THE BIGGIE’S

RENDERING OPINIONS

CONFLICTS OF INTEREST

COERCION

DECISION MAKING/SELF-DETERMINATION

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OK/NOT OK?  PRO SE PARTICIPANT

• Your case is worth way more than you think.
• I think you should hire my friend, Mary McSwindle. She’ll get you the money you deserve.
• The judge will dismiss this case
• You have the right to seek independent counsel.
• Although I am a lawyer, I cannot offer you any legal advice.
• Has the judge made any comments about this case?
OK/NOT OK?
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RULE 10.370 ADVICE, OPINIONS, OR INFORMATION

• Providing information. Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.

• Independent legal advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.

• Personal or professional opinion. A mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.
OK/ NOT OK?

• Your daughter represents a party in the case you are being asked to mediate.

• A lawyer represents a party in the case you are being asked to mediate. Your daughter works in the same firm but is not involved in the case.
OK/ NOT OK?

• Your daughter represents a party in the case you are being asked to mediate.

A lawyer represents a party in the case you are being asked to mediate. Your daughter works in the same firm but is not involved in the case.

if the parties waive after disclosure

Practice pointer – disclose ANYTHING that could cause a participant to doubt your ability to be neutral. Decline the mediation if doubt cannot be removed.
RULE 10.340 CONFLICTS OF INTEREST

• Generally. A mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator’s impartiality.
• Unless you agree to make an offer, I will report to the court that you mediated in bad faith.

• Unless you agree to a walkaway and waive your claim for any money, I will not convey your offer to the other side.

• The choice is yours, but have you considered the possible following risks and costs of continuing to litigate?

• I will convey whatever terms you instruct me to convey. Would you consider another approach that might gain more traction in the other room?
COERCION (RULE 10.410, .370)

• Unless you agree to make an offer, I will report to the court that you mediated in bad faith. (Also, self determination).

• Unless you agree to a walkaway and waive your claim for any money, I will not convey your offer to the other side.

• The choice is yours, but have you considered the possible following risks and costs of continuing to litigate?

• I will convey whatever terms you instruct me to convey. Would you consider another approach that might gain more traction in the other room?
OK/ NOT OK?

- It’s been ten hours, I cannot think straight.
- I am fine. I only had four martinis at lunch before coming to mediation.
- It’s my wife’s case, but I have complete control.
- I am tired
- I do not understand the terms of this settlement agreement.
- I don’t speak Spanish and my client doesn’t speak English.
OK/ NOT OK?

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- I do not understand the terms of this settlement agreement.
- I don’t speak Spanish and my client doesn’t speak English.
RULE 10.310 SELF-DETERMINATION

• Decision-making. Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination.

• Coercion prohibited. A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation.

• Misrepresentation prohibited. A mediator shall not intentionally or knowingly misrepresent any material fact or circumstance in the course of conducting a mediation.

• Postponement or cancellation. If, for any reason, a party is unable to freely exercise self-determination, a mediator shall cancel or postpone a mediation.
SELF-DETERMINATION

• What terms do you think are reasonable?
• Tell me what I should do
• What choice do I have
• What would you do?
• Is it your business if the lawyer pressures his client
• What if the client says: “I will sign this settlement agreement, but I feel like I am being pressured.”
SUBTLE ISSUES

How would you handle this...

• The mediator observes that the decision maker is easily pressured
• A participant falls asleep during the presentations.
• A party’s case evaluation is based upon a clearly erroneous understanding of the law
• Opposing counsel are yelling at each other and calling each other names
• Counsel has told you to tell the other side about devastating surveillance, which does not exist
• Your immediate relative works at the same company as one of the participants.
• The clients want to settle, but the lawyer won’t agree to confidentiality.
SAMPLE PRO SE ACKNOWLEDGMENT FORM

• Case name: _______________________________

• Pro se disclaimer acknowledgment – to be read and signed by pro-se (party not represented by an attorney) participants prior to the beginning of the mediation

• I understand that I am a pro se party (which means that I am not represented by an attorney). I acknowledge the following:

  • I understand that I have the right to retain and consult with an attorney at my own expense and to have an attorney represent me at mediation;
  
  • I understand that the mediator, while a Florida licensed attorney, cannot give me legal advice or assist me in handling my case.
  
  • I understand and agree that this mediation is confidential.
  
  • I understand that the mediator is not a judge.
  
  • I understand that the mediator will not try to force me to make any decisions against my will. I alone have the power to determine whether I will settle my case.
  
  • I understand that the mediator will discuss issues and raise questions designed to help me identify issues and possible outcomes to help me evaluate whether settlement makes sense or not, but the decision whether to settle rests solely with me.
  
  • I understand that I am not required to settle my case.
  
  • I understand that I have the right to declare an impasse and end the mediation at any time after the mediator's opening statement.
  
• I understand and agree to the above.

___________________________________

[Pro se party]
RULE 10.110 GOOD MORAL CHARACTER

• General requirement. No person shall be certified by this court as a mediator unless such person first produces satisfactory evidence of good moral character as required by rule 10.100.

• Purpose. The primary purpose of the requirement of good moral character is to ensure protection of the participants in mediation and the public, as well as to safeguard the justice system. A mediator shall have, as a prerequisite to certification and as a requirement for continuing certification, the good moral character sufficient to meet all of the mediator standards of professional conduct set out in rules 10.200-10.690.

• Certification. The following shall apply in relation to determining the good moral character required for initial and continuing mediator certification:

   (1) the applicant’s or mediator’s good moral character may be subject to inquiry when the applicant’s or mediator’s conduct is relevant to the qualifications of a mediator. (2) an applicant for initial certification who has been convicted of a felony shall not be eligible for certification until such person has received a restoration of civil rights. (3) an applicant for initial certification who is serving a sentence of felony probation shall not be eligible for certification until termination of the period of probation. (4) in assessing whether the applicant’s or mediator’s conduct demonstrates a present lack of good moral character the following factors shall be relevant:

   (a) the extent to which the conduct would interfere with a mediator’s duties and responsibilities; (b) the area of mediation in which certification is sought or held; (c) the factors underlying the conduct; (d) the applicant’s or mediator’s age at the time of the conduct; (e) the recency of the conduct; (f) the reliability of the information concerning the conduct; (g) the seriousness of the conduct as it relates to mediator qualifications; (h) the cumulative effect of the conduct or information; (i) any evidence of rehabilitation; (j) the applicant’s or mediator’s candor; and (k) denial of application, disbarment, or suspension from any profession. (l) decertification. A certified mediator shall be subject to decertification for any knowing and willful incorrect material information contained in any mediator application. There is a presumption of knowing and willful violation if the application is completed, signed, and notarized.