

ETHICAL CHALLENGES IN MEDIATION

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EFFECT OF COVID-19 ON MEDIATION PROCESS

- Number of mediations
- Timing of mediations
- Effect of Covid-19 on settlement expectations
- More arbitrations as an alternative to trial?

PRE-MEDIATION PROCESS

- Position statements • provide to opposing counsel?
- What materials are helpful? • how much is too much?
- Pre-mediation communication between counsel and mediator • purpose?
• ethical? • how much is too much?

MEDIATION PROCESS

- Zoom v. in person • advantages/disadvantages
- Post-Covid, will Zoom become the exception or the rule?
- Attendance/participation by claim reps • require?
- Joint conference remarks by counsel • frequency? • helpful or hurtful to process?

- Role of mediator when counsel clearly misunderstands or misstates the law • appropriate to intervene? • ethical?
- Post-mediation communication in cases not settled during "formal" mediation process • ethical?
- Memorandum of Understanding • contents
- Biggest impediments to successful mediations

IOWA COURT RULE 11 (copy attached)

Rule 11.1 SCOPE

Rule 11.2 SELF-DETERMINATION

Rule 11.3 IMPARTIALITY

Rule 11.4 CONFLICTS OF INTEREST

Rule 11.5 COMPETENCE

Rule 11.6 CONFIDENTIALITY

Rule 11.7 QUALITY OF THE PROCESS

Rule 11.8 ADVERTISING AND SOLICITATION

Rule 11.9 FEES AND OTHER CHARGES

Rule 11.10 ADVANCEMENT OF MEDIATION PRACTICE

IOWA CODE CHAPTER 679C (copy attached) (selected provisions)

679C.104 PRIVILEGE AGAINST DISCLOSURE-ADMISSIBILITY-DISCOVERY

679C.105 WAIVER AND PRECLUSION OF PRIVILEGE

679C.106 EXCEPTIONS TO PRIVILEGE

679C.107 PROHIBITED MEDIATOR REPORTS

679C.108 CONFIDENTIALITY

679C.109 MEDIATOR'S DISCLOSURE OF CONFLICTS OF INTEREST-BACKGROUND

679C.115 MEDIATOR IMMUNITY

IOWA COURT RULE 11

Rule 11.1 Scope. These standards apply to mediators who are lawyers licensed to practice law in Iowa, mediators who participate in any mediation program approved by a court of this state, and mediators in any matter an Iowa court order or rule requires to be mediated.
[Court Order November 10, 2011, effective January 1, 2012]

Rule 11.2 Self-determination.

11.2(1) A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

a. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these standards.

b. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help the parties make informed choices.

11.2(2) A mediator shall not undermine any party's self-determination for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media, or others.

[Court Order November 10, 2011, effective January 1, 2012]

Rule 11.3 Impartiality.

11.3(1) A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias, or prejudice.

11.3(2) A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

a. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

b. A mediator should neither give nor accept a gift, favor, loan, or other item of value that raises a question as to the mediator's actual or perceived impartiality.

c. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

11.3(3) If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

[Court Order November 10, 2011, effective January 1, 2012]

Rule 11.4 Conflicts of interest.

11.4(1) A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest that reasonably raises a question of a mediator's impartiality can arise from a mediator's involvement with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional.

11.4(2) A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

11.4(3) A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

11.4(4) If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it to all parties as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

11.4(5) If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

11.4(6) Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals, or organizations following a mediation in which the parties, individuals, or organizations were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

[Court Order November 10, 2011, effective January 1, 2012]

Rule 11.5 Competence.

11.5(1) A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

a. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings, and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

b. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

c. A mediator should have available for the parties information relevant to the mediator's training, education, experience, and approach to conducting a mediation.

11.5(2) If a mediator, during the course of a mediation, determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the

parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

11.5(3) If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, or medication, or is otherwise impaired, the mediator shall not conduct the mediation.
[Court Order November 10, 2011, effective January 1, 2012]

Rule 11.6 Confidentiality.

11.6(1) A mediator shall maintain the confidentiality of all information the mediator obtains in mediation, unless the parties otherwise agree or as required by applicable law.

a. If the parties to a mediation agree, the mediator may disclose information obtained during the mediation.

b. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

c. If a mediator participates in teaching, research, or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

11.6(2) A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person any information that was obtained during that private session without the consent of the disclosing person.

11.6(3) A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

11.6(4) Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

[Court Order November 10, 2011, effective January 1, 2012]

Rule 11.7 Quality of the process.

11.7(1) A mediator shall conduct a mediation in accordance with these standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency, and mutual respect among all participants.

a. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

b. A mediator should only accept cases when the mediator can satisfy the reasonable expectations of the parties concerning the timing of a mediation.

c. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

d. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

e. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide only if the mediator can do so consistent with these standards.

f. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

g. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes.

h. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

i. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation.

j. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications, or adjustments that would make possible the party's capacity to comprehend, participate, and exercise self-determination.

11.7(2) If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation.

11.7(3) If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation.

[Court Order November 10, 2011, effective January 1, 2012]

Rule 11.8 Advertising and solicitation.

11.8(1) A mediator shall be truthful and not misleading when advertising, soliciting, or otherwise communicating the mediator's qualifications, experience, services, and fees.

a. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

b. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

11.8(2) A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

11.8(3) A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

[Court Order November 10, 2011, effective January 1, 2012]

Rule 11.9 Fees and other charges.

11.9(1) A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses, and any other actual or potential charges that may be incurred in connection with a mediation.

a. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required, and the rates customary for such mediation services.

b. A mediator's fee arrangement should be in writing unless the parties request otherwise.

11.9(2) A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

a. A mediator should not enter into a fee agreement that is contingent upon the result of the mediation or amount of the settlement.

b. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to impact adversely the mediator's ability to conduct a mediation in an impartial manner.

[Court Order November 10, 2011, effective January 1, 2012]

Rule 11.10 Advancement of mediation practice.

11.10(1) A mediator should act in a manner that advances the practice of mediation. A mediator promotes this standard by engaging in some or all of the following:

a. Fostering diversity within the field of mediation.

b. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

c. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

d. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

e. Assisting newer mediators through training, mentoring, and networking.

11.10(2) A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators, and work with other mediators to improve the profession and better serve people in conflict.

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IOWA CODE 679C

679C.104 Privilege against disclosure — admissibility — discovery. 1. Except as otherwise provided in section 679C.106, a mediation communication is privileged as provided in subsection 2 and is not subject to discovery or admissible in evidence in a proceeding unless the privilege is waived or precluded as provided by section 679C.105. 2. In a proceeding, the following privileges shall apply: a. A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication. b. A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator. c. A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant. 3. Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation. 2005 Acts, ch 68, §9; 2006 Acts, ch 1010, §158 Referred to in §679C.103, 679C.105, 679C

679C.105 Waiver and preclusion of privilege. 1. A privilege under section 679C.104 may be waived in a record or orally during a proceeding if it is expressly waived by all mediation parties and if all of the following apply: a. In the case of the privilege of a mediator, the privilege is expressly waived by the mediator. b. In the case of the privilege of a nonparty participant, the privilege is expressly waived by the nonparty participant. 2. A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under section 679C.104, but only to the extent necessary for the person prejudiced to respond to the disclosure or representation. 3. A person that intentionally uses a mediation to plan, to attempt to commit, or to commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege pursuant to section 679C.104. 2005 Acts, ch 68, §10 Referred to in §679C.103, 679C.104

679C.106 Exceptions to privilege. 1. No privilege exists under section 679C.104 for a mediation communication that involves any of the following: a. An agreement evidenced by a record signed by all mediation parties to the agreement. b. A communication that is available to the public under chapter 22 or made during a session of a mediation which is open, or is required by law to be open, to the public. c. A threat or statement of a plan to inflict bodily injury or commit a crime of violence. d. A plan to commit or attempt to commit a crime, the commission of a crime, or activity to conceal an ongoing crime or ongoing criminal activity. e. A communication that is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator. f. Except as otherwise provided in subsection 3, a communication that is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a mediation party based on conduct occurring during a mediation. g. A communication that is sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult

protective services agency is a party, unless the child or adult protection case is referred by a court to mediation and a public agency participates.

2. There is no privilege under section 679C.104 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in any of the following situations: a. A court proceeding involving a felony or misdemeanor. b. Except as otherwise provided in subsection 3, a proceeding to prove a claim to rescind or reform a contract or a defense to avoid liability on a contract arising out of the mediation. 3. A mediator shall not be compelled to provide evidence of a mediation communication referred to in subsection 1, paragraph “f”, or subsection 2, paragraph “b”. 4. If a mediation communication is not privileged under subsection 1 or 2, only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection 1 or 2 does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose. 2005 Acts, ch 68, §11 Referred to in §679C.103, 679C.104, 679C.107

679C.107 Prohibited mediator reports. 1. Except as required in subsection 2, a mediator shall not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation. 2. A mediator may disclose any of the following: a. Whether the mediation occurred or has terminated, whether a settlement was reached, and attendance. b. A mediation communication as permitted under section 679C.106. c. A mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment. 3. A communication made in violation of subsection 1 shall not be considered by a court, administrative agency, or arbitrator. 2005 Acts, ch 68, §12

679C.108 Confidentiality. Unless subject to chapter 21 or 22, mediation communications are confidential to the extent agreed to by the parties or provided by other law or rule of this state. 2005 Acts, ch 68, §13 Referred to in §13.14, 216.15B, 654A.13

679C.109 Mediator’s disclosure of conflicts of interest — background. 1. Before accepting a mediation, an individual who is requested to serve as a mediator shall do all of the following: a. Make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation. b. Disclose any such known fact to the mediation parties as soon as is practicable before accepting a mediation. 2. If a mediator learns any fact described in subsection 1 after accepting a mediation, the mediator

shall disclose it as soon as is practicable. 3. At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute. 4. A person that violates subsection 1, 2, or 7 is precluded by the violation from asserting a privilege under section 679C.104. 5. Subsections 1, 2, 3, and 7 do not apply to an individual acting as a judge. 6. This chapter does not require that a mediator have a special qualification by background or profession. 7. A mediator must be impartial, unless after disclosure of the facts required in subsections 1, 2, and 3 to be disclosed, the parties agree otherwise. 2005 Acts, ch 68, §14; 2006 Acts, ch 1030, §79

679C.115 Mediator immunity. A mediator or a mediation program shall not be liable for civil damages for a statement, decision, or omission made in the process of mediation unless the act or omission by the mediator or mediation program is made in bad faith, with malicious purpose, or in a manner exhibiting willful or wanton disregard of human rights, safety, or property. This section shall apply to mediation conducted before the workers' compensation commissioner and mediation conducted pursuant to chapter 216. 2005 Acts, ch 68, §20