

# **ETHICAL DUTIES IN MEDIATION: ETHICS RULES EVERY ATTORNEY SHOULD KNOW**

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**ADR Services, Inc. MCLE Day 1, Jan. 15th 2025**

# AGENDA

**1 Confidentiality & Cross-jurisdictional Practicing**

**2 1129**

**3 Settlement Agreements**

**4 8.3**

**5 Client Trust Accounts & Pro Bono Reporting**

**6 SB 940**

# PART I.

# Mediation Confidentiality & Cross-jurisdictional Practicing

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Peter Linn, Esq.

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# Confidentiality



# 3 WAYS WE DISCUSS CONFIDENTIALITY IN MEDIATION

## Formal Rules of Evidence

govern admissibility of evidence in court & whether material is subject to discovery

## Confidentiality in Caucus

when a party wants to tell us private information and ask us not to repeat it to the other side

## Broader Sense

of keeping information private so that others outside the mediation will not learn of the mediation communications

# MEDIATION CONFIDENTIALITY ACROSS JURISDICTIONS

- Increasing prevalence of remote mediations involving attorneys across state lines.
- Confidentiality depends on:
  - Jurisdiction of the case.
  - Location of the mediator.
  - Applicable confidentiality rules.

# JURISDICTIONAL COMPARISONS

## ● California

- Governed by Cal. Evid. Code 1119:
  - Communications, negotiations, or settlement discussions are inadmissible in non-criminal proceedings.
  - Policy encourages candid discussions to promote dispute resolution.

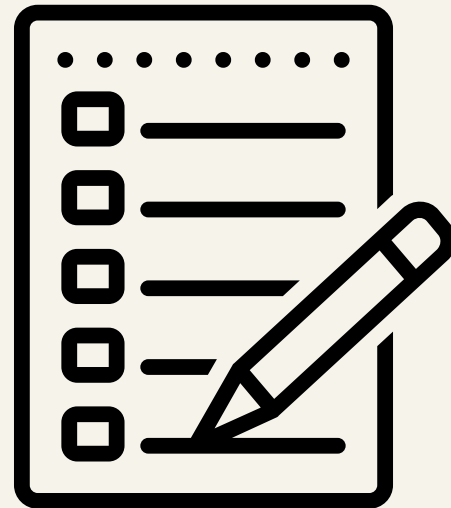
## ● Federal Court

- Fed. Rule of Evid. 408:
  - Focuses on admissibility of compromise-related evidence.
  - Does not explicitly address confidentiality.

## ● Uniform Mediation Act (12 states)

## ● Mediation communications are privileged, with exceptions:

- Waivers.
- Proof of malpractice claims.



# STATUTORY PROTECTIONS

## \*Federal Rules of Evidence, Rule 408

Evidence of compromise offers and negotiations are inadmissible to prove validity and invalidity of a claim or to impeach prior inconsistent statements in a civil proceeding. This carves out criminal proceedings & public investigative and regulatory enforcements. Seemingly allows the communication for collateral purposes.

## \*California Evidence Code sections 1115-1123

Basically say anything done, said or written in a mediation is inadmissible in non-criminal proceedings. Applies to mediators, parties & attorneys.

Policy is to encourage people to share information and compromise to resolve disputes by making their communications inadmissible. They need to know efforts to compromise won't be used against them should case not settle.

Mandatory Settlement Conferences are different – governed by rules of court



# UNIFORM MEDIATION ACT

(adopted by approx. 12 states, including NJ)

## Exceptions to Confidentiality

Agreement signed by all the parties

Plans to conceal an ongoing crime

Evidence is not otherwise available

Documents required to be kept open to the public

Information needed by mediator to respond to claims made against him

Need for evidence outweighs need to keep information confidential

Threats to commit bodily injury or violence

Situations involving child abuse or neglect

Evidence offered in court involving felony or litigation over the contract reached in mediation



- 1** Be careful & do not just naturally assume comprehensive confidentiality protections when your mediator says everything is confidential. Know what that means.
- 2** Don't blindly sign confidentiality agreements because you may be losing or gaining confidentiality protections for your client – be thoughtful here & draft the agreements yourselves if you want them.
- 3** Some judges do not honor the confidentiality agreements so be careful when revealing information even when using these agreements.
- 4** Make sure your mediator knows if and when you want to share information.
- 5** Make strategic decision regarding sharing information and when.

# PRACTICAL CONSIDERATIONS

## BEST PRACTICES

- **Proactively address confidentiality upfront:**

Discuss applicable laws and expectations with the mediator and all parties.

- **Research jurisdiction-specific rules before agreeing to mediate.**

- **When agreements are possible, clearly define the scope of confidentiality.**

# PART II.

# 1129

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**Peter Linn, Esq.**

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# CALIFORNIA CODE EVIDENCE CODE 1129

- **(a) Except in the case of a class or representative action, an attorney representing a client participating in a mediation or a mediation consultation shall, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, provide that client with a printed disclosure containing the confidentiality restrictions described in Section 1119 and obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions.**
- **(b) An attorney who is retained after an individual agrees to participate in the mediation or mediation consultation shall, as soon as reasonably possible after being retained, comply with the printed disclosure and acknowledgment requirements described in subdivision (a).**
- **(c) The printed disclosure required by subdivision (a) shall:**
  - **(1) Be printed in the preferred language of the client in at least 12-point font.**
  - **(2) Be printed on a single page that is not attached to any other document provided to the client.**
  - **(3) Include the names of the attorney and the client and be signed and dated by the attorney and the client.**
- **(d) If the requirements in subdivision (c) are met, the following disclosure shall be deemed to comply with the requirements of subdivision (a): see next page**
- **(e) Failure of an attorney to comply with this section is not a basis to set aside an agreement prepared in the course of, or pursuant to, a mediation.**

**(Added by Stats. 2018, Ch. 350, Sec. 2. (SB 954) Effective January 1, 2019.)**

# MEDIATION DISCLOSURE NOTIFICATION AND ACKNOWLEDGMENT

## Mediation Disclosure Notification and Acknowledgment

To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:

- All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
- Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
- A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.
- A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.

This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

I, \_\_\_\_\_ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

[Name of Client] [Date signed]

[Name of Attorney] [Date signed]

# CASSEL V. SUPERIOR COURT, 51 CAL. 4TH 113 (2011)

**Confidentiality protections extend to  
attorney-client discussions related to  
mediation/**

## PART III.

# Legal Ethics in Mediation Settlement Agreements

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Debra Bogaards, Esq.

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# SETTLEMENT AGREEMENTS

\*Evidence Code section 1123 makes settlement agreements inadmissible unless any of the below conditions are met—

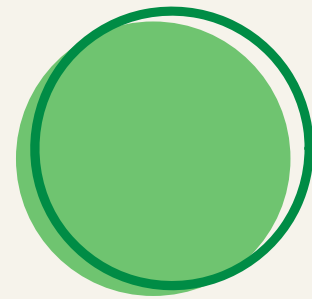
- 1. Parties make it clear that the agreement is admissible or subject to disclosure;
- 2. The agreement provides that it is enforceable or binding (or words to that effect)
- 3. All parties to the agreement expressly agree to its disclosure
- 4. The agreement is used to show fraud, duress or illegality

## **ADVICE:**

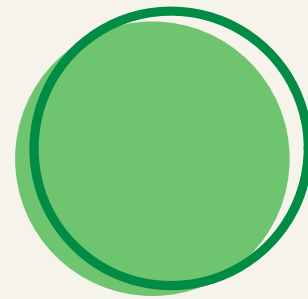
for clarity, make sure to waive Section 1123 and then add in some of the other language as well.

# WHEN IS MEDIATION OVER?

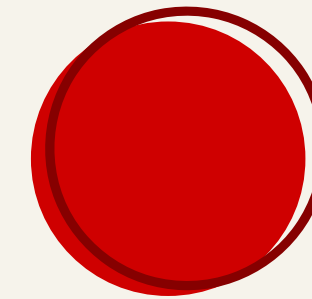
(Impacts Confidentiality)



**Fully executed  
written agreement**



**10 days with no  
communication  
between the mediator  
and any of the parties**

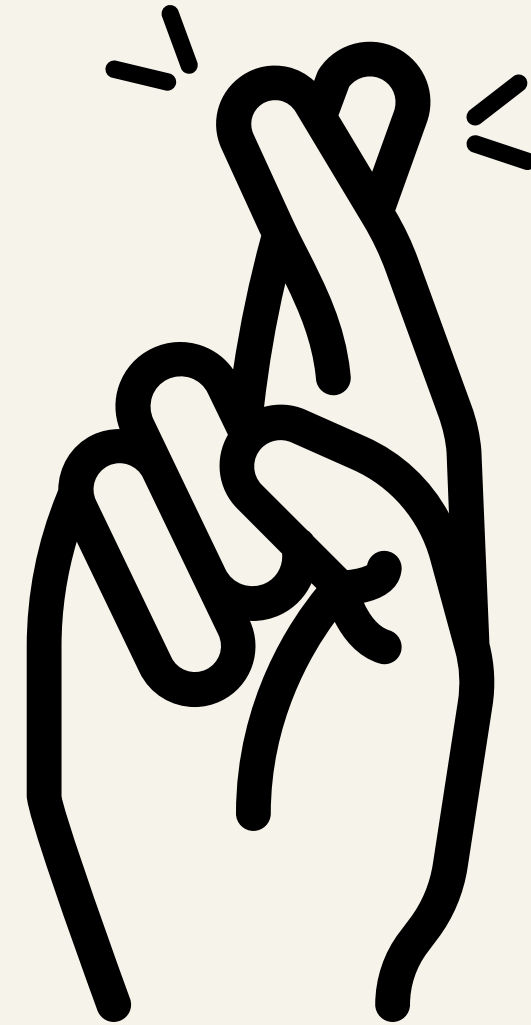


**Agreement by parties  
to terminate the  
mediation**

# LYING IN MEDIATION



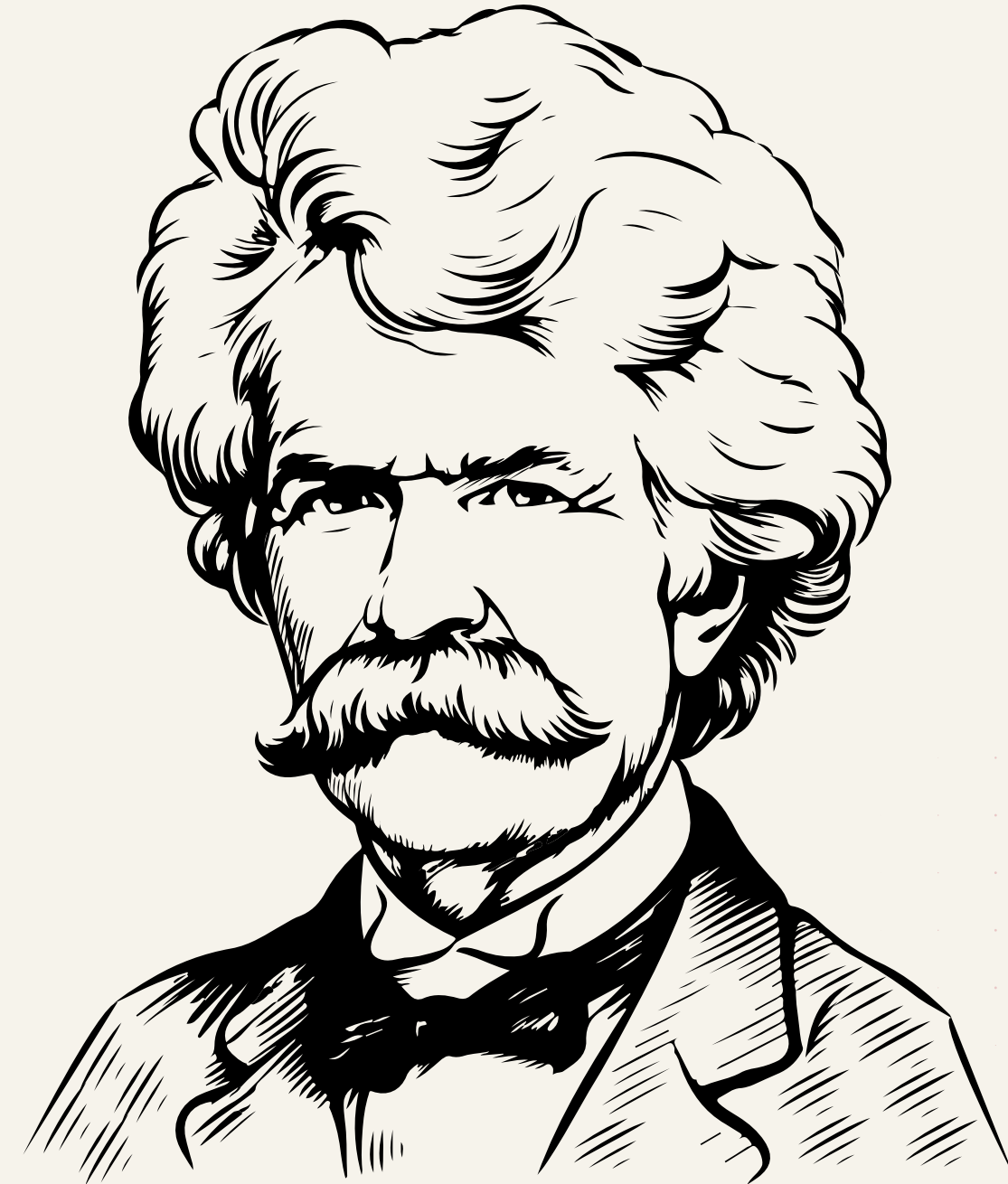
# IS IT OK TO LIE TO THE MEDIATOR?



**"A man is never more truthful than when he acknowledges himself a liar."**

**"There are three kinds of lies: Lies, Damned Lies, and Statistics"**

**-Mark Twain**



# CALIFORNIA RULES OF PROFESSIONAL CONDUCT: RULE 4.1

## TRUTHFULNESS IN STATEMENTS TO OTHERS

(RULE APPROVED BY THE SUPREME COURT, EFFECTIVE NOVEMBER 1, 2018)

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 Business and Professions Code section 6068, subdivision (e)(1) or 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. ...

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, 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...

**SEE ALSO: AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.1 Truthfulness In Statements To Others**

# LIES!

**Bottom Line**

**Authority to Settle**

**Coverage**

**Top Line**

**Authority to settle at a certain amount?**

**Solvency/  
Bankruptcy Facts**

**Desire to Settle**

**Decision Makers Present**

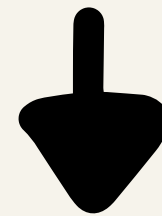
**Witnesses**

# USDC CD CAL GENERAL ORDER NO. 11-10 - ADR



## 8.5

Each party shall appear at the mediation in person or by a representative with final authority to settle the case... A corporation or other... entity satisfies this attendance requirement if represented by a person who has final settlement authority and who is knowledgeable about the facts of the case.



Representatives of insurers with decision-making authority are required to attend...



## 8.6

Each party shall be represented at the mediation by the attorney who is expected to try the case...



# NEUTRALITY



# **VOLUNTARY PARTICIPATION & SELF-DETERMINATION**

## **Model Standards of Conduct**

### **Standard I. Self-Determination**

- **American Bar Association**
- **American Arbitration Association**
- **Association for Conflict Resolution**

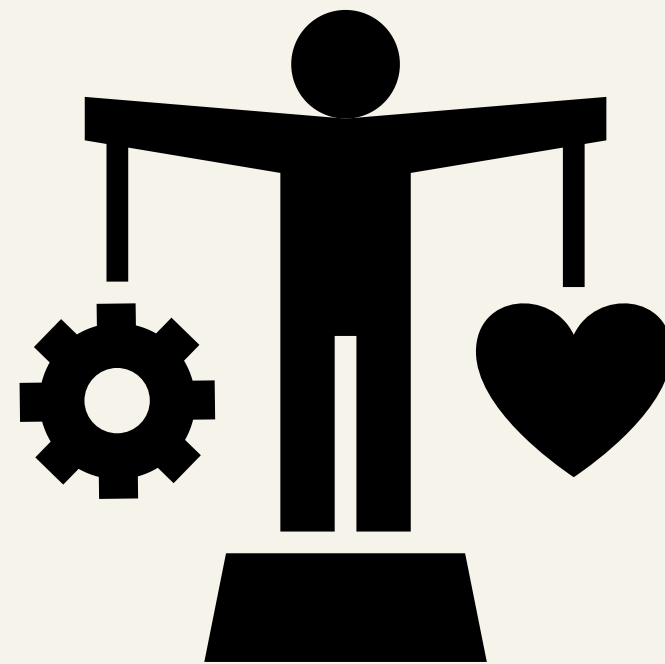
### **Ca. Court Rule 3.853**

**Voluntary participation and  
self-determination**

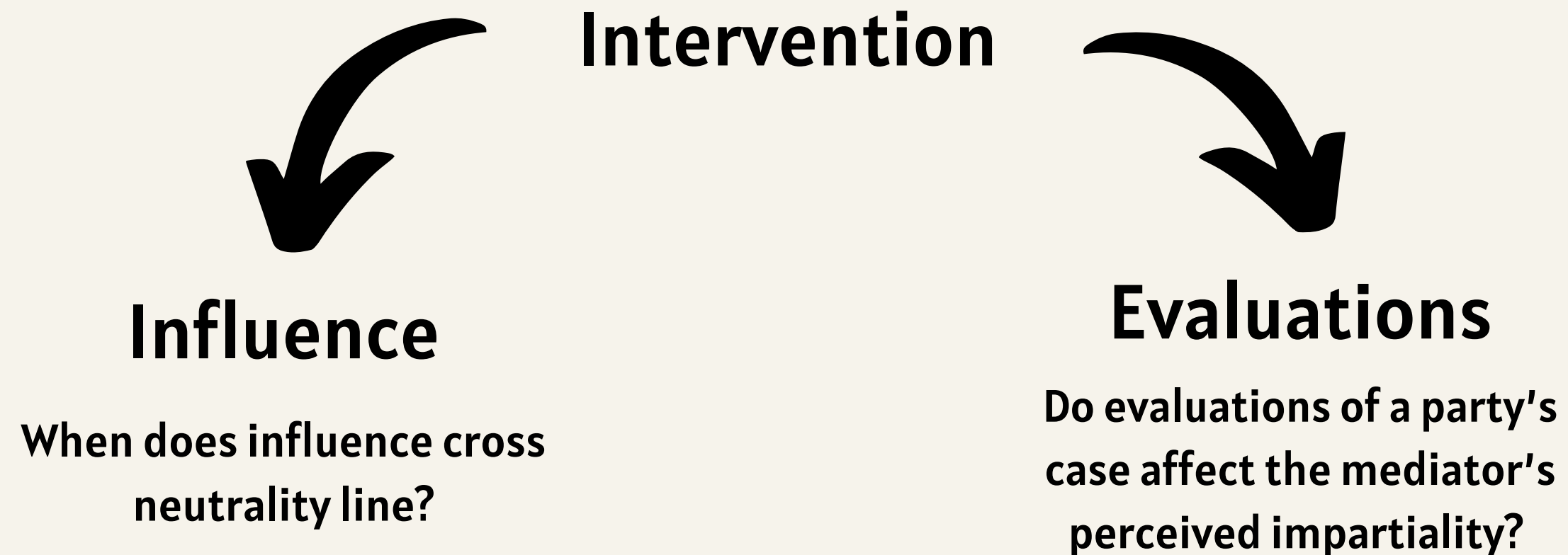


**WHAT IS  
NEUTRALITY? HOW  
DOES IT DIFFER FROM  
IMPARTIALITY?**

# BALANCING CONFIDENTIALITY WITH TRANSPARENCY IN SETTLEMENT TERMS



# MEDIATOR NEUTRALITY & IMPARTIALITY



# THE MEDIATOR'S PROPOSAL

## What the "Experts" Say!

"I define the mediator's proposal as the exact point in time where the mediator ran out of skills."

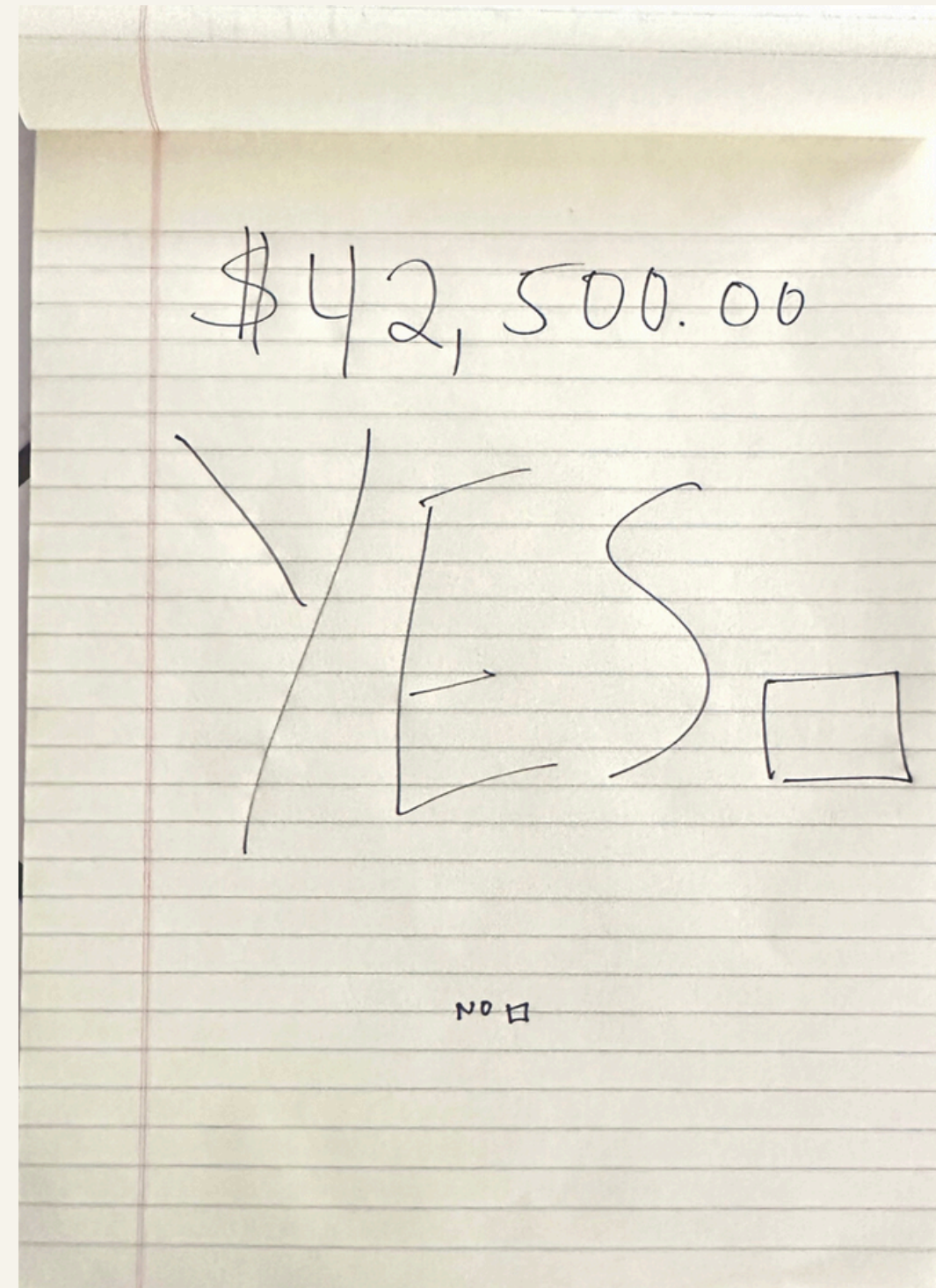
"Some mediators use it as a tool for self-importance in a way that says, 'Here, I'll resolve this for you.'"

"Could it be that if more mediators possessed a wider variety of skills and techniques, then the mediator's proposal might quietly slip away?"

"Unfortunately, I think many counsel looking for a mediator's proposal are more lazy than savvy."



# THE MEDIATOR'S PROPOSAL



# INFORMED CONSENT IN SETTLEMENT AGREEMENTS

## Key Ethical Principles:

- Attorneys must ensure parties provide informed consent to settlement terms
- CRPC 4.1
- Settlement Authority/ Policy Limits

## Case Law examples:

Fair v. Bakhtiari, 40 Cal. 4th 189  
(2006) Clarification on  
enforceability of mediation  
agreements

## Attorney Responsibilities:

- Providing clear explanation of terms (i.e. Confidentiality and non-disparagement)
- Avoiding undue influence



# ENFORCEABILITY OF MEDIATION SETTLEMENT AGREEMENTS

## Statutory Requirements

- California Code of Civil Procedure (CCP) § 664.6: Requirements for entering settlement terms into a judgment.

## Best Practices

- Ensuring agreements are in writing and signed by parties.
- Meeting statutory language for enforceability.
- DocuSign/adobe sign acceptable

## Case Law Examples

- Rael v. Davis, 166 Cal. App. 4th 1608 (2008): Criteria for enforceability under CCP § 664.6.

## Avoiding Coercive Practices

- Mediator neutrality and voluntary decision-making.

## Best Practices

- Ensuring agreements are in writing and signed by parties.
- Meeting statutory language for enforceability.
- DocuSign/adobe sign acceptable

# OTHER RELEVANT CODE SECTIONS

## Pushing clients into settlement agreements

- Rule 1.2 Scope of Representation and Allocation of Authority (a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably\* consult with the client as to the means by which they are to be pursued.

## Global settlements; multiple party actions; non-class claims – mediating multiple cases at once eg

- Rule 1.8.7 Aggregate Settlements
- (a) A lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent.\* The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person\* in the settlement.
- (b) This rule does not apply to class action settlements subject to court approval.

## Could impact authority to accept settlement proposals; extra layer of complication

- Rule 1.13 Organization as Client
- (a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement

# PART IV.

## 8.3 the “Snitch” rule

# RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(RULE APPROVED BY THE SUPREME COURT, EFFECTIVE AUGUST 1, 2023)

(a) A lawyer shall, without undue delay, inform the State Bar, or a tribunal\* with jurisdiction to investigate or act upon such misconduct, when the lawyer knows\* of credible evidence that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud,\* deceit, or reckless or intentional misrepresentation or misappropriation of funds or property that raises a substantial\* question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(b) Except as required by paragraph (a), a lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.

(c) For purposes of this rule, "criminal act" as used in paragraph (a) excludes conduct that would be a criminal act in another state, United States territory, or foreign jurisdiction, but would not be a criminal act in California.

(d) This rule does not require or authorize disclosure of information gained by a lawyer while participating in a substance use or mental health program, or require disclosure of information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.8.2; mediation confidentiality; the lawyer client privilege; other applicable privileges; or by other rules or laws, including information that is confidential under Business and Professions Code section 6234.

## 8.3 SUMMARIZED



**Took effect: August 1, 2023**

**Requires attorneys, under appropriate circumstances, and without undue delay, to report certain criminal or dishonest conduct of or misappropriation of funds by other attorneys to the State Bar**

# WHAT DOES THE RULE REQUIRE?

## Inform

- Inform the State Bar, or a tribunal with jurisdiction to investigate or act on misconduct

## When?

- Without undue delay
- When the lawyer knows of "credible evidence" that another lawyer has either "committed a criminal act" or 1. has engaged in "conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property" and 2. the act or conduct has raised a substantial question as to the lawyer's honesty, trustworthiness, or fitness in other respects."



Requirements



Exceptions?  
YES!

# EXCEPTIONS



**Subsection (d) explicitly states that it “does not require or authorize disclosure of:**

- **Information protected by mediation confidentiality.**



# EXCEPTIONS



**Subsection (d) also does not require disclosure of:**

- **Information Protected from disclosure by the attorney client privilege**

# EXCEPTIONS

**Subsection (d) provides, in part, the rule does not authorize or require disclosure of... information protected from disclosure by Business & Professions Code Section 6068(e) ("It is the duty of an attorney to ...maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, or his or her client.")**

# EXCEPTIONS

**However, note that comment (2) to model rule 8.3 provides trial lawyers should seek client consent and disclosure where it would not substantially prejudice the interests of the client.**

# EXCEPTIONS

Also, Rule 8.3 does not require or authorize disclosure of:

- Information subject to other applicable privileges
- Information protected by California Rules of Professional Conduct 1.6 (confidential information of a client) and 1.8.2 (use of a current client's information); and
- Information gained by a lawyer while participating in a substance or mental health program; and
- Information "protected" by ...other rules or laws, including information that is confidential under Business & Professions Code section 6234 (which protects "information provided to or obtained by the Attorney Diversion Assistance Program")

# ARE REPORTS TO THE STATE BAR OR OTHER TRIBUNAL CONFIDENTIAL?

**The first sentence of Comment 10 to Rule 8.3 states that:**

**"Communications to the State Bar relating to lawyer misconduct are "privileged, and no lawsuit predicated thereon may be instituted against any person."**

**(Bus & Prof Code section 6094)**

**CONFIDENTIAL**

# ANYTHING ELSE TO PROVIDE AN ASSURANCE OF CONFIDENTIALITY OF A REPORT UNDER THE SNITCH RULE?

The Rule does not otherwise or specifically address the confidentiality of reports. However, the FAQ's on the State Bar website state: "State Bar investigations and inquires are, by statute, confidential. The complaint becomes public when the disciplinary charges are filed in against an attorney in State Bar Court and will become public, with notice on the attorney's online profile." (See also *People v. Hoy* (2020 8 Cal.5th 892, 956 [noting that State Bar investigations are confidential until charges are filed]; Bus & Prof. Code Section 6086 I, subd. (b).)



# CONCERNS:

- **Possibility of abuse**

- **Reporting under the guise it is required or appropriate when it is not for a strategic advantage**

- **Concern Rule 8.3 may require attorneys to act contrary to client interests**

# **PENALTIES FOR FALSE REPORTS**

**The second sentence in Comment 10: Lawyers may be subject to criminal penalties for false and malicious reports or be subject to discipline or other penalties by offering false statements to a tribunal.**





# RETROACTIVE APPLICATION?

**Silent.**

**Perhaps not as much of an issue.**

# WHAT DOES THIS MEAN FOR MEDIATION?

- 1 Penalties for malicious report**
- 2 The Rule against threatening criminal, administrative or disciplinary action (Rule of Professional Conduct 5-100) as well as prohibitions against extortion also apply**
- 3 How does the new rule impact civility – general civility and rules requiring civility?**
- 4 Concern the rule could lead to or we could see vindictive litigation games in mediation.**
- 5 Mediation confidentiality still applies.**

# SUMMARY

**Mandatory**

**Knowledge requirement**

**Report: without undue delay**

**To whom: State Bar or a court or tribunal with authority to take action**

**Requires judgment**

**Mediation confidentiality and A/C privilege still applies**

# **PART V.**

# **CTAPP – Client Trust Account Protection Program & Pro Bono Reporting Requirement**

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Debra Bogaards, Esq.

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# CTAPP OVERVIEW

- Many high-profile lawyers have recently been in the news for client trust issues
- Led to creation of Committee on Special Discipline Case Audit in mid-2021
- Within a year, State Bar of California Board of Trustees implemented Client Trust Account Protection Program(CTAPP)
- Goal is to proactively regulate client trust accounts and help quickly identify attorneys with issues, including willful non-compliance
- Went into effect December 1, 2022 as part of the 2023 license renewal process after approval by the California Supreme Court

# ETHICAL REQUIREMENTS REGARDING CLIENT FUNDS

- **Lawyers have statutory and ethical obligations to safeguard funds they hold for their clients**
- **Funds must be kept separate from their personal and business accounts**
- **Must also maintain accurate accounting records and provide regular and timely reports to their clients**
- **Program is designed to better protect the public and better support attorneys to meet their obligations**

# CTAPP REQUIREMENTS



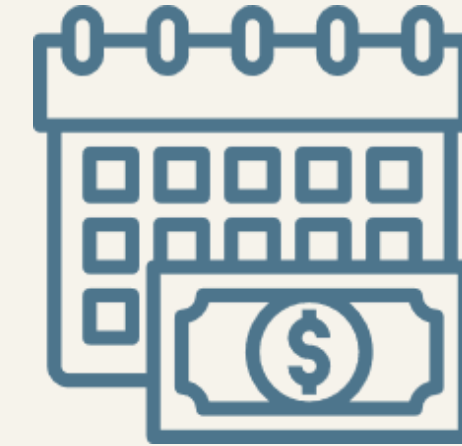
Basically, all attorneys in good standing must comply with the new requirements, including:

- Register client trust accounts, including IOLTA, annually with the State Bar
- Complete an annual self-assessment of client trust account management practices
- Certify with the State Bar that you understand and follow all requirements and prohibitions pursuant to Rule 1.15 of the Rules of Professional Conduct



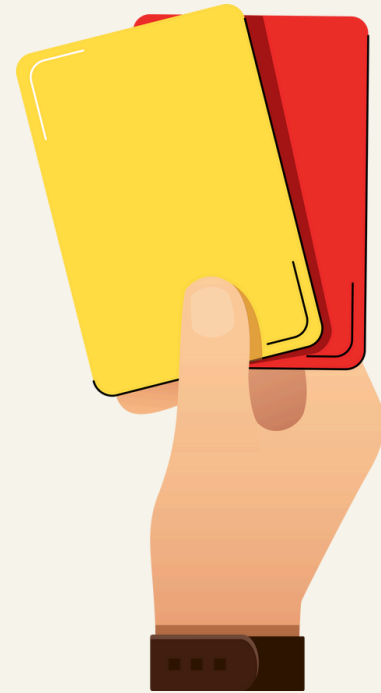
May fulfill your reporting requirements through My State Bar Profile

- Deadline for reporting is same as deadline for paying annual license fees. The 2025 annual deadline is April 1, 2025.
- Penalties were imposed as of April 2, 2023



To register a CTA, including IOLTA, must report year-end balance

# PENALTIES



**Basically, all attorneys in good standing must comply with the new requirements, including:**



**May fulfill your reporting requirements through My State Bar Profile**



# CTAPP REQUIREMENTS

## 1. Network Solution

- A wide variety of easily scalably network solutions that can be easily integrated into any infrastructure.

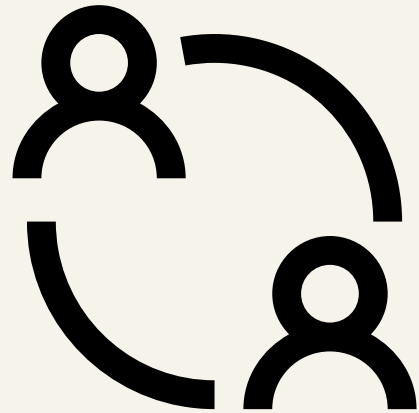
## 2. Wireless Terrestrial Broadband

- Enables the lightning-speed network speed to the customers.

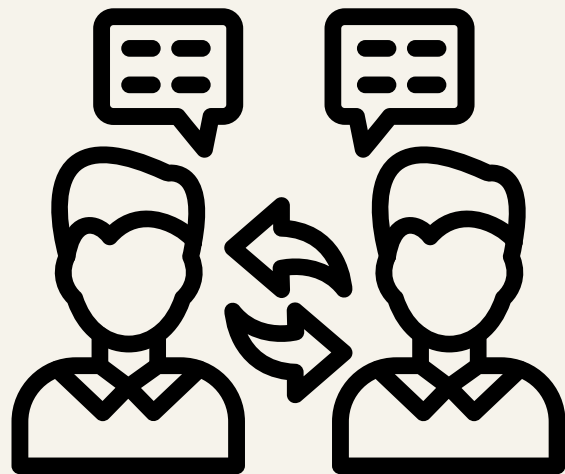
## 3. Telecom Value Added Service

- An offering of relevant, customized, and content-based service over SMS, USSD, and WAP.

# SELF ASSESSMENT



**A subordinate lawyer may consult supervisory lawyer to confirm duties are performed by others at the firm**



**Entitled to rely on their responses**



**Objective of the Self-Assessment is to promote awareness of duties**



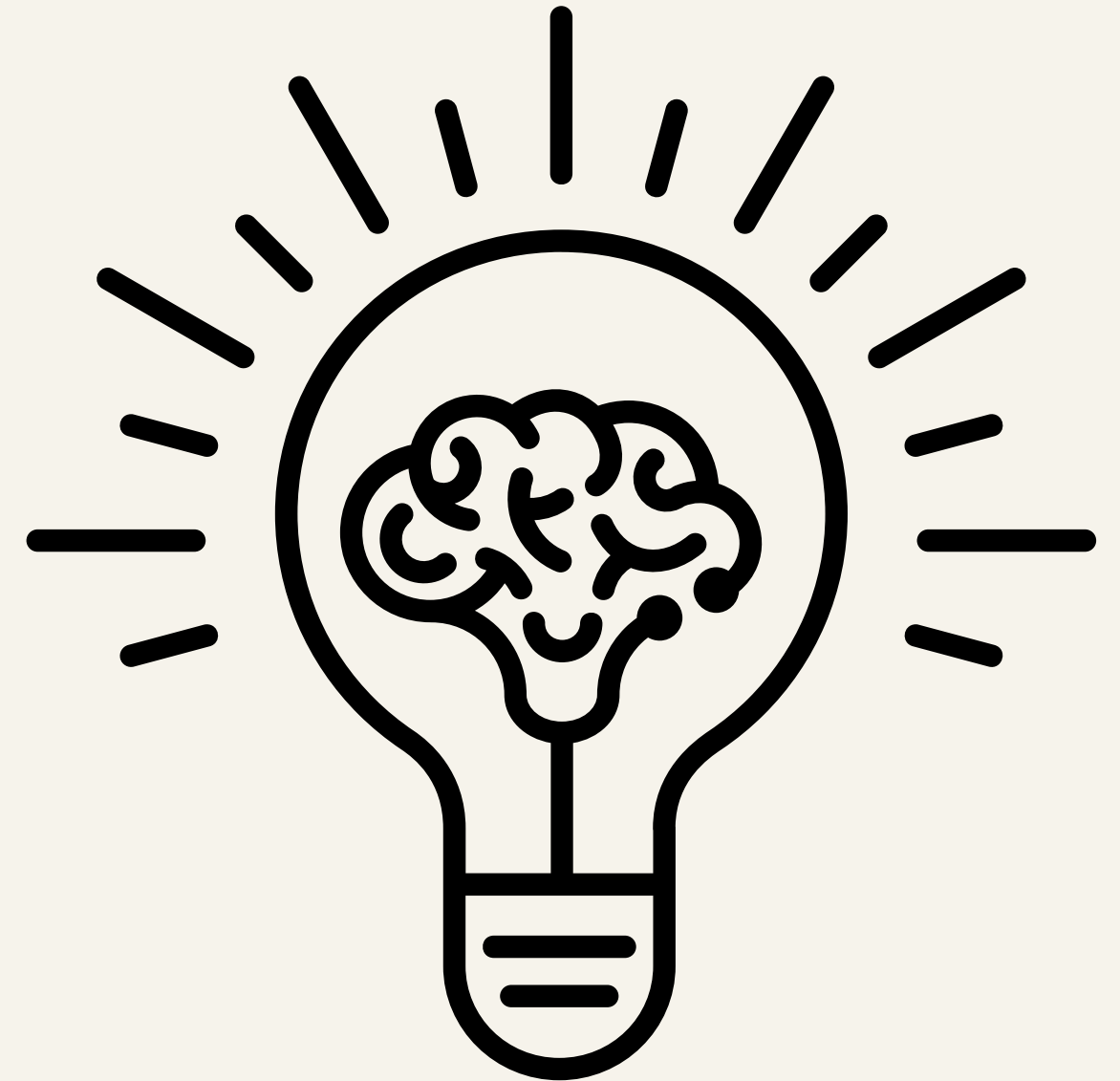
**No exceptions for out of state accounts**

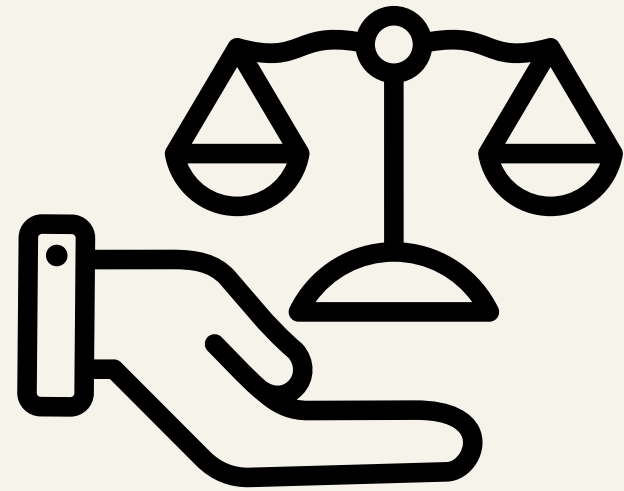
# FUTURE ENHANCEMENTS

**Expanded public outreach and education**

**Enhanced education for attorneys**

**Compliance reviews of selected attorneys by CPAs**





# AB 2505 – PRO BONO REPORTING REQUIREMENT

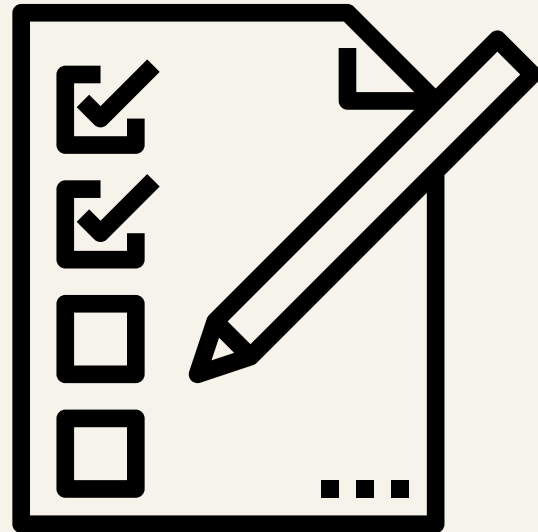
Effective January 1, 2025 – B&P Code §§  
6073.1, 60736.2

## What is AB 2505?

- New California law requiring active attorneys to report pro bono and reduced fee legal services annually.
- Enacted to encourage legal aid for persons of limited means and support California legal aid organizations

## Key Definitions:

- Pro Bono Legal Services: Free legal services to indigent individuals or qualifying organizations.
- Reduced Fee Legal Services: Substantially reduced-rate legal services for low-income clients or organizations



# REPORTING REQUIREMENTS AND EXCEPTIONS

## 1 Who Must Report?

2 All active State Bar licensees through their My State Bar online profile.

3 Information to be reported annually when paying license fees:

1. Pro Bono Hours (previous calendar year).
2. Reduced Fee Hours (previous calendar year).

4 Exemptions from Reporting:

- Full-time employees of organizations primarily providing pro bono legal services.
- Government employees (state, federal, or political subdivisions).
- Attorneys prohibited by employers from performing pro bono work (must declare this)

# PRIVACY, COMPLIANCE, AND REPORTING IMPACT

## ● Confidentiality:

- Reported data is confidential and exempt from public record requests.
- State Bar may publish anonymized, aggregated reports

## ● Compliance:

- Failure to report is not grounds for disciplinary action.
- Options for attorneys to indicate non-tracking or refusal to report.

## ● Retention and Transparency:

- State Bar will maintain records for 5 years.
- Promotes transparency in legal aid contributions while respecting individual privacy.

# PART VI.

## **SB 940: Significant Changes to California's Alternative Dispute Resolution – For Neutrals and ADR Providers**

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Edward Weiss, Esq.

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# SUMMARY

- 1 Effective January 1, 2025
- 2 State Bar to Create Voluntary Certification Program (New Business & Professions Code §6173)
- 3 Restrictions Re Location and Applicable Law for Consumer Arbitrations
- 4 Consumers to Have Option to Go to Small Claims Court
- 5 Requirement for Disclosure of "Solicitation" by ADR Providers and Neutrals
- 6 Solicitations Prohibited During Pendency of a Consumer Arbitration
- 7 Expanded Discovery in Arbitration



# STATE BAR TO CREATE NEW ADR CERTIFICATION PROGRAM

## ● Program shall include

- (A) The firm, provider, or practitioner requires, at a minimum, its arbitrators to comply with the Ethics Standards for Neutral Arbitrators in Contractual Arbitration as adopted by the Judicial Council pursuant to Section 1281.85 of the Code of Civil Procedure.
- (B) The firm, provider, or practitioner requires, at a minimum, its mediators to comply with ethical standards that are equivalent to the Rules of Conduct for Mediators in Court-Connected Mediation Programs for General Civil Cases as provided in Rules 3.850 to 3.860, inclusive, of the California Rules of Court.
- (C) The firm, provider, or practitioner has procedures in place for persons to make complaints regarding the failure of an arbitrator or mediator of the firm, provider, or practitioner to comply with the standards described in subparagraph (A) or (B), as applicable. For mediators, those complaint procedures shall be substantially similar to the complaint procedures specified in Article 3 (commencing with Rule 3.865) of Chapter 3 of Division 8 of Title 3 of the California Rules of Court.
- (D) The firm, provider, or practitioner has procedures to remedy failures of arbitrators or mediators to comply with the standards described in subparagraph (A) or (B), as applicable.

## ● Program "shall not require a firm, provider, or practitioner to be a licensee of State Bar to be certified

## LAW FOR CONSUMER ARBITRATIONS

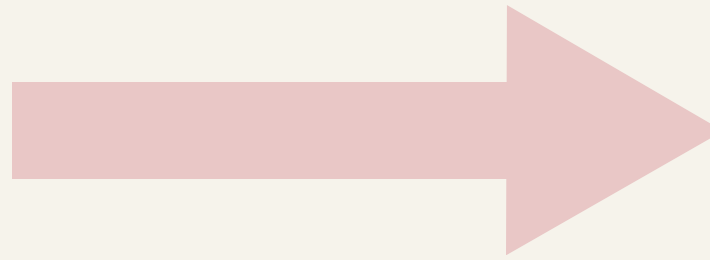

- New Civil Code Section 1799.208 sets forth two new restrictions on consumer arbitration agreements. Any contract with an arbitration provision "entered into, modified, or extended on or after January 1, 2025," cannot require a consumer to:
  - (1) Arbitrate outside of California a claim arising in California" or
  - (2) "arbitrate a controversy arising in California under the substantive law of a state other than California."
- Does not only apply to California residents
- Also applies to claims arising from activities in California regardless of residency
- Provision that violates these is voidable by the consumer; if rendered void, litigated in CA and CA law shall govern the dispute.
- Injunctive relief, other remedies and reasonable attorney's fees to enforce these rights.

# CONSUMER OPTION OF GOING TO SMALL CLAIMS COURT



- **New Civil Code §1799.209:**
  - **Section 1799.209 has been added to the Civil Code:**
  - **(a) If a consumer contract requires a dispute under the contract to be arbitrated and the dispute may be adjudicated pursuant to the Small Claims Act (Chapter 5.5 (commencing with Section 116.110) of Title 1 of Part 1 of the Code of Civil Procedure), the consumer shall be given the option to have the dispute adjudicated pursuant to that act.**
  - **(b) This section applies to a contract entered into, modified, or extended on or after 1/1/25.**

**Statute does not specify who is required to give consumer option to proceed.**



# **ADR PROVIDERS AND NEUTRALS REQUIRED TO DISCLOSE “SOLITICATION”**

**Code of Civil Procedure Section 1281.9 is amended to add subdivisions (a)(7) and (c)(4) Requires proposed neutral arbitrator to disclose in any consumer arbitration “any solicitation made after January 1, 2025, and within the last two years, by, or at the direction of, the private arbitration company to a party or lawyer for a party to the consumer arbitration.”**

# **“SOLICITATION” DEFINED:**



**Subdivision (c)(6) defines solicitation as including both:**

- **“Private presentations made to a party or lawyer for a party by the private arbitration company or the arbitrator” and**
- **“ Oral or written discussions, meetings, or negotiations to designate the private arbitration company or the arbitrator as the arbitration provider or arbitrator for a party in specific contracts.”**

# **“SOLICITATION” DOES NOT INCLUDE:**

- 1. “Advertising directed to the general public”**
- 2. “Communications indicating a general willingness to serve as an arbitrator or private arbitration company”**
- 3. Presentations made by the private arbitration company or arbitrator at a program or seminar held open to the public” or**
- 4. “Responding to inquiries regarding the arbitration provider’s costs, rules, procedures or standards.”**

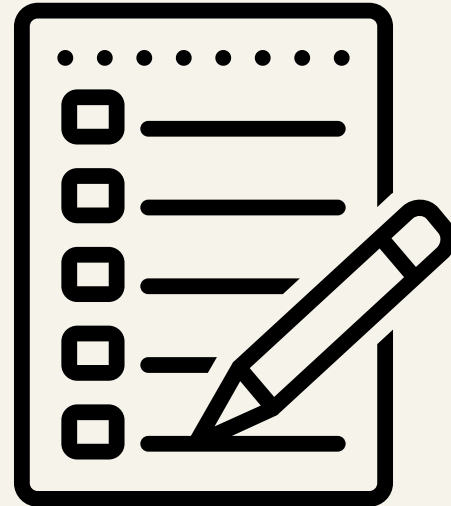
# SOLICITATIONS PROHIBITED DURING THE PENDING OF A CONSUMER ARBITRATION



**New Code of Civil Procedure Section 1281.93 prohibits any "solicitation" of a party to a consumer arbitration or a lawyer<sup>4</sup> for a party to the arbitration "during the pendency of the consumer arbitration[.]"**



**"Solicitation" has the same meaning as defined in CCP §1281.9.**



# EXPANDED DISCOVERY RIGHTS IN ARBITRATION

Amendments to Sections 1282.6 and 1283.05 of the CCP and repealed Section 1283.1 of the CCP, significantly changing the rules for discovery in arbitrations.

## Prior to January 1, 2025...

- Full discovery rights were limited to certain types of cases
- Effective January 1, 2025, with repeal of 1283.1, full rights under the Discovery Act (section 1283.5) are deemed incorporated into every arbitration agreement "as if the subject matter of the arbitration were pending before the superior court of this state in a civil action other than a limited civil case."



# DEPOSITIONS?

**CCP 1283.05(e) will continue to provide: "Depositions for discovery shall not be taken unless leave to do so is first granted by the arbitrator or arbitrators."**



# STATUS OF THIRD PARTY SUBPOENAS?

CCP §1282.6 amended to delete "if Section 1283.05 is applicable" and provides as follows:

**"(a) A subpoena requiring the attendance of witnesses, and a subpoena duces tecum for the production of books, records, documents, and other evidence, at an arbitration proceeding or a deposition under Sections 1283 and 1283.05 for the purposes of discovery, shall be issued as provided in this section. In addition, the neutral arbitrator upon their own determination may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents, and other evidence.**

**(b) Subpoenas shall be issued, as of course, signed but otherwise in blank, to the party requesting them, by a neutral association, organization, governmental agency, or office if the arbitration agreement provides for administration of the arbitration proceedings by, or under the rules of, a neutral association, organization, governmental agency or office, or by the neutral arbitrator.**

**(c) The party serving the subpoena shall fill it in before service. Subpoenas shall be served and enforced in accordance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of this code."**

# THANK YOU



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