Procrastinators’ Programs™

Professionalism in Mediation

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Loyola University College of Law

Course Number:  0200121227
1 Hour of Professionalism CLE

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10:10 – 11:10 a.m.
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Professor Bobby Harges of Loyola University New Orleans College of Law teaches courses in mediation and arbitration, arbitration advocacy, torts, evidence, and criminal law and procedure. An active mediator and arbitrator, Harges has mediated and arbitrated over one thousand cases of all types since 1990. He is a member of the panel of mediators and arbitrators of Mediation Arbitration Professional Systems (MAPS) and a member of various arbitration panels.

He is a graduate of Mississippi State University, the University of Mississippi School of Law, and Harvard Law School. Since 1994 he has trained lawyers, judges, mental health professionals and various other professionals to be mediators. Mr. Harges has written extensively on ADR and Evidence. His most recent book on ADR, The Handbook on Louisiana Alternative Dispute Resolution Laws, was recently published by Esquire Books.
On May 23, 1997, the Louisiana Supreme Court issued an order modifying the Mandatory Continuing Legal Education Rules by requiring lawyers licensed to practice law in Louisiana to obtain at least one hour of professionalism credit. As a result, Louisiana lawyers are required to obtain credit annually for not less than fifteen hours of CLE courses, with at least one of those hours concerning legal ethics and another concerning professionalism.

The professionalism CLE requirement is distinct from, and in addition to the legal ethics CLE requirement. While legal ethics sets forth the standards of conduct required of a lawyer, professionalism includes what is more broadly expected of a lawyer. The professionalism CLE requirement was issued in response to what many observers labeled as the increased incivility and unprofessional conduct of lawyers in Louisiana. The professionalism requirement is designed to promote civility and discourage this unprofessional conduct. With this professionalism requirement, Louisiana joined twenty other states in requiring more than one hour of CLE annually on ethics and/or professionalism.

The MCLE rules define professionalism and legal ethics as follows:

"Legal ethics concerns the standard of professional conduct and responsibility required of a lawyer. It includes courses on professional responsibility and malpractice. It does not include such topics as attorneys' fees, client development, law office economics, and practice systems, except to the extent that professional responsibility is discussed in connection with these topics.

"Professionalism concerns the knowledge and skill of the law faithfully employed in the service of client and public good, and entails what is more broadly expected of attorneys. It includes courses on the duties of attorneys to the judicial system, courts,

1La. Sup.Ct.Rules, Rule 30 CLE Rule 3, 8 LSA-R.S.

2Id.

3Id.

4Frank X. Neuner, Jr., Mandatory Professionalism: A Cure for An Infectious Disease, 45 La. BJ 18, 19 (1997).
The purpose of this discussion is to consider the conduct of lawyers and mediators who participate in mediations and to determine if this conduct is professional or not. Over the past 22 years, I have served as a mediator in over one thousand cases and have had the opportunity to observe the conduct of thousands of lawyers and clients before, during and after mediations. Additionally, I have taught mediation training seminars and classes to lawyers, judges, other professionals, and law students during this same period of time and have discussed on many occasions whether particular conduct associated with mediations is professional. My observations are detailed below.

I will first describe the conduct and/or statement of the attorney, the context in which it arises and offer observations on whether the conduct is professional or not.

I. Civil Mediations

1. Not informing client of ADR options. Most lawyers would agree that physicians have a duty to discuss with their patients non-surgical treatment options. Should lawyers have a comparable duty which requires them to discuss ADR options with their clients? Just as surgery is a drastic remedy,

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5"Mediation is a dispute resolution process that uses a trained neutral third party - a mediator - to assist the parties in resolving their dispute. Unlike an arbitrator, who has the authority to render a binding decision, the mediator has no power to bind the parties. The function of the mediator is to assist the parties in reaching a settlement." Bobby Marzine Harges, The ABCs of Effective ADR, Ten Practical Tips for Representing Clients in Mediations, 43 La. Bar J. 142, 142 (Aug. 1995).

6“While the [Louisiana Mediation Act] stops short of requiring counsel to advise clients of the propriety of using mediation, the Act does encourage counsel to discuss with their clients the appropriateness of using mediation in any civil case pending in the courts. Because of this “encouragement” by the Act, lawyers should educate themselves about the advantages and disadvantages of mediation and advise clients accordingly. A corollary issue is whether a lawyer has a duty to inform his client that an opposing party has suggested the use of mediation as a method of resolving a dispute. The Act does not answer this question. However, the encouragement provided by the Act coupled with a lawyer's ethical duty to “keep a client reasonably informed about the status of a matter”4 would indicate that a lawyer has such an ethical duty. Consequently, the author “encourages” lawyers to not only learn about the benefits of mediation but also to talk with their clients about the propriety of using mediation.” Bobby Marzine Harges, Blueprint for Effective ADR, Mediation Advocacy in the Wake of the Louisiana Mediation Act, 46 La. B. J. 100 (1998).
the same can be said about a trial.\(^7\)

2. Not informing client of an offer to mediate made by the opposing party.

3. Name calling in a caucus - e.g., sending messages to the other side that are vulgar or profane. For example, “Mediator, when you go back to the other room, tell that #$%* to go to #$%^.” [Remember that one of the purposes of the causes is to allow the parties to talk candidly with the mediator and to vent their frustrations.]

4. Showing up late for a mediation without calling to inform the mediator or the opposing parties. Or not showing up at all after the mediation has been scheduled and not informing the mediator or the other party.

5. Showing up at mediation without the client when the agreement was that clients from all parties will be present.

6. Mediators charging cancellation fees when the mediation is cancelled within a few days of the mediation.

7. Disrespect to mediator and process - last minute cancellations.

8. Answering cellular phones during the joint session of a mediation. I once heard a lawyer state during a joint session while answering the telephone, “Unless somebody is dying, your a#% is dead. This better be important. You know not to call me during a mediation.”

9. In the hallway or other common area of a mediation facility, a mediator commenting to another mediator or lawyer about what is going on in the mediation.

10. Coming to the mediation totally unprepared. I once observed a lawyer make an opening statement about the cause of the client’s injury being a slip and fall in a grocery store while the actual cause was a rear end collision. While Mrs. Smith was the client at the mediation, the lawyer was referring to Mrs. Jones’ claim. Oops!\(^8\)

\(^7\)Rule 1.4(a) of the Louisiana Rules of Professional Conduct, Communication states, in pertinent part, (a) A lawyer shall: (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

\(^8\)To prepare for mediation, the lawyer should meet with the client to discuss in detail the manner, length and substance of the opening presentations, the joint session, the caucus and the closure of the mediation. The lawyer also should explain the negotiation process to the client, that mediation is a structured negotiation and that there will be many offers and counter-offers exchanged at the mediation. Mediation is a give-and-take process where neither party should
11. Criminal acts during mediation, e.g., threats of harm to another, physical contact, or fist fighting among lawyers. Remember that a criminal assault in Louisiana is defined under La. R. S. 14:36 as “an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery.”

12. Leaving the process to run personal errands. Or taking conference calls.

13. Walking out of the mediation in frustration without informing the mediator or opposing parties.

14. Double billing. During the down time, billing for the full amount of time in the mediation while working on other files. For example, during a six hour mediation, the client bills nine hours to several different clients.

15. Using mediation for the sole purpose of discovery, i.e., the use of mediation to access the other side in terms of their potential effectiveness at trial or to war down a litigant where one party is more financially able than the other.

16. Informing the judge at a pretrial conference about the offers that were made in mediation. [See Louisiana Mediation Act, La. R.S. 9:4112 Confidentiality, “Except as provided in this Section, all oral and written communications and records made during mediation, whether or not conducted under this Chapter and whether before or after the institution of formal judicial proceedings, are not subject to disclosure, and may not be used as evidence in any judicial or administrative proceeding.”]9

17. The trial judge asking the parties after a mediation, “I see that you went to a mediation. Where were the last offers in the mediation?”

18. Representing the same party at the same time in two different mediations. Both mediations expect to receive everything that it wants from the other. The objective of the mediation is for the mediator and the parties to find a solution that best serves the interests of all parties to the dispute. Bobby Marzine Harges, The ABCs of Effective ADR, Ten Practical Tips for Representing Clients in Mediations, 43 La. Bar J. 142, 142 (Aug. 1995).

9With limited exceptions, all mediations conducted in Louisiana, those conducted under the Act and those private mediations not conducted under the Act, are confidential. All written and oral communications and records made during any mediation, whether before or after the institution of formal judicial proceedings, are not subject to disclosure, and may not be used as evidence in any judicial or administrative proceeding. Further, the parties, counsel and other participants in a mediation shall not be required to testify concerning the mediation proceedings and are not subject to process or subpoena, issued in any judicial or administrative procedure, which requires the disclosure of any communications or records of mediation.” Id. at 102.
begin at nearly the same time. The idea is to have a settlement day where the same adjuster and
defense attorney would attempt to resolve multiple cases in a day. Four possible mediations would
be scheduled throughout the day with two mediations being scheduled at 9:00 a.m. and 9:15 a.m. and
two mediations being scheduled at 1:00 p.m. and 1:15 p.m. Two mediators are involved with each
mediator handling two cases during the day. Four different plaintiffs and four different plaintiff
lawyers are involved in the mediations. The starting times of the mediations are staggered so that the
joint sessions do not overlap.

19. Verbally attacking the mediator. For example, “Mediator, you ought to be ashamed of yourself
for bringing this offer to me. You should know better. I though that you were a good mediator. You
are a $#@” [Note, this is a paraphrase of some of the choice words that are heard during a
mediation.]

20. Subpoenaling the mediator to testify about what happened at a mediation.¹⁰

¹⁰La. R.S. 4112 of the Louisiana Mediation Act provides, §4112. Confidentiality

A. Except as provided in this Section, all oral and written communications and records made
during mediation, whether or not conducted under this Chapter and whether before or after the
institution of formal judicial proceedings, are not subject to disclosure, and may not be used as
evidence in any judicial or administrative proceeding.

B.(1) The parties, counsel, and other participants therein shall not be required to testify
concerning the mediation proceedings and are not subject to process or subpoena, issued in any
judicial or administrative procedure, which requires the disclosure of any communications or
records of the mediation, except with respect to the following:

(a) Reports made by the mediator to a court, pursuant to that court's order, only as to whether the
parties appeared as ordered, whether the mediation took place, and whether a settlement resulted
therein.

(b) In connection with a motion for sanctions made by a party to the mediation based on a claim
of a party's noncompliance with the court's order to participate in the mediation proceedings;
however, the disclosure of any communications and records made during the course of the
mediation shall be strictly limited to the issue of noncompliance with the court's order.

(c) A judicial determination of the meaning or enforceability of an agreement resulting from a
mediation procedure if the court determines that testimony concerning what occurred in the
mediation proceeding is necessary to prevent fraud or manifest injustice.

(2) The mediator is not subject to subpoena and cannot be required to make disclosure through
discovery or testimony at trial except in a judicial or administrative procedure with respect to
Subparagraph B(1)(a) of this Section.
II. Domestic Mediations

“When parties arrive at a child custody, divorce, or family mediation (hereinafter referred to as “family mediation”), they are usually very emotional. This phase of their lives is full of stress. Some of the losses that parties suffer in a separation and/or divorce are: economic loss; loss of a home; social loss; loss of daily contact with children; loss of a housekeeper, cook, grocery buyer, clothes buyer, and/or taxi driver; loss of a repairman, gardener, or person with technical knowledge; loss of a career, loss of the ex-spouse’s family members and friends; loss of a sex partner; loss of physical security; and loss of a value system.

“The emotions associated with these losses affect the parties’ moods, their attitudes, their ways of thinking, and their behavior in a mediation. The feelings that divorcing and/or separating parties could have in a family mediation include abandonment, shock, anger, denial, insecurity, low self-esteem, confusion, depression, loneliness, betrayal, and victimization. Sleepless nights, strange illnesses, and weird feelings are also among the things that participants in a family mediation may also be experiencing. It is also common for parties to experience or engage in behavior that they have never experienced before. Parties may sometimes be surprised by their own behavior. Many times, they are not “themselves.

“Some feelings that may be associated with a divorce or separation include: “I’m going crazy;” “Life isn’t worth it without her;” “I feel dead, like a walking zombie;” “I am sad and cry all the time and don’t know why;” “I’m helpless;” “I’m hopeless;” I’d like to kill my ex;” “If I can’t have her, no one can have her.” and “I’m not me anymore.” The mediator must recognize that these feelings could possibly exist and learn how to deal with them.”

C. The confidentiality provisions of this Section do not extend to statements, materials and other tangible evidence, or communications that are otherwise subject to discovery or are otherwise admissible, merely because they were presented in the course of mediation, if they are based on proof independent of any communication or record made in mediation.

D. If this Section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure.

E. Confidentiality, in whole or in part, may be waived when all parties and the mediator specifically agree in writing.

11Bobby Marzine Harges, Mediating High Conflict Domestic Relations Cases, 63 La. B.J. 212 (October/November 2012).
In other words, litigants in a family mediation are very frustrated. As a result of these feelings and emotions, parties sometimes “act out” or “act up.” The words and actions of the parties can lead lawyers, judges, and mediators to view the parties as being childish, crazy, batty, mentally unstable, and petty. Additionally, this conduct by the parties may cause the lawyers and the mediator to use language that they would not normally use. In other words, lawyers, mediators, and judges sometimes feel the pressure from the parties and they “act out” or “act up.” Here are additional scenarios:

21. Mediator or lawyer (or judge during a settlement conference) - “You people are crazy. You people are just nuts.” A Louisiana district judge once asked me if this statement is appropriate. Apparently, she was frustrated with the games that family court litigants play during a divorce or during a child custody battle.

22. “You two have to be kidding, you are arguing over matchboxes, or coupons, or cups [or whatever ??]”

23. A lawyer states to her client, “You and your wife and acting childish! You need to stop it!”

24. In response to a telephone call from a client who stated that the mother did not bring the children on time, (she was 15 minutes late) the lawyer states, “You need to get a life. That is the fifth time you called me this week.”

25. A judge issues a decision and announces it announce from the Bench, and the attorneys are supposed to reduce it to writing and submit it, but they cannot agree on what the judge said. At the next conference, the judge states from the Bench, “You two are acting just like your clients. You need to grow up and stop acting like your crazy clients.”

26. The mediator’s (or judge’s or lawyer’s) use of profanity or vulgar language in response to the parties use of such language. My students tell me that profanity is not big deal. Everyone uses it; thus no one should be shocked and no one should take offense.