MCLE Program on Wednesday, March 31, 2021

Via Zoom

Time: 12:00 pm – 1:00 pm

Presented by:
Ventura County Bar Association

Virtual IS Reality

2021 Mediation Update: Legal and Practical Issues; Zoom Tricks and Technology

SPEAKERS:

David M. Karen, Esq.
Judicate West

Floyd J. Siegal, Esq.
Judicate West

Virtual mediation has become the new mandate and Zoom is here to stay. This panel features two experienced Judicate West mediators who will discuss the evolving art of Virtual Mediation and the practical considerations to ensure success in the virtual world – Virtual IS our new Reality!

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JUDICATE WEST
Alternative Dispute Resolution

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THIS PROGRAM HAS BEEN APPROVED FOR 1 HOUR OF CALIFORNIA GENERAL MCLE CREDIT.

HANDOUTS

Program Discussion Handout

- Updated CCP 664.6 (effective 1/1/21)
- *Mostafavi Law v. Rabineau* (CCP 998 enforcement)
- Zoom Background study You Are What You Show
- Zoom Shortcuts Keyboard commands
- Ethical Considerations Advocate Article - Gail Glick, Judicate West
- Zoom Breakout Rooms JW Best Practices, Caveats & Gotchas

CODE OF CIVIL PROCEDURE - CCP

PART 2. OF CIVIL ACTIONS [307 - 1062.20] *(Part 2 enacted 1872.)*
TITLE 8. OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS [577 - 674] *(Title 8 enacted 1872.)*

CHAPTER 8. The Manner of Giving and Entering Judgment [664 - 674] *(Chapter 8 enacted 1872.)*

664.6. (a) If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

(b) For purposes of this section, a writing is signed by a party if it is signed by any of the following:

(1) The party.

(2) An attorney who represents the party.

(3) If the party is an insurer, an agent who is authorized in writing by the insurer to sign on the insurer's behalf.

(c) Paragraphs (2) and (3) of subdivision (b) do not apply in a civil harassment action, an action brought pursuant to the Family Code, an action brought pursuant to the Probate Code, or a matter that is being adjudicated in a juvenile court or a dependency court.

(d) In addition to any available civil remedies, an attorney who signs a writing on behalf of a party pursuant to subdivision (b) without the party's express authorization shall, absent good cause, be subject to professional discipline.

(Amended by Stats. 2020, Ch. 290, Sec. 1. (AB 2723) Effective January 1, 2021.)

Filed 3/3/21

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MOSTAFAVI LAW GROUP, APC, Plaintiff and Appellant, v. LARRY RABINEAU, APC, et. al., Defendants and Respondents.	B302344 Los Angeles County Super. Ct. No. BC565480

APPEAL from an order of the Superior Court of Los Angeles County, Teresa A. Beaudet, Judge. Affirmed.

Mostafavi Law Group, Amir Mostafavi; Joseph S. Socher, for Plaintiff and Appellant.

Law Offices of Larry Rabineau, Larry Rabineau and Virginia Narian, for Defendants and Respondents.

INTRODUCTION

The Legislature enacted Code of Civil Procedure[1] section 998 to encourage and expedite settlement of lawsuits before trial. To effectuate this purpose, the statute simultaneously promotes the extension and acceptance of reasonable pretrial offers to compromise. The "policy is plain. It is to encourage settlement by providing a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer. (This is the stick. The carrot is that by awarding costs to the putative settler the statute provides a financial incentive to make reasonable settlement offers.)" (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.)

Section 998, subdivision (b) requires, among other things, that a party seeking to take advantage of the statute serve on an opposing party a written offer to have judgment entered on specified terms. Most important, for purposes of this appeal, the written offer "shall" contain what has come to be known as an "acceptance provision." (*Perez v. Torres* (2012) 206 Cal.App.4th 418, 422 (*Perez*); *Boeken v. Philip Morris USA Inc.* (2013) 217 Cal.App.4th 992, 1001 (*Boeken*).) Specifically, the statute states that the written offer "shall" include "a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." (§ 998, subd. (b).)

A number of cases have addressed whether a section 998 offer without an acceptance provision is valid for purposes of triggering the statute's cost-shifting provisions when the offer is

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1 All undesignated statutory references are to the Code of Civil Procedure.

not accepted. This case poses an issue of first impression: whether the purported *acceptance* of a section 998 offer lacking an acceptance provision gives rise to a valid judgment.

Here, defendants and respondents Larry Rabineau, APC, and Larry Rabineau (collectively, "Rabineau") served plaintiff and appellant Mostafavi Law Group (MLG) with a statutory offer to compromise. The offer did not specify how MLG could accept it. Nevertheless, MLG's counsel hand-wrote MLG's acceptance onto the offer itself and filed a notice of acceptance with the trial court. Thereafter, the court entered judgment in favor of MLG pursuant to section 998, subdivision (b)(1).

Rabineau filed a motion to vacate the judgment under section 473, subdivision (d). He argued his section 998 offer was invalid because it lacked an acceptance provision. Consequently, Rabineau contended, the judgment stemming from the offer's acceptance was void and should be set aside. The trial court agreed and granted Rabineau's motion.

On appeal, MLG contends the trial court erred by vacating the judgment because its ruling: (1) lacks support in caselaw; (2) contradicts the policies and purposes underlying section 998; and (3) violates principles of contract law and equity.

For the reasons discussed below, we conclude the trial court correctly found the judgment was void. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2015, plaintiff Amir Mostafavi and his law firm, MLG, filed their operative complaint, which asserted a claim for defamation per se, among others, against Rabineau. The case was litigated extensively over the next several years.

Although the parties attended a mediation on May 28, 2019, they were unable to settle.

On May 31, 2019, Rabineau served MLG with a "Statutory Offer to Compromise" pursuant to section 998. The offer stated, in its entirety: "TO PLAINTIFF, MOSTAFAVI LAW GROUP, AND TO ITS COUNSEL OF RECORD: [¶] Pursuant to *California Code of Civil Procedure* §998 [sic], Defendant [sic], LAW OFFICES OF LARRY RABINEAU AND LARRY RABINEAU, offer to compromise the above-entitled action for the sum of $25,000.01. [¶] PLEASE TAKE NOTICE that if this Offer to Compromise is *not* accepted within the time specified by §998 [sic] of the *Code of Civil Procedure* and Plaintiff fails to obtain a more favorable judgment, Plaintiff is not entitled to recover court costs (despite being a 'prevailing party') and must pay the offering defendants' costs from the time of the offer." (Italics and underlines in original.)

On June 20, 2019, Mostafavi, acting as MLG's counsel, hand-wrote the following onto the section 998 offer: "Plaintiff Mostafavi Law Group, APC accepts the offer." That same day, MLG filed a notice of the offer's acceptance, along with proof thereof, with the trial court and sent a copy to Rabineau. After receiving MLG's notice of acceptance, on June 21, 2019, Rabineau told MLG he would "draft and send . . . a settlement agreement for . . . signature" before paying the settlement amount.

On June 28, 2019, the trial court entered judgment in favor of MLG pursuant to section 998.[2] Three days later, MLG sent a

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2 Section 998, subdivision (b)(1) states: "If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly."

copy of the judgment to Rabineau and requested "timely payment according to the judgment." In response, Rabineau reiterated that before remitting payment, he "require[d] [MLG] to sign a settlement agreement," under which "[e]ach party [would] bear [its] own fees and costs."

Soon thereafter, the parties got into a dispute over whether MLG could enforce the judgment, and thereby require Rabineau to pay the amount set forth in the section 998 offer, even though it had not signed any proposed settlement agreement. When they were unable to resolve the matter, Rabineau filed a motion to set aside the judgment under section 473, subdivision (d).[3] He argued: "The [section] 998 [offer] [MLG] accepted did not have an acceptance provision and is therefore invalid. As such, the judgment that was entered pursuant to [MLG's] acceptance of the [section] 998 [offer] is void." Rabineau argued in the alternative that if the trial court found the offer was valid, it should amend the judgment to include both MLG and Mostafavi. On this point, Rabineau asserted MLG was Mostafavi's alter ego, and that "[a]n absolute injustice would occur if the [trial court] finds the judgment for $25,000 against [Rabineau] valid and still permits Mr. Mostafavi to proceed to trial" against him.[4]

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3 Section 473, subdivision (d) provides, in relevant part: "The court . . . may, on motion of either party after notice to the other party, set aside any void judgment or order."

4 Mostafavi was both a plaintiff in his own right, and counsel for his law firm, MLG. Rabineau's section 998 offer, however, was directed only to MLG, not Mostafavi. And the judgment was entered only in favor of MLG, not Mostafavi himself. Mostafavi is not a party to this appeal.

Following a hearing, the trial court granted Rabineau's motion. Explaining the rationale behind its ruling, the court stated: "The Court notes that neither party cites to any case dealing with the situation where a defective section 998 offer was actually accepted. Therefore, without any authority to the contrary, the Court follows the rule as set forth in [*Puerta v. Torres* (2011) 195 Cal.App.4th 1267 (*Puerta*)]—'the manner of acceptance must be indicated in the offer.' [Citation.] Moreover, where a section 998 offer is found to be invalid, any portion of a judgment that results from the section 998 offer is similarly invalid. [Citation.] Because the Judgment was entered pursuant to section 998, and in particular, Code of Civil Procedure section 998, subdivision (b)(1), the Court finds that the Judgment is appropriately set aside as void." (Footnotes omitted.) The trial court also rejected Rabineau's contention that MLG was Mostafavi's alter ego, noting it was not supported by sufficient evidence and "a number of the trial documents prepared by the parties in this case indicate that there was ambiguity on both sides as to who were the remaining parties in this matter."

MLG timely appealed.

DISCUSSION

I. Statutory Framework and Standard of Review

"Section 998 concerns pretrial offers to compromise." (*Puerta, supra,* 195 Cal.App.4th at p. 1270.) The statute "was designed to encourage settlement of disputes through a straightforward and expedited procedure." (*Bias v. Wright* (2002) 103 Cal.App.4th 811, 819.)

Pursuant to section 998, subdivision (b): "Not less than 10 days prior to commencement of trial . . . , any party may serve an

offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party[.]"

"If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly." (§ 998, subd. (b)(1).) However, "[i]f an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer." (§ 998, subd. (c)(1).) The trial court also has discretion to "require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses[.]" (*Ibid.*)

Where, as here, "the issue to be decided [on appeal] is purely one of statutory construction, the question is one of law subject to our de novo review. [Citation.]" (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 999, overruled on other grounds in *People v. Watson* (2007) 42 Cal.4th 822, 831.)

II. Arguments Based on Caselaw and Policy

As noted above, section 998, subdivision (b) provides, in pertinent part: "The written offer *shall* include . . . a provision that allows the accepting party to indicate acceptance of the offer

by signing a statement that the offer is accepted." (Emphasis added.)

MLG concedes Rabineau's section 998 offer "did not have any statement at all regarding acceptance," and thus did not comply with the statutory language requiring an acceptance provision. Nevertheless, MLG maintains the judgment is valid and enforceable because the terms of the offer were clear and unambiguous and MLG accepted the offer in writing. In other words, MLG appears to contend that because it accepted the offer in writing, the offer's omission of an acceptance provision was harmless, as the "sole purpose" of requiring section 998 offers to contain such a provision is "to make it clear that written acceptance is required." In support of its position, MLG emphasizes: (1) prior caselaw did not address the validity of a judgment following the acceptance of a section 998 offer lacking an acceptance provision; and (2) section 998's "goals of eliminating uncertainty, requiring written acceptance, and encouraging settlement would be defeated by a rule which voided the [judgment] where the offeree has communicated an unqualified, written acceptance of a clear and unambiguous offer."

Like MLG, we have not located any California appellate court decisions addressing the validity of a judgment stemming from acceptance of a section 998 offer lacking an acceptance provision. Nevertheless, we conclude the trial court's ruling—that such a judgment is void—has ample support in existing caselaw and accepted principles of statutory construction.

In *Puerta*, the Court of Appeal addressed whether a section 998 offer without an acceptance provision is valid for purposes of triggering the cost-shifting provisions set forth in section 998,

subdivision (c). (*Puerta, supra*, 195 Cal.App.4th at p. 1269.) In resolving this issue, the court applied two "fundamental principles of statutory construction": (1) where statutory language is clear and unambiguous, courts must give effect to its plain meaning; and (2) courts generally construe the word "shall" as mandatory. (*Id.* at pp. 1272-1273.) Based on those principles, the court held section 998, subdivision (b) "sets forth two mandatory requirements about what *shall* be included in a section 998 offer: the offer shall be written, and it shall contain a provision stating that the recipient can accept the offer 'by signing a statement that the offer is accepted.'" (*Id.* at p. 1273.) The court concluded that because "[t]he offer at issue . . . contained nothing regarding acceptance, only the terms of the offer itself and its expiration date," the offer was "invalid under the plain language of the statute[.]" (*Ibid.*)

California appellate courts have consistently followed *Puerta* to hold that a section 998 offer lacking an acceptance provision is invalid, and therefore an offeree's failure to accept it does not trigger any of section 998's cost-shifting provisions.[5] (See, e.g., *Perez, supra,* 206 Cal.App.4th at p. 424 [defendant's section 998 offer was invalid because "the plain language of the statute requires *all* offers to contain an acceptance provision"]; *Boeken, supra*, 217 Cal.App.4th at p. 1004 ["Because [plaintiff's] section 998 offer did not include the required acceptance

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5 Section 998, subdivisions (c) and (e) govern cost-shifting where "an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award[.]" (§ 998, subds. (c) & (e)). Subdivision (d) applies where "an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award[.]" (*Id.*, subd. (d).)

provision, the offer was invalid. [Citations.]"]; *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 331 [plaintiff was not entitled to costs under section 998 because her offer "did not include an acceptance provision" and "therefore did not comply with the statute"].)

The trial court's application of these cases—which involved *rejection* of a section 998 offer without an acceptance provision—to this case—which involves acceptance of such an offer—is a logical extension of their holdings. It also is consistent with section 998's language and structure. Section 998, subdivision (b) sets forth the mandatory requirements that an offer and acceptance must satisfy in order to be valid under the statute. (See § 998, subd. (b).) When those requirements are met, subdivisions (b)(1) and (c) through (e) delineate the consequences that may follow depending on whether the offer is accepted (entry of judgment) or not (cost-shifting). (See *id.*, subds. (b)(1) & (c)-(e).) If failure to accept an offer lacking an acceptance provision does not trigger the cost-shifting consequences set forth in subdivisions (c) through (e) (*Puerta, supra*, 195 Cal.App.4th at p. 1273; *Boeken, supra*, 217 Cal.App.4th at p. 1004), then purported acceptance of such a defective offer likewise cannot trigger the consequences in subdivision (b)(1) and give rise to an enforceable judgment. This is so because where a section 998 offer is invalid based on its failure to satisfy all of the "statutorily required elements[,] . . . there is nothing for the receiving party to accept" in the first place. (*Perez, supra*, 206 Cal.App.4th at p. 426.)

This conclusion is supported by *Saba v. Crater* (1998) 62 Cal.App.4th 150 (*Saba*). While *Saba* was based on a prior version of section 998 that did not require offers to include an acceptance

provision, the opinion is instructive on the validity of a judgment stemming from the acceptance of a defective offer. (*Id.* at p. 153.)

In *Saba*, the defendant's counsel made a section 998 offer orally on the record at a deposition. (*Saba, supra*, 62 Cal.App.4th at p. 152.) After failing to obtain a formal written offer after the deposition, the plaintiff's counsel served the defendant with a written acceptance and moved for entry of judgment pursuant to section 998, subdivision (b)(1). (*Ibid.*) The trial court found that "a valid section 998 offer had been made and accepted" and entered judgment in the plaintiff's favor. (*Ibid.*) The Court of Appeal reversed, holding the judgment was defective because, among other things, the offer was not in writing as required by statute. (*Id.* at pp. 153-154.) *Saba* therefore demonstrates acceptance of an offer that fails to comply with all of section 998's requirements does not result in a valid judgment. (See *ibid.*)

Additionally, we reject MLG's contention that a rule requiring offers to include an acceptance provision in order to give rise to an enforceable judgment under section 998, subdivision (b)(1) will defeat the statute's goals of "eliminating uncertainty" and "encouraging settlement." On the contrary, it is an application of the "bright-line rule" articulated in *Perez*, which "require[s] the parties to comply with the provisions [of section 998] the Legislature has deemed necessary" by "invalidating an offer when it omits an acceptance provision, or any other statutorily required provision[.]" (*Perez, supra*, 206 Cal.App.4th at pp. 425-426.) Contrary to MLG's argument, we agree with the *Perez* court that adherence to this "bright-line rule will eliminate confusion and uncertainty" and "encourage settlements[.]" (*Id.* at p. 426.) Specifically, consistent application of this rule will ensure parties can efficiently discern: (1) whether an offer extended or

received is valid and capable of acceptance based on its compliance with all of section 998's requirements; (2) the specific actions that must be taken to accept an offer, as defined by the offeror; and (3) the consequences that may flow from an offer's acceptance or rejection. Adopting a rule requiring section 998 offers to include an acceptance provision to be valid, whether they are rejected or accepted, adds consistency and predictability to section 998's operation. This may incentivize litigants to utilize this "straightforward and expedited procedure" to settle disputes before trial. (*Bias v. Wright*, *supra*, 103 Cal.App.4th p. 819.)[6]

III. Arguments Based on Contract Principles and Equity

A. Contract Principles

MLG contends we should apply "pure contract principles" to conclude the judgment is valid. Specifically, MLG argues that because Rabineau's offer was "unambiguous" and its acceptance was "clear and unqualified," the parties exhibited a "clear intent" to enter into a "binding agreement" for entry of judgment under section 998, subdivision (b)(1); consequently, it asserts, the

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6 We note that had Rabineau's section 998 offer contained an acceptance provision, and had it been accepted in accordance with that provision, Rabineau could not have later conditioned payment of the settlement funds on MLG's execution of a settlement agreement containing terms not specified in the offer, as he tried to do in this case. Rabineau's attempt to introduce additional terms outside of the offer is inconsistent with the plain language of section 998, subdivision (b), which requires the offer itself to "contain[] the terms and conditions of the judgment or award."

"resulting judgment is cannot [sic] be voided." Put differently, MLG contends "pure contract principles" require the conclusion that the offer was valid and capable of giving rise to an enforceable judgment under section 998, notwithstanding its omission of an acceptance provision. We are not convinced.

Our Supreme Court has acknowledged that, "[b]ecause the process of settlement and compromise is a contractual one, [general contract law] principles may, in appropriate circumstances, govern the offer and acceptance process under section 998. [Citation.]" (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1020.) The Supreme Court has made clear, however, that these principles should not apply where, as here, their "application would conflict with section 998 . . . . [Citation.]" (*Ibid.*) Specifically, as the trial court correctly noted, application of general contract principles to conclude a section 998 offer is valid, even if it does not have an acceptance provision, would conflict with the language of section 998, which clearly provides otherwise. (See § 998, subd. (b); see also *Perez, supra*, 206 Cal.App.4th at p. 424, fn. omitted ["The plain language of [section 998] requires *all* offers to contain an acceptance provision."].)

Additionally, relying on Civil Code section 1654, MLG contends we should conclude the offer was valid because Rabineau drafted it, and should be held responsible for any "ambiguity" regarding its validity. Section 1654 of the Civil Code states: "In cases of uncertainty not removed by the preceding rules, the *language* of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." (Emphasis added.) This interpretive rule has no relevance here, however, as MLG does not point to any ambiguity in the terms of

the offer which would require further construction. Indeed, as noted above, MLG asserts on appeal that the offer "was unambiguous."

B. Equity

Relying on "principles of . . . equity," MLG contends the judgment should be enforced because to hold otherwise would allow Rabineau to unfairly benefit from his own "drafting errors" and "avoid the duties and consequences of [his] own offer based on a technical deficiency [he himself] created." Again, we are not persuaded.

As an initial matter, we note Rabineau acknowledges he made several errors in drafting the section 998 offer, including failing to include an acceptance provision and failing to direct the offer to both plaintiffs listed on the operative complaint. But we disagree with MLG's conclusion that we should overlook Rabineau's failure to comply with a statutory requirement based entirely on its view of what is fair. Instead, stare decisis and common tenants of statutory construction direct us to adhere to the clear statutory requirement of an acceptance provision "without regards to what occurred in this particular case or the tactics of a party." (*Boeken*, *supra*, 217 Cal.App.4th at p. 1004). We "cannot ignore the . . . statute to achieve a more desirable result." (*Perez*, *supra*, 206 Cal.App.4th at p. 424, italics omitted.)

Finally, MLG asserts Rabineau should be equitably estopped from challenging the validity of judgment. Arguably, this argument has been forfeited, as MLG did not raise it before the trial court. (See *Bigler-Engler v. Breg, Inc.*, *supra*, 7 Cal.App.5th at pp. 331-332.) In any event, because the judgment

MLG seeks to enforce is the product of section 998, we are not convinced that the doctrine of equitable estoppel can be used to escape the statute's requirements. Moreover, MLG has not shown the elements of equitable estoppel have been satisfied, as the record does not reflect Rabineau made any misrepresentations of material fact to MLG, or that MLG relied on any such misrepresentations to its detriment. (See *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 584 [application of equitable estoppel requires satisfaction of *all* of the following elements: "(a) a representation or concealment of material facts; (b) made with knowledge, actual or virtual, of the facts; (c) to a party ignorant, actually and permissibly, of the truth; (d) with the intention, actual or virtual, that the ignorant party act on it; and (e) that party was induced to act on it. [Citation.]"].)

DISPOSITION

The order vacating the judgment is affirmed. Respondents shall recover their costs on appeal.

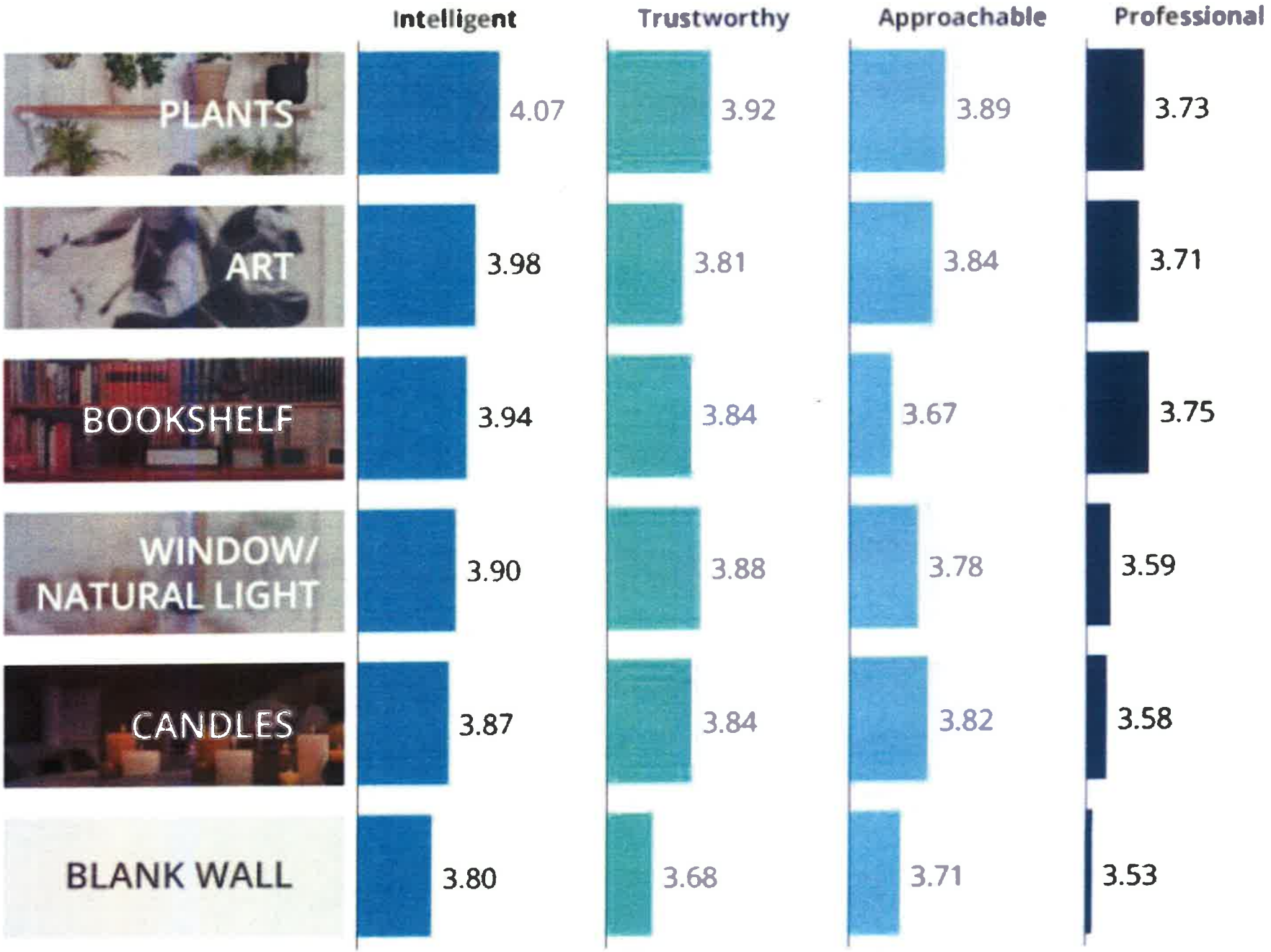
CERTIFIED FOR PUBLICATION

CURREY, J.

WE CONCUR:

WILLHITE, Acting P. J.

COLLINS, J.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JW2021-FS-20

ZOOM SHORTCUTS

- Mute or unmute audio: *Alt + A* ***(Command + Shift + A)***
- Mute the entire group at once: *Alt + M* ***(Command + Control + M)***
- Start or stop video: *Alt + V* ***(Command + Shift + V)***
- Pause or resume screen sharing: *Alt + T* ***(Command + Shift + T)***
- Start recording a meeting: *Alt + R* ***(Command + Shift + R)***
- Pause or resume screen recording: *Alt + P* ***(Command + Shift + P)***
- Switch camera: *Alt + N* ***(Command + Shift + N)***
- Raise or lower hand: *Alt + Y* ***(Option + Y)***
- Open the invite window: *Alt + I* ***(Command + I)***

The shortcut commands above are listed for Windows PC and Mac users. Mac users will want to use the ones in bold parentheses.

Gail A. Glick
JUDICATE WEST

ADVOCATE
March 2021

Pandemic "time-out"

ETHICAL ISSUES IN VIRTUAL MEDIATION; ZOOM DOES NOT GIVE YOU LICENSE TO CHUCK YOUR ETHICAL OBLIGATIONS TO CLIENTS, OPPOSING COUNSEL OR THE MEDIATOR

I frequently describe mediation as a "time-out" from the litigation process. Mediation is an opportunity for the litigants to take a pause, discuss the case frankly with a third-party neutral, and achieve a resolution without having to endure the ongoing pain of a litigation and, ultimately, a trial or arbitration. Although it is a time-out from the normal rigors of litigation, the lawyers must remember that mediation is not a time-out from their ethical obligations to their clients and to each other.

The COVID-19 crisis has thrown us abruptly into a virtual universe, where lawyers no longer have the luxury of sitting with their clients in the same room, or even in the same city, while mediating disputes. Virtual mediations have become the norm, and it is likely that we will be practicing law for many years into the future with virtual platforms as the preferred mode of meeting, so long as COVID-19 and other pandemics remain part of our reality.

Misbehaving on Zoom

Since spring 2020, I have exclusively conducted mediations by Zoom. My mediator colleagues and I have noted that many mediation participants behave in ways in which they never would have behaved had they been in the more formal environment of a conference room, both for the good and for the bad. Some parties and lawyers attempt to lurk behind a turned-off video feed. We have seen lawyers using drugs and drinking alcohol, parties seeming inebriated, parties lying on their beds throughout the mediation day, parties disappearing from the mediation session, parties participating in mediation from their hospital beds, and hidden "participants" to the mediation suddenly emerging onscreen at various times during our virtual mediation sessions.

In this article, I identify some of California's ethical rules and aspirations, and I address some of the ways in which lawyers and mediators can be mindful to avoid violating their ethical obligations when zealously representing their clients in pursuing a resolution in mediation.

Mediators' ethical obligations

So far, mediators' ethical obligations in California are only aspirational. In August and September of 2005, the American Arbitration Association and the American Bar Association adopted and approved the Model Standards of Conduct for Mediators ("Model Standards"), which revised the original 1994 standards. These standards, "unless and until adopted by a court or other regulatory authority do not have the force of law." Nevertheless, mediators should beware that the Model Standards "might be viewed as establishing a standard of care for mediators."

The California Rules of Court were amended with the adoption of minimum standards of conduct for mediators in *court-connected* mediation programs in civil cases in 2007. These rules are "intended to guide the conduct of mediators…, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process." At the same time, the rules point out that they do not establish a ceiling on good practice or discourage anyone from educating on best practices, they do not create a basis for challenging a settlement agreement reached in connection with a mediation, and they do not create a basis for a civil action against a mediator. (Rules of Court, rule 3.850, et seq.)

Party self-determination

The first standard of the Model Standards is party self-determination. (Model Stds. of Conduct for Mediators, Std. I.) The parties come together voluntarily, without coercion, and with the ability to make free and informed choices as to the process and the outcome of the mediation. (*Ibid.*) A mediator should advise the parties of the importance of consulting other professionals, i.e., their attorneys, to help them make informed choices. Practically speaking, this means that I, the mediator, must ensure that, although I am an experienced attorney by training, the parties and lawyers fully understand that I do not intend to give legal advice to them, and the parties should look to their respective lawyers for advice as to how to negotiate and resolve their case. Even if a mediator has worked with the lawyer-clients in the past on numerous occasions, or even if the mediator knows that the lawyer-clients are well-versed in the rules and methods of mediation, the mediator must take the time to advise the lawyers' clients that they should look to their lawyers for legal advice to assist them in making an informed, good decision, rather than relying on the mediator, who is there only to assist the parties in getting to "yes."

Standard I(B) of the Model Standards states, "[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." The danger of violating this standard arises frequently and plays out in subtle ways in the daily lives of mediators. For example, there are frequent opportunities for a mediator to see the imminence of a specific result in the middle of a mediation session, which could lead some mediators to push for that result. The reasoning for pushing a certain result can be perfectly ethical or it can violate the aspiration of party self-determination.

For example, some parties may inform the mediator that it is essential that the mediation be concluded within a certain short time frame or for a specific amount of money. With that input from the parties, the mediator can use her "clairvoyance" to shorten the process. If the goal is merely to please a repeat lawyer-client, or to please a lawyer-client who has promised to speak well of the mediator in an online forum, then a mediator may well violate this rule of party self-determination. "Cutting to the chase" in mediation can seem to be a satisfying tactic of the impatient lawyer, but it frequently results in a mediator taking control out of the hands of the parties and their attorneys in the process, which is antithetical to the self-determinative aspirations of mediation.

Impartiality

Standard II of the Model Standards requires mediators to show impartiality. They should not demonstrate any favoritism, bias, or prejudice. Further, a mediator should not accept or give gifts, favors, loans, or other items of value that might raise a question as to their perceived impartiality. (*Id.* at Std. II(B)(2).) Mediators may accept or give de minimus gifts or incidental items or services to facilitate a mediation or respect cultural norms so long as these do not raise questions as to the mediator's impartiality. (*Id.* at Std. II(B)(3).) Under these standards, mediators should not pay for potential clients' meals, and they should not send holiday or birthday gifts. If they receive any gifts from any lawyer-clients, they should give them away or return them to the sender with a polite declining note. If a mediator finds that the mediator is not able to conduct a mediation in an impartial manner, then the mediator must withdraw from mediating the dispute.

During my career of litigating disputes, I have often heard colleagues impugn the ethics of mediators based on certain law firms' penchant for employing those mediators. Simply because a mediator is a favorite of a firm you dislike does not mean the mediator is dishonest, biased, or not suited to help you settle your dispute. The truth is, at least in the employment law field, there are "go to" mediators who everyone knows are adept in resolving cases. It will be inevitable that a firm that specializes in employment law will use some of the same mediators repeatedly. I recommend a reassessment of such situations with this food for thought: If your opposing counsel proposes a mediator, this means they are

likely to take the mediator seriously and feel more compelled to resolve the case for fair value.

Conflicts of interest

Model Standard III requires that mediators must avoid conflicts of interest. The subject matter of a dispute, as well as the identity of the parties and their attorneys, may raise a conflict and question of a mediator's impartiality. (*Id.* at Std. III(A).) The mediator must make a reasonable inquiry to determine whether there are any conflicts, and the mediator must disclose any conflicts as soon as they are reasonably known. If all parties to the mediation agree to waive the conflicts, the mediator may proceed to mediate the dispute (*Id.* at Std. III(D).) Subsequent to a mediation, "a mediator must not establish a relationship with any of the participants in any matter that could raise questions about the integrity of the mediation" (*Id.* at Std. III(F).)

Lawyers are required to be ethical in virtual mediation

Mediating virtually does not somehow relieve lawyers of the obligation to abide by the ethical rules of our legal profession. All of the California Rules of Professional Conduct ("Rules") that apply to us in litigation apply to us in a Zoom mediation. In the mediation context, the Rules I see implicated most frequently are Rules 1.4 through 1.6, 3.10, and 4.1.

Rule 1.4 requires lawyers to "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation" and "keep the client reasonably informed about significant developments relating to the representation." (Rules Prof. Conduct, rule 1.4, subds. (a)(2), (a)(3).) The Rules also require lawyers to explain matters to the client to permit *the client* to make an informed decision. The lawyer must promptly communicate all terms and conditions of any offer of settlement if it is a "significant development" in the representation. (Rules Prof. Conduct, rule 1.4.1, subds. (a), (b), and comment.)

Rule 1.5 disallows a lawyer from making an agreement for, or charging, an unconscionable fee. Rule 1.5, subdivisions (b)(1) through (b)(13) set forth the factors to consider in determining whether a lawyer is charging an unconscionable fee, including,

> the amount of the fee in proportion to the value of the services performed; the relative sophistication of the lawyer and the client; the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; ...the amount involved and the results obtained; ...the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer or lawyers performing the services; ...the time and labor required; and whether the client gave informed consent to the fee.

Rule 1.6 and section 6068, subdivision (e)(1) of the Business and Professions Code impose confidentiality on lawyers and requires them to maintain inviolate the confidences of their clients.

Rule 3.10 disallows a lawyer to threaten criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. Rule 4.1 prohibits a lawyer from making a knowingly false statement of material fact or law to a third person.

Avoid violating the Rules of Professional Conduct in Zoom mediations

Provide reasonable consultation to your client

The pandemic dictates that lawyers cannot meet with clients in person prior to a mediation session. As a result, it is imperative that lawyers carefully plan for the mediation with their clients to prepare them properly for the virtual session. This is the *reasonable consultation* prong of lawyers' ethical best practices. Lawyers should schedule a Zoom meeting *by video* with clients for a date well in advance of the mediation session to discuss the process, explain how the negotiation might proceed, and advise the client on how to behave during the mediation session. It is also important to ensure that your client knows how to use the Zoom platform, has access to technology that will allow the client to meaningfully participate in the Zoom session, and is familiar with how to be admitted to the meeting, how to agree to accept "breakout room" invitations, how to turn on and off their audio and video, how to comport themselves during the session, and how to leave the session. As you are reading this, if you do not know how to do these things yourself, you have an ethical obligation to get educated on the technologies that are in mainstream use among your colleagues in the legal profession.

Because often lawyers are not present with their clients in person during the Zoom mediation, they have to make extra efforts to *keep the client reasonably informed about significant developments* during the mediation day. Especially for those lawyers who like to meet with the mediator separately from their clients by going to a separate break-out room or texting or speaking on the phone with the mediator, it is imperative that the lawyer speak with the client by phone, e-mail, or text promptly upon hearing new information from the mediator throughout the mediation session. After all, it is the client, not the lawyer, who must make an informed decision on how to resolve the case.

Obviously, drinking alcohol or ingesting drugs during a mediation will impact a lawyer's ability to provide reliable advice and reasonable consultation to a client. It is best to avoid substance abuse, and it is certainly a best practice to avoid all substances during the mediation session. The same is true for your clients. Strongly advise them against imbibing in alcohol or other inebriating substances throughout the mediation. Among other things, substance use has a negative impact on a client's ability to give informed consent to the terms of a settlement if the parties reach a deal at mediation. It can also have an impact on parties' and attorneys' ability to behave in

a dignified and professional way, which can be detrimental to your ends.

Ensure conscionability of the attorney's fee

The ethics and conscionability of the lawyer's fee can pose an issue in mediation, especially when cases are settled prior to the lawyers having expended much effort in pursuing the client's claims or defenses. It is imperative that plaintiffs' counsel ensure that their fees charged are not unconscionable given the totality of the circumstances involved in each client's case. Now that many of us are performing all work tasks remotely, all lawyers involved in the representation should track their hours and the specifics of the work completed for the client so that they can justify the fee charged. Even when the fee agreement calls for a contingent fee in a personal injury dispute, where there is no opportunity to make a petition for fees after prevailing at trial or arbitration, a well-documented representation in a billing statement or billing software can go a long way to quell any suggestion that the lawyer's fee is unconscionable. It also helps lawyers explain the fee breakdown to a client in the course of a mediation as the parties are arriving at a final number for settlement.

Employment mediations and truthfullness

In virtual mediations, as with mediation in person, there is an obligation of truthfulness in representations of the law and facts of the case. A time when this is seen frequently in the employment defendant's room is when the mediator asks whether insurance coverage exists, whether there is a reservation of rights, and the limits of liability on the insurance coverage for the dispute. Defense counsel has an obligation to answer truthfully.

Difficult questions in the plaintiff's room in an employment case include whether the plaintiff is currently working following an alleged wrongful termination, the plaintiff's current rate of pay, their date of hire at the new job, and whether they have sought any psychiatric treatment (counseling, medication) for the wrongs alleged in the lawsuit. All of these facts go to mitigation of damages and are highly relevant. Legal ethics require plaintiff's counsel to tell the truth here. Truthful answers indicating that the plaintiff obtained a job promptly and for a similar or higher wage than at the original job about which the parties' dispute arises can have a devastating impact on the value of the plaintiff's economic damages. A response that the plaintiff has not taken any psychotropic medicines and has not sought any psychiatric treatment can put a significant dent in the defendant's perceived value of the emotional distress losses. Despite that these facts may demonstrate weakness in the case, the plaintiff's counsel is obligated to disclose them.

Civility is ethical and makes sense in mediation

Civility is an aspirational part of California's ethics rules. Numerous courts in California provide civility guidelines to litigants, and the oath for new attorneys in California requires that lawyers treat opposing counsel with "dignity, courtesy, and integrity." The Los Angeles Superior Court's Guidelines for Civility in litigation state that "[n]either written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue." They also require that counsel behave in a courteous manner, both in writing and orally. The Civility Guidelines of the Orange County Superior Court explain that "[u]ncivil or unprofessional conduct not only disserves the individual involved, it demeans the profession as a whole and our system of justice." Further, local bar associations require lawyers to conduct themselves in a professional and civil manner at all times when engaged in bar activities.

It is good practice to take these civility rules seriously when interacting with the mediator as well as your opposing counsel. Besides being the right thing to do, courteous behavior establishes your professionalism and engenders confidence in your abilities in the mediator's mind. It will allow the mediator to share their belief with your opposing counsel that you are professional, competent, and ready to strike a fair deal. Remember that it is not just your client who needs to convince the mediator of the client's veracity and the righteousness of the case. Ideally, your conduct should have the same positive impact on the mediator's perception of your client's case.

Promising confidentiality in multi-state mediation may be impossible

In addition to the allure of a "time-out" from the rigors of litigation, mediation is also appealing and effective because it is normally a confidential process. Mediators cannot and will not ever testify for or against the parties in their litigation, and you may not subpoena mediator's records or have the mediator testify in your proceeding. This is the law in California. (Evid. Code, § 1119.)

In a national dispute, however, this promise of mediation confidentiality might not hold true. For example, this may happen where the case is mediated in a federal court or arbitrated dispute between parties from different states with different mediation confidentiality rules. Even if the mediation agreement states that California law applies to the mediation and any dispute about it, a foreign state's court might not enforce this choice of law provision and require testimony or production of information in that foreign state's proceeding. This will vitiate the confidentiality that mediators have promised to uphold.

As this example demonstrates, although conducting virtual mediations for parties outside of the state of California seems appealing at first blush, mediators and interstate litigants should beware of the unlikely, but possible, result of breach of confidentiality. Unless and until there is a uniform code concerning confidentiality of the mediation process

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throughout the United States, we must tread carefully when dealing with multi-party, multi-state disputes. (See *Larson v. Larson* (D. Wyoming, April 27, 2017) [order that Wyoming choice of law rule applied to a Colorado-based mediation, and allowed discovery of PowerPoint presentation used in a mediation session among diverse parties].)

Lawyers have a duty of confidentiality to their clients, but Zoom mediation from our homes, especially during the COVID-19 stay-at-home orders, makes keeping client confidences much more difficult than when we work from our offices.

First of all, to the extent that lawyers' clients are participating in a mediation with their relatives and other household members in close proximity, the attorney-client privilege may be vitiated. Secondly, if the platform from which the parties mediate can be compromised, then confidentiality may be impossible. Further, clients sometimes are unaware of the need for a private place from which to conduct their mediation sessions.

It is at once amusing and alarming to see lawyers' and parties' children and other household members in the background and foreground in a Zoom mediation. Likewise, if the mediator has non-staff people in close proximity in the mediator's home, the mediation confidentiality is destroyed. Mediators as well as lawyers must be vigilant to ensure that confidentiality is maintained. To the extent it is not, all parties must be apprised of this fact so that they can make an informed decision on whether to proceed with the mediation in light of these risks to confidentiality.

Where a party wishes to have a friend or relative present for support, a solution is to formalize their presences in the mediation and obtain their commitment to the confidentiality of the process. Lawyers should discuss confidentiality of the process with their clients prior to the mediation session so that issues around confidentiality can be resolved in a timely manner.

Conclusion

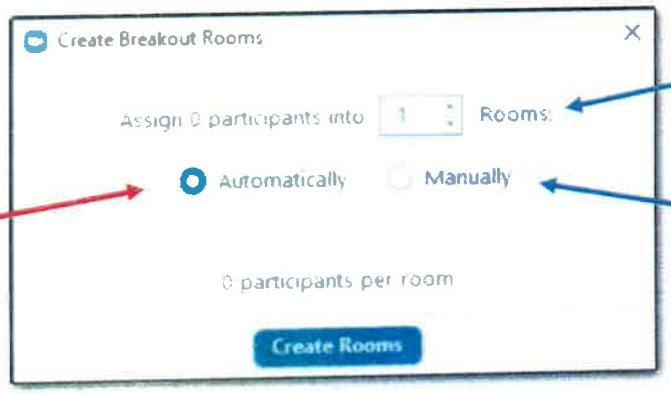
Although we should not leave our ethics at the door of a mediation session, if lawyers do fail to abide by the rules of ethics in mediation, it appears that they remain insulated from liability. The public policy of encouraging candor being necessary for a successful mediation remains paramount in this state. So far, the California Supreme Court has refused to invade the confidentiality of the process, even in instances where a party to mediation has sued an attorney for malpractice and conflict of interest in the proceeding. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113.) Nevertheless, may you continue to represent your clients with civil, ethical advocacy in all of your mediation sessions.

After a 26-year litigation career, Gail Glick became a full-time neutral mediator and arbitrator with Judicate West *in 2020. She mediates employment, PI, business, and lemon law disputes throughout California. Gail is a former Chair of LACBA's Labor and Employment Law Section and a Fellow of the College of Labor and Employment Lawyers. She received her J.D. from Loyola Law School and her B.A., cum laude, from Amherst College.*

Zoom Breakout Rooms – Best Practices, Caveats & Gotchas

- **Make sure you plan ahead and have all the rooms created in the beginning. Once the rooms are open - you are stuck with what you have**
- **Do NOT click Create Rooms until you set it to "Manually"!**
- **ALWAYS Make sure you uncheck** "Allow participants to return to the main session at any time"
- **Do NOT check** "Breakout rooms close automatically after... minutes"
- **Never Click " Close All Rooms " – unless you want a Joint Session**
- **When leaving a breakout room – be sure to click " Leave Breakout Room " not "Leave Meeting" or "End Meeting for All"**

Zoom Breakout Rooms – Room Settings Warnings



Set Desired # of Rooms

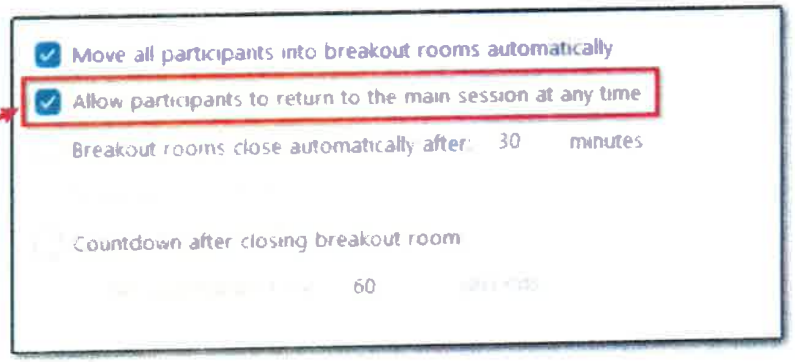
"Automatically" is the Default
DO NOT LEAVE IT THIS WAY

Set Room Creation to "Manually"

If you create rooms with the "Automatically" option – the parties will be automatically and arbitrarily assigned to rooms randomly – definitely NOT what you want!

Zoom Breakout Rooms – Room Settings Warnings

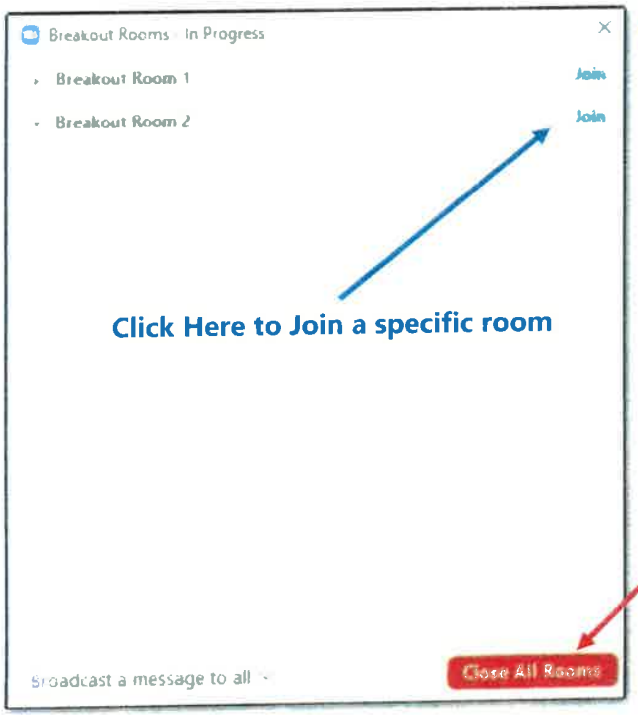
You need to change the Default Room settings



You'll want to uncheck "Allow participants to return..."

Make sure you uncheck the above which is on by default. Otherwise parties can leave the breakout room and go back to the main room on their own.

Zoom Breakout Rooms – Using the Breakout Rooms Dialog



If you want to close this dialog – click the "X" do NOT click the red button below

Be CAREFUL not to click " Close All Rooms " unless you actually do want a *JOINT SESSION* with all parties

Zoom Breakout Rooms – Leaving a Breakout Room

Clicking here will end the session for everyone

Clicking here will end the session for you

This is the one you want – click it to leave the Room and then you can join another room.

Zoom: Multiple Sessions vs. Breakout Rooms: Pros and Cons

Multiple Sessions

- Simple, Easy & Safe
- Quicker to start the mediation
- Slower to move between sessions
- Rigid Approach
- No side conversations with video

Breakout Rooms

- More flexible and nimble approach
- Move between rooms quickly
- Easy side conversations w/ Video
- Slower to start the mediation
- Requires up front planning of rooms
- More burden on Neutral
- Riskier Approach – mistakes are easy