



Abraham Lincoln wrote, “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man.” The Preamble to the Florida Rules of Professional Conduct, consistent with Lincoln’s words, counsels the lawyer as a negotiator to seek an advantageous result for the client consistent with requirements of honest dealing with others. The Florida Rules of Professional Conduct also give direction on how the application of legal ethics can lead to success at mediation.

Competence

Be prepared. Lawyers often arrive at the mediation unprepared, not ready to competently and diligently represent their clients. The lawyer’s first duty under Rule 4-1.1 is competence. That is, the lawyer must have the knowledge, skill, thoroughness, and preparation reasonably necessary to provide competent representation.¹ The successful lawyer prepares for mediation as if preparing for trial. Competent handling of a particular matter at mediation includes inquiry into and analysis of the factual and

legal elements of the problem.² The successful lawyer must unearth all of the facts that can be admitted into evidence, prepare a detailed analysis of the case, and create a persuasive theory on how to reach a settlement agreement.

Communication

Communicate. Properly communicating with clients increases the chances of success at mediation. Under Rule 4-1.4, a lawyer must promptly inform the client of any decision or circumstance with respect to which the client’s informed consent is required, and the lawyer must reasonably consult with the client about the means of negotiating a settlement.³ A lawyer must provide a client with a professional assessment of the advantages and disadvantages of a proposed settlement so the client can make a fully informed decision. When meeting with the client, the lawyer discusses the negotiation strategy, starting points, concessions, and aims for the settlement zone. This enables the lawyer to act with commitment to the interests of the client at mediation. Remember, the decision on whether to pursue settlement discussions belongs to the client who needs the information in order to make that decision. In fact, in accordance with Rule 4-1.2, a lawyer must abide by the client’s decision whether to settle a matter.⁴



“Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time.”
— Abraham Lincoln

Truthfulness in Statements to Others

Tell the truth. Under Rule 4-4.1, a lawyer must not knowingly make a false statement of material fact or law. Nevertheless, an attorney is under no obligation to tell what the client will accept to settle, either to the opposing party or to the mediator.⁵ The comment

explains that under the generally accepted conventions in negotiation, certain types of statements such as a party’s intentions as to an acceptable settlement are not taken as statements of material fact.

Applying legal ethical principles can lead to successful compromises at mediation if we are thoroughly prepared, properly communicate, and are committed to telling the truth.

¹ Florida Rules of Professional Conduct, Rule 4-1.1.

² Ibid. Rule 4-1.1 Comment.

³ Ibid. Rule 4-1.4.

⁴ Ibid. Rule 4-1.2.

⁵ Ibid. Rule 4-4.1.



Author:
Thomas Newcomb Hyde -
HCBA Mediation and Arbitration Law Section’s Representative to the Thirteenth Judicial Circuit Professionalism Committee