

The Mediation Advocate's Bill of Rights

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For 16 years, I have been proud to be a full-time professional mediator. Mediation offers tremendous benefits — settlements, for sure, and so much more — client satisfaction with the results, with the process and with your performance as counsel.



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To get those benefits in full, you must recognize that if you hire mediators, you have rights! If you insist on your rights, you and your clients will have a superior mediation experience. You will settle more cases, and your clients will express greater satisfaction with those settlements, with the mediation process and with your professional performance.

So, here it is, the mediation advocate's bill of rights.

You Have the Right to a Mediator Who Stands Behind the Quality of Her Work

Accountability breeds quality. But, what if a mediator shunned accountability for the quality of his work by inserting a “prospective waiver of liability” into a seemingly routine “confidentiality agreement” or “mediation agreement” in small print near the end?

A prospective waiver of liability is a statement that “the mediator shall have no liability for any act or omission in connection with this mediation.” In law practice, they are forbidden, either entirely (Rule 3-400, California Rules of Professional Conduct) unless clients are independently represented in making the agreement (Rule 1.8(h)(1), ABA Model Rules of Professional Conduct).

In mediation practice, how could ethical standards be viewed as any different? Mediators are not above the law. You have a right to hold mediators accountable to you, just as every other professional stands accountable for the quality of his work.



You Have the Right to a Mediator Who Puts Your Interests Ahead of His Own

It seems obvious, but it's worth asking whether your mediator practices this way. How can you tell? Ask whether the mediator honors his statutory role to assist the participants as they pursue their interests and, hopefully, make a deal.

See generally California Evidence Code Section 1115: Yes, to assist the participants as they pursue their interests as they themselves define those interests!

By contrast, what if a mediator says, “my client is the deal?” If a mediator elevates this abstract idea above the concrete need to assist the participants, does he not signal a willingness to sacrifice your interests in favor of his own ego-driven need to see you settle, no matter how unreasonable or inappropriate the terms?

Are not manipulation, and even deception, fair game? Will not reasonableness and flexibility be exploited, even punished? How can that qualify as legitimate “assistance” to anyone?


You Have the Right to a Mediator Who Is Properly Prepared

Everyone wants “evaluative mediation.” In practice, this means that your mediator must be able to participate intelligently in a substantive discussion of your case. In order to do that, your mediator must be willing to read your briefs before the mediation and to call you after reading the briefs with any questions and to discuss aspects of the case — the people factors — which are sometimes difficult to put into writing.


In screening mediators, these should be among your “due diligence” questions. Does your mediator have a reputation for doing this? And, of course, you have a concomitant responsibility to get your briefs to the mediator sufficiently before the mediation for the mediator to discharge her responsibilities in this regard.

You Have the Right to a Mediator Who Has Clear and Fair Billing Practices

What are the services for which you are being charged, and what are you paying? Does the mediator charge separately for preparation and follow-up time? What about travel? What



about services provided by people other than your mediator himself? Are you billed extra for meals served during the mediation day? Photocopies? How about “administrative fees” and “case management fees?” Do they provide you any value? Does your mediator even validate your parking?



It’s a buyer’s market for mediation services. The supply far outstrips the demand. You have the right to billing practices that are clear and fair.

You Have the Right to a Mediator Who Allows You to Put Your Best Foot Forward to the Other Side


Lawsuits are works in progress. Good lawyers constantly refine themes, develop details and eliminate tangents. You can never be sure that the other side knows your case as it exists at that moment. Some of their representatives have never heard you explain your side at all — they have heard it only as filtered by intermediaries.

A compelling presentation to the other side benefits your client enormously. And nobody is better able to make that compelling presentation than you. Only you have the duty of undivided loyalty. Only you are the most familiar with your interests, positions and arguments. Only you can deliver the message with the impact your client deserves.

And so, you have the right to a mediator who knows how to give you that opportunity through a well-managed joint session. If a mediator takes that opportunity from you and keeps it to herself in a “caucus-only” mediation, she does you a disservice and likely costs you money in the negotiation.

You Have the Right to a Mediator Who Lets You Decide How Much Your Client Will, or Will Not, Speak

The art and science of putting your best foot forward in a joint session includes an exercise of your independent judgment as to who should speak on behalf of your side and what they should say. Sometimes, you will want your client to speak, sometimes, not. The decision is yours, not the mediator’s. The fiduciary duty to your client is yours, not his.



Does your mediator have a reputation for calling on your clients or asking them questions in joint session without your permission? Is he known for trying to require clients to speak, or, for that matter, not to speak?

The beauty of mediation is its flexibility. Be sure that your mediator will work with you and honor your right to control just how your best foot is indeed put forth.

You Have the Right to a Mediator Who Uses Every Tool Available to Break Impasse


Many mediations are sadly formulaic. After a joint session — and sometimes skipping that step — the mediator shuttles back and forth between caucus rooms, using some “good cop” and generally more “bad cop” techniques to get you and your client to make concessions. Like Hatfields and McCoys, the sides never get near each other after that first morning pro forma. This serial head-banging often runs out of steam and leaves you at an impasse.

You have the right to a mediator who is not afraid to get the sides — or at least the lawyers — back together mid-stream to face up to impasse and generate simultaneous movement to break it. In such a “lawyers-only” meeting, a mediator might observe that the sides seem stuck in their respective positions and that it is obvious that the case will not settle at either side’s current number.


The mediator will then broker simultaneous moves, up for the defendant and down for the plaintiff, which each lawyer will then recommend to her client. These simultaneous moves break impasses and set the stage for further bargaining (possibly including further simultaneous moves or a “mediator’s proposal”). This technique works. Be sure that your mediator is ready, willing and able to use it.

You Have the Right to a Mediator Who Allows You to Have a Settlement Agreement Tailored for Your Specific Case

When that magical handshake happens, does your mediator try to whisk you out of there with a preprinted, vanilla form of settlement agreement? In cases of any complexity, you and your clients need and deserve better. You have the right to tailor your settlement agreement to the needs of your specific client and this specific case. It’s your responsibility



to draft a settlement agreement that protects your client's rights, not the mediator's responsibility.



Again, you are the one with the duty of undivided loyalty! And this may take time. You have the right to a mediator who shows patience, respect for your need to discharge your fiduciary duties to your client and a willingness to treat you to pizza at this critical juncture at the end of the mediation day.

You Have the Right to a Mediator Who Follows up As Necessary

Have you noticed that fewer and fewer cases settle on the first day of mediation? Mediators talk about it all the time. In days of old (circa 2000), if a case didn't settle on the mediation day, the mediator might have casted you irretrievably on the path to trial like a bowling ball rolling unstopably down the lane.


Now, it's different. Since fewer cases settle on mediation day, diligent follow-up is now as necessary as responsible advance preparation. Does your mediator have a reputation for responsible follow-up?

You Have the Right to a Mediator Who Allows You to Fulfill Your Ethical Duty to Be a Zealous and Responsible Advocate


The best mediators honor and respect the demarcation between your role as counsel and their role as mediator. Your job is to be a zealous and responsible advocate for your client's interests. The mediator's job is to help you do that.

The best mediators respect your right to advise your client outside of their presence at any point during the mediation day. They will not usurp that right by insisting on taking your client to the woodshed without you.

The best mediators respect your right to negotiate the best deal you can for your client. They will facilitate that negotiation responsibly, not usurp your right by hijacking your role and trying to do your negotiating for you in a "caucus-only" process.



They are committed to settlement wherever reasonably possible but not attached to settlement for settlement's sake and so will not bully or badger you into capitulating to another side, which may be too greedy, ideological or consumed by rage to negotiate reasonably.



When you insist on your rights, you will settle more cases than ever. And you will get the real benefits that mediation uniquely provides — settlements which strengthen the attorney-client relationship by maximizing client satisfaction with the results, the process and your active and excellent performance as counsel.

--By Jeff Kichaven

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