are a potential source of lots of mediation referrals) assigned large room with natural light. The private company and small firm counsel assigned a small, interior room with no windows.
- The Firm provides beverages during business hours, nothing available after 5 pm.
- Mediator sends each side out to get food in downtown area during crowded lunch time where they cannot have privacy to discuss anything.
- The Building heat goes off at 6 pm, as it gets later, everyone gets cold and uncomfortable.
- Parties close to deal, want to memorialize it. One side brought laptop and printer, other brings paper drafts. No night support available, so mediator escorts one side to their personal office to use their firm computer to draft/print a proposal. Mediator suggests terms they may have overlooked and suggests they include them.

# Creating a Supportive Environment for Clients

- Advocates should prepare to avoid client inconvenience or discomfort. This is part of duties of competence, diligence, and communication under [Rules 1.1, 1.3 and 1.4](#).
- Ask mediator upfront about process design and physical arrangement, resources, and provisions and what happens if you work into the evening.
- Make sure your client will be comfortable and enough space for your side.
- Bring/arrange for nourishment. A deal struck because client is tired, hungry or thirsty is likely to be regretted.
- Tell client to bring jacket or sweater, reading or other entertainment for down time and chargers for devices.
- If a remote/virtual mediation, assure you and your client have technology that works.
- Ensure you have what you need to document the deal. More on this later.

# Mediator Creating a Supportive Environment

- Experienced judge presenting on settlement conferences shared when they wanted to get a deal, they invited everyone for a settlement conversation over bagels and coffee so people would feel nurtured.
- [ABA Standard II Impartiality; IV - Competence and VI Quality of the Process](#) Neutral creating supportive environment conducive to settlement is often overlooked.
- **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.**
- ✦ A mediator should agree to mediate when the mediator can:
  - Assure setting allows for confidential discussions for each side, enough space for everyone. Provide what attendees reasonably need if spending long day with you.
  - If multiple parties, need to room for each party so they can confer privately.
  - Taking care of attendees is not superficial. Create environment that is not distracting or uncomfortable. Have enough provisions for a long day.

# Case Study – Building Rapport with Parties

- Dispute - Employee claims race and age discrimination. Employee's counsel agrees to Mediator proposed by the employer.
- Employee's counsel does not conduct due diligence, which could reveal Mediator is favored by large employers who refer Mediator a lot of work.
- Mediator starts discussing numbers without asking employee or counsel underlying issues. When employee starts to vent about their work experience, Mediator is noticeably impatient, brushing off employee.
- When the employee won't reduce their demand, the Mediator raises their voice, pounds the table and belittles employee.
- If parties are doing remote mediation, Mediator only wants to interact with lawyers; thinks it is unnecessary to speak with parties directly.

# Building Rapport with Parties for Advocates

- Counsel has a duty of competence and diligence under the Rules to **investigate and conduct due diligence to select the right mediator** for their client in the dispute. Counsel should ask others about experience with mediator to assess style and temperament.
- Issues for Remote/Virtual Mediation
  - Make sure parties get perspective from Mediator.
  - Lawyers may want **Mediator to discuss with client directly risks of client position**; counsel concerned client views lawyer input on risk as lawyer weakness or not listening to client. **Need to be sensitive to ABA Formal Opinions 06-489 and 518**
  - For neutral to understand impediments to settlement, **need to listen to parties speaking for themselves.**

# Neutral Strategies for Building Rapport with Parties

- **ABA Model Standards Preamble**

- Mediation - impartial third party facilitates communication and negotiation, promotes **voluntary decision by parties** to the dispute.

- **Standard I Self-Determination**

- Mediator shall conduct a mediation based on principle of party self-determination. **Self-determination** - coming to **voluntary, uncoerced decision** in which each party makes free and informed choices.

- **Standard II Impartiality**

- B.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.
- B.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.

- **Can a mediator be neutral if gets a lot of repeat work from a lawyer or firm?**

- **Can a party exercise self-determination if a mediator is a bully or does not listen to them directly?**

# Mediator Building Rapport with Parties

- **ABA Model Standard III Conflicts**

- 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.
- 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.**
- When a mediator develops personal or professional relationships with parties, ... the **mediator should consider... the nature of the relationships established, and services offered** when determining whether the relationships might create a perceived or actual conflict of interest.
- **Standard VI Quality of the Process** - "in a manner that promotes ... mutual respect among all participants"  
**Is there respect when mediator is impatient or does not give the parties a chance to speak for themselves?**

# Case Study: Making a Deal that Sticks

- This dispute involves the sale of a business. The seller owned a manufacturing plant that generated \$20 million/year. The deal included a big upfront payment and final \$1 million payment one year later. Buyer defaults on final payment claiming business did not perform as expected claiming seller misrepresented pipeline orders and equipment condition.
- Counsel for seller is distracted by personal matters and did not prepare with client or discuss terms for a settlement in advance of mediation.
- Parties reach deal and sign term sheet at mediation. Deal is for reduced final amount if \$500,000, payable to seller in 5 monthly installments of \$100,000. Next day, seller has remorse, wants to back out because deal does not include interest for late installments, attorneys' fees if collection effort is necessary, or security/personal guaranty if buyer doesn't pay the full installments on time.
- Seller confronts own counsel demanding counsel negotiate for the additional terms. Buyer refuses to accept new terms, threatening to sue to enforce deal.

# Case Study: Making a Deal that Sticks for Advocates

- Seller's counsel breached duties of competence and diligence. They were either not skilled or prepared. Personal distractions do not excuse breaches such as lack of preparation.
- **Avoid these issues:**
  - Before mediation, draft agreement leaving numbers blank or prepare checklist of terms that might fit different scenarios. Consider terms needed if payment is delayed or other breaches.
  - Bring a laptop so you can draft on site.
  - Make sure you sign a deal term sheet if not full agreement at mediation.
  - Check in advance if client has terms they always expect in settlements.

# Case Study: Making a Deal that Sticks for Neutrals

- ✦ Mediators must know the rules that apply in their forum and jurisdiction.
  - ✦ Is the mediator permitted to draft or assist in drafting the term sheet or memorandum?
  - ✦ Certain court annexed mediations require the mediator to do so.
  - ✦ Some jurisdictions allow mediator to do so once a deal is reached as it is perceived as permissible joint representation of parties.
  - ✦ Assisting parties in crafting the terms or proposing terms may be a violation of the obligations of neutrality and be considered favoring one side over the other.

# Conclusions and Key Takeaways

- Both advocates and neutrals have ethical and professional obligations in mediation.
- The ABA Model Rules of Professional Conduct, The ABA Standards of Conduct for Mediators, applicable law, rules of court, forum, judge, and parties' agreements control how lawyers and mediators should act.
- All participants should be bound by confidentiality; act respectfully.
- Neutrals and counsel should ensure comfortable setting so parties can focus on efforts to settle, not distracted by hunger, thirst, temperature, etc.
- Mediators must disclose conflicts at outset and any that arise later; withdraw if concern about perceived impartiality that is not waivable.
- Counsel should prepare checklist of desired settlement terms in advance to avoid overlooking something important for client and next day regrets.



We get it done right.