

Session Three

10:00 – 11:00 a.m.

(Ethics)

"Mediation Ethics"

Hon. Suzan S. Ponder (Ret.)

Baton Rouge City Court

Baton Rouge



HON. SUZAN PONDER

ARBITRATOR & MEDIATOR

Louisiana

JUDGE PONDER was elected in May, 1993 to serve on the Baton Rouge City Court and retired June 30, 2017. She handled criminal and civil cases, including landlord-tenant matters, automobile accidents and contract disputes. During her tenure in City Court, Judge Ponder, in addition to handling her regular docket, presided over Sobriety Court, which addressed offenders with multiple DWI offenses. Prior to her election, she served as an Assistant District Attorney for East Baton Rouge Parish as well as engaging in private practice.

EDUCATION & SPECIAL TRAINING

B.S., Louisiana State University, 1977

J.D., Southern University Law Center, 1983

MEMBERSHIPS/AFFILIATIONS

- Louisiana State Bar Association
- Baton Rouge Bar Association
- Chair of Baton Rouge Bench Bar Conference
- Co-Chair of Baton Rouge Bar 75th Anniversary Committee

AWARDS

- Recipient of Baton Rouge Bar President's Award
- Appointed by Louisiana Supreme Court to Judiciary Commission Rules Revision Committee
- Appointed by Louisiana Supreme Court as Louisiana's Delegate to National Conference on Assisting Pro Se Litigants
- Selected by Louisiana Supreme Court to attend Louisiana Judicial Leadership Institute
- State of Louisiana - DWI Law Enforcement Award
- Louisiana City Judges Association, Past President
- Paula G. Manship YMCA, Board of Directors, Past Member
- Volunteer, East Baton Rouge Parish Public Schools, (VIPS) Friend Read-Along Program
- Adjunct Professor, Southern University Law Center

MEDIATION ETHICS

BY

SUZAN S. PONDER

JANUARY 19, 2018

LOUISIANA MEDIATION ACT

Louisiana Revised Statutes 9:4101 provides for the Louisiana Mediation Act. Paragraph C (4) defines “mediation” as “a procedure in which a mediator facilitates communication between the parties concerning the matters in dispute and explores possible solutions to promote reconciliation, understanding and settlement.”

L.R.S. 9:4102 states that “Counsel are encouraged to discuss with their clients the appropriateness of using mediation in any civil case pending in the courts.”

RULES OF PROFESSIONAL CONDUCT - Promptness

Rule 3.2 of the Rules of Professional Conduct provide that “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” Rule 1.3 states that “A lawyer shall act with reasonable diligence and promptness in representing a client.”

What are some advantages to mediation?

1. Your client decides, with your advice and guidance, whether to accept or reject your opponent’s offer as opposed to a judge or jury deciding the outcome.
2. Your client usually receives the settlement funds within a few weeks as opposed to several months or years due to the trial and appellate process.
3. Your client may incur less costs and attorney fees if resolved through mediation rather than trial.

4. Your client's privacy is protected since mediations are confidential. L.R.S.9:4112.
5. Your client can leave the mediation with a written settlement agreement rather than the uncertainty and stress of a trial outcome.
6. A mediation does not limit the parties strictly to a monetary resolution.

OFFICE OF DISCIPLINARY COUNSEL – 2016 Statistics

The Office of Disciplinary Counsel received approximately 3000 complaints in 2016 of which formal charges were filed in 82 cases. The ten most common allegations of misconduct in 2016 are as follows:

1. Neglect/Lack of Diligence, Rule 1.3
2. Lack of Communication, Rule 1.4
3. Misrepresentation/Dishonesty, Rule 8.4(c)
4. Scope of Representation, Rule 1.2
5. Ineffective Assistance of Counsel, Multi-Rule
6. Failure to Account, Rules 1.5 & 1.15
7. Fee Dispute/Excessive Fee, Rule 1.5
8. Incompetence, Rule 1.1
9. Conflicts of Interest, Rules 1.7-1.11
10. Return of File, Rule 1.16(d)

In 2016, complaints were filed by judges, ODC, opposing attorney, opposing party, past client, present client, self-reporting, successor attorney, unrelated attorney and unrelated party.

RULES OF PROFESSIONAL CONDUCT - Competence

Rule 1.1 (a) states that “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

BE PREPARED is the requirement of Rule 1.1(a). Your client is entitled to competent representation which requires you to consider all risks and possibilities of your client’s case.

- How well do you know the facts of the case?
- How well do you know your client?
- Do you have any documents that you plan to use at the mediation?
- Do you have a summary of medical expenses including copies of supporting statements for opposing counsel and the mediator?

- Have you looked at the strengths and weaknesses of your client's case and discussed both with your client?
- How have you prepared your client for the mediation?

RULES OF PROFESSIONAL CONDUCT – Meritorious Claims and Contentions and CODE OF CIVIL PROCEDURE ARTICLE 863 – Signing of Pleadings , effect

The Rules of Professional Conduct at Rule 3.1 provides “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”

The Code of Civil Procedure Article 863 sets forth signing of pleadings at paragraph B “... the signature of an attorney or party shall constitute a certification by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact; that it is warranted by existing law or a good faith

argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Paragraph D of Article 863 provides that an “appropriate sanction” may be imposed, which “may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading including a reasonable attorney’s fee.”

RULES OF PROFESSIONAL CONDUCT - Fairness to Opposing Party
and Counsel

Rule 3.4 sets forth that “A lawyer shall not

- (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonable diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent of a client, and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

NEW CASE EVALUATION

In representing a new client, prepare the case based on the that facts that your client presented, not those you wish you could create. Be honest with your client by not setting false expectations. Evaluate their case and explain how you arrived at your conclusions for their success/failure.

An important factor in preparing the case is your familiarity with opposing counsel. Consider their reputation and work ethic. Are they willing to work with you? Are they attentive to detail? Are they precise or vague in their work product? How promptly do they return communications?

PREPARING YOUR CLIENT FOR MEDIATION

Early Considerations to Discuss with Your Client

- Discuss the advantages to mediate versus going to trial.
- Discuss the level of compromise that your client is willing to consider.
- Discuss whether your client will make remarks during the opening session.
- Discuss the importance of your client remaining open-minded, level-headed and patient to insure that the mediation process will be successful.

The Mediation Process

Preparing your client for mediation is part of your ethical responsibilities which may be done by a letter to your client explaining the day of the mediation.

- The mediation is a meeting at an office where the lawyers and clients meet to attempt to settle their case.
- You and your client will be present throughout the mediation.
- The mediator is a lawyer who has training in helping people settle their case.
- The mediator does not decide the case nor advise the litigant what amount of money is appropriate.

- The mediator's role is to assist the parties in coming to an agreement that will resolve the case.
- The client's decision to settle their case rests with them.
- They do not have to settle their case if they are dissatisfied with defendant's offer.
- The mediation will occur at your office or at the mediator's office,
- The joint session is first and then the caucus sessions take place.
- The people present at the joint session—you, your client (and a spouse, parent or other advisor), lawyers on the other side, and, in most cases, a representative of the party who has been sued and the mediator.

- The mediator will explain how the mediation will be conducted.
- Advise your client that you may make opening remarks explaining your case to the mediator.
- Prior to the mediation a “position paper” setting forth the facts of their case may be submitted to the mediator.
- You and your client should decide if your client will make any statements during the opening session.
- The defendants will make their opening comments.
- The parties go to separate conference rooms.
- The mediator will meet with us to discuss your case in more depth.

- The information that we share with the mediator is confidential unless we tell him that it is acceptable to discuss certain information with the other side.
- Once we discuss your case with the mediator, the mediator will ask us to make an opening offer.
- The mediator will then meet with opposing counsel to discuss their case and ask for their offer to resolve your claim.
- The mediator goes back and forth between the conference rooms until the case is settled or until the parties tell the mediator that the case cannot be settled.
- The mediation may take several hours so they need to be patient so an acceptable settlement can be reached.

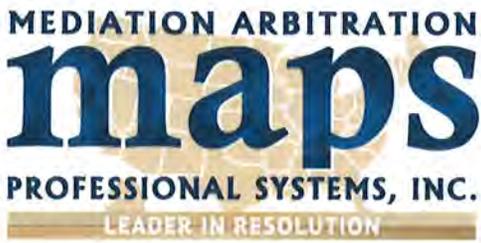
- Suggest that they bring something to read so they will not be bored during the caucuses.
- Advise your client that their attire should be comfortable and as if they were going to court.
- If your case is settled at the end of the mediation, explain that the mediator will prepare a settlement agreement that the plaintiff's attorney, the plaintiff, the defendant's attorney and the adjuster sign.
- If the case does not settle, advise your client that the mediator will follow up to help resolve their case or that the case will proceed to trial.

MEDIATION EXTRAS

1. The Rules of Professional Conduct apply in representing your client in a mediation or in a trial.
2. Your client's most important focus is to resolve their case. They are not interested in the other cases that you have mediated, nor that you and your opponent/mediator are friends nor anything that is not relevant to resolving their case. Some war stories have value and do help in making or emphasizing an important point.
3. Since each case is different, beware of creating a set pattern of negotiating.
4. The mediator will have some knowledge about your case, but don't assume that the mediator knows more than they really do and certainly not as much as you do.

5. Acknowledge that your case has weak spots. It enhances your credibility and, more often than not, provokes like responses.
6. In mediation – work toward each other.
 - a. T.E.A.M. approach – Together Everyone Achieves More
 - b. Don't forget – Conciliatory Advocacy
7. The mediator is not a magician, but your friend!
 - a. Try not to overload the mediator with too much confidential information.
 - b. The mediator's intention is always to reach resolution, not act as an agent of the parties to prepare for trial.
 - c. Trust that as the mediation process moves, the mediator has combined knowledge from both sides that neither party knows.

- d. Strategy is a full-time requirement so don't think that you know what the mediator is doing or not doing.
- e. Be tenacious – NEVER QUIT



Intake Initials: _____
 Date Submitted: _____
 Case No.: _____
 Reopen: _____
(maps Internal Use Only)

Case Transmittal Form

Short Caption, including first name:

 [Claimant/Plaintiff(s)]

v.

 [Insured/Defendant(s)]

Case Submitted by: _____ for Plaintiff Defendant Adjuster

Mediator(s) Requested: _____

Mediation date/time desired: _____ **Are we holding a date? If yes, what date?** _____

Location: Metairie _____ Baton Rouge _____ Other _____

Have you **discussed mediation** with the other side? Yes _____ No _____ Notes: _____

Are there any **trial dates** or **time limitations**? _____ **If yes, what date?** _____

If no, **what time frame to schedule?** _____

How are the fees to be handled: Paid by Submitter _____ Split (Explain): _____ Other _____

Type of case:

- Personal Injury Property Damage Workers' Comp Products Liability Med. Malpractice
 Construction Maritime Commercial Domestic Other _____

Does this case, or any others at your firm, have any **lien issues** related to **Medicare/Medicaid, group/private health plans** (including **Class Actions**)? _____ If so, **we can help**. Please call us at 800 -443-7351, or use this referral form: [LRS referral form](#)

Parties Involved:

Plaintiff's Counsel:

Name: _____
 Represents: _____
 Phone No.: _____
 Email: _____
 Avail dates: _____

Plaintiff's Counsel:

Name: _____
 Represents: _____
 Phone No.: _____
 Email: _____
 Avail dates: _____

Defense Counsel:

Name: _____
 Represents: _____
 Phone No.: _____
 Email: _____
 Avail dates: _____

Adjuster:

Name: _____
 Company: _____
Claim No.: _____
 Phone No.: _____
Email: _____
 Avail dates: _____

PLEASE FORWARD THIS FORM TO:

TWO LAKEWAY CENTER
 3850 N. CAUSEWAY BLVD, SUITE 400
 FREE:
 METAIRIE, LOUISIANA 70002

PHONE: (504) 831-2141
 TOLL (800) 443-7351
 FAX: (504) 837-2566

Website: <http://maps-adr.com/>
 E-mail: resolutions@maps-adr.com

BATON ROUGE LOCATION:

TWO UNITED PLAZA
 8550 UNITED PLAZA BLVD, SUITE 904
 BATON ROUGE, LOUISIANA 70809

PHONE: (225) 769-4553
 TOLL FREE: (866) 769-4553

Additional Parties

Counsel:

Name: _____
Represents: _____
Phone No.: _____
Email: _____
Avail dates: _____

Counsel:

Name: _____
Represents: _____
Phone No.: _____
Email: _____
Avail dates: _____

Adjuster:

Name: _____
Company: _____
Claim No.: _____
Phone No.: _____
Email: _____
Avail dates: _____

Adjuster:

Name: _____
Company: _____
Claim No.: _____
Phone No.: _____
Email: _____
Avail dates: _____

Counsel:

Name: _____
Represents: _____
Phone No.: _____
Email: _____
Avail dates: _____

Counsel:

Name: _____
Represents: _____
Phone No.: _____
Email: _____
Avail dates: _____

Adjuster:

Name: _____
Company: _____
Claim No.: _____
Phone No.: _____
Email: _____
Avail dates: _____

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Claim No.: _____
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Avail dates: _____

Counsel:

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Represents: _____
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Email: _____
Avail dates: _____

Adjuster:

Name: _____
Company: _____
Claim No.: _____
Phone No.: _____
Email: _____
Avail dates: _____

Adjuster:

Name: _____
Company: _____
Claim No.: _____
Phone No.: _____
Email: _____
Avail dates: _____

AGREEMENT TO MEDIATE

We, the undersigned parties, hereby agree to participate in mediated settlement negotiations provided by Mediation Arbitration Professional Systems, Inc. (**maps**) in the following matter:

CaseName

in accordance with the following terms:

MEDIATION PROCEDURES: **maps** will administer the mediation in accordance with its Mediation Procedures.

MEDIATOR: The parties agree that _____ will be the mediator. All parties recognize that mediation is voluntary settlement negotiation and that the mediator is not a judge and has no authority to compel the parties to settle. The parties acknowledge that the mediator is an independent contractor and not an agent or employee of MAPS. The parties acknowledge that neither MAPS nor the mediator will provide legal advice or counsel. The mediator is a neutral intermediary and shall not act as an advocate for either party. All parties are encouraged to consult with their attorneys before and during the mediation and before finalizing a settlement.

CONFIDENTIALITY: The participants to this mediation agree and acknowledge that mediation's very nature involves settlement negotiations by and between the various parties and the mediator. During the course of the mediation the mediator will discuss the issues, facts and problems involved in the dispute and may ask for the revelation of information that may be considered confidential. The parties are encouraged to reveal to the mediator whatever information they deem appropriate to settle the case. The parties therefore acknowledge and agree that in order for the mediation process to be as effective as possible, the mediator as well as all participants must be free to openly and candidly discuss all issues involved in the dispute being mediated and therefore must be insulated and protected from being compelled to testify, produce records or otherwise reveal information, opinions, views, facts, documents, positions, or statements brought out or made during the mediation process. During the mediation process no records shall be kept or otherwise preserved whether by written, stenographic, audio or visual means.

Therefore, each participant agrees not to make any effort to compel the mediator, anyone associated with his or her mediation company, or any other participant in the mediation process to testify or otherwise reveal information, opinions, views, facts, documents, positions, statements, or conduct brought out during the mediation process.

Further, the parties agree that they shall not compel, or attempt to compel, any other party or participants to the mediation to testify or produce records or otherwise reveal information, opinions, views, facts, documents, positions, statements, or conduct brought out or made during the mediation process. This paragraph is in no way intended to prevent parties from undertaking normal discovery as a result of information and documents revealed at the mediation.

In the event an attempt is made to compel the mediator or anyone associated with his or her company to testify and/or otherwise reveal information or produce records pertaining to any aspect of the mediation process to a third party, the parties to the mediation agree to take whatever legal steps necessary to protect the mediator and/or person connected with his or her company from such attempts.

By signing this agreement or otherwise agreeing to participation in the mediation, the parties and participants further agree that nothing said or done in the mediation process may be used by either party to: make a claim that the other party was in bad faith or otherwise in violation of Revised Statute 9:4108 (whether or not the mediation was court ordered); make or otherwise pursue a claim that the other party was in bad faith for failing to make an "unconditional tender"; or to make or pursue a claim for penalties and attorney's fee under Revised Statute 22:1892 or 22:1973.

