

SCMA 24th Annual Fall Conference
The Working Mediator: Improving the Culture of Conflict

“Nuts and Bolts”

Session 2: Confidentiality, Neutrality and Ethics

Chair: **Dr. Jack R. Goetz, Esq.**, Academic Lead, CSUN Program in Mediation and Conflict Resolution

Panelist: **Jan F. Schau, Esq.**, Past President of the SCMA, a veteran of 1,000 mediations and a current member of the International Academy of Mediators

- 1) Selected California Rules of Court and California Evidence Code sections pivotal to mediation procedure and confidentiality (Dr. Jack R. Goetz, Esq.)
 - a) Attendance Needed at a Mediation: California Rules of Court 3.894
 - b) Content of a Mediator Opening: California Rules of Court 3.857
 - c) Confidentiality under the California Rules of Court: California Rules of Court 3.854
 - d) Confidentiality under the Evidence Code
 - i.) Evidence Code §1121
 - ii.) Evidence Code §1119
 - iii.) Evidence Code §1120 and §1122
 - iv.) Evidence Code §1123
- 2) Coping with Confidentiality, Neutrality, and Ethics in Mediation (Jan F. Schau, Esq.)
- 3) Question and Answer session relating to the Session 2 topics

SCMA 24th Annual Fall Conference
The Working Mediator: Improving the Culture of Conflict



“Nuts and Bolts”

Session 2: Confidentiality, Neutrality and Ethics

Part 1: Selected California Rules of Court and California Evidence Code sections pivotal to mediation procedure and confidentiality

Chair: Dr. Jack R. Goetz, Esq.

Dr. Goetz is the Academic Lead in a program he initiated in 2009 at California State University at Northridge, a certificate program in Mediation and Conflict Resolution. He was the founding dean and president of Concord Law School, the nation’s first fully online nationally accredited law school. He earned his doctorate in Education, and his unique understanding and application of traditional and modern teaching philosophies have established him as an innovator for career-oriented students who wish to achieve academic and professional advancement. In 2002, Dr. Goetz’s contributions to the field of distance education were recognized by the presentation of the Distance Education and Training Council’s Distinguished Recognition Award.

Dr. Goetz has been a member of the California State Bar since 1979 and actively mediates litigated cases throughout Los Angeles and Ventura counties privately as well as for the Superior Courts. In recognition of his work at CSUN and privately as a volunteer mediator for the Los Angeles Superior Court, he was awarded the Alternative Dispute Resolution department’s “Volunteer of the Year” award in 2012. Dr. Goetz additionally serves as an arbitrator and mediator for the Los Angeles County Bar Association and arbitrates cases for FINRA, the self-regulatory agency that oversees securities brokers and dealers.

Dr. Goetz is a graduate of San Diego State University, Economics, 1976, received his M.B.A. at Pepperdine University (1990), his J.D. from Boston University (1979), and his Ph.D. from Capella University (2006).

Email: jack.goetz@csun.edu

A) Attendance needed at a Mediation

Rule 3.894. Attendance, participant lists, and mediation statements

(a) Attendance

- (1) All parties and attorneys of record must attend all mediation sessions in person unless excused or permitted to attend by telephone as provided in (3). If a party is not a natural person, a representative of that party with authority to resolve the dispute or, in the case of a governmental entity that requires an agreement to be approved by an elected official or a legislative body, a representative with authority to recommend such agreement, must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).

- (2) If any party is insured under a policy of insurance that provides or may provide coverage for a claim that is a subject of the action, a representative of the insurer with authority to settle or recommend settlement of the claim must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).
- (3) The mediator may excuse a party, attorney, or representative from the requirement to attend a mediation session under (1) or (2) or permit attendance by telephone. The party, attorney, or representative who is excused or permitted to attend by telephone must promptly send a letter or an electronic communication to the mediator and to all parties confirming the excuse or permission.
- (4) Each party may have counsel present at all mediation sessions that concern the party.

B) Content of a Mediator Opening

Rule 3.857. Quality of mediation process

(c) Explanation of process

In addition to the requirements of rule 3.853 (voluntary participation and self-determination), rule 3.854(a) (confidentiality), and (d) of this rule (representation and other professional services), at or before the outset of the mediation the mediator must provide all participants with a general explanation of:

- (1) The nature of the mediation process;
- (2) The procedures to be used; and
- (3) The roles of the mediator, the parties, and the other participants.

(d) Representation and other professional services

A mediator must inform all participants, at or before the outset of the first mediation session, that during the mediation he or she will not represent any participant as a lawyer or perform professional services in any capacity other than as an impartial mediator. Subject to the principles of impartiality and self-determination, a mediator may provide information or opinions that he or she is qualified by training or experience to provide.

C) Confidentiality under California Rules of Court

Rule 3.854. Confidentiality

(a) Compliance with confidentiality law

A mediator must, at all times, comply with the applicable law concerning confidentiality.

(b) Informing participants of confidentiality

At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings.

(c) Confidentiality of separate communications; caucuses

If, after all the parties have agreed to participate in the mediation process and the mediator has agreed to mediate the case, a mediator speaks separately with one or more participants out of the presence of the other participants, the mediator must first discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants. Except as required by law, a mediator must not disclose information revealed in confidence during such separate communications unless authorized to do so by the participant or participants who revealed the information.

(d) Use of confidential information

A mediator must not use information that is acquired in confidence in the course of a mediation outside the mediation or for personal gain.

D) Confidentiality under the Evidence Code (Brief Summary of Code Sections follows)

EC 1121 – Mediator is not allowed to give court report or recommendation other than whether mediation was held and an agreement was reached.

EC 1119 – No written or oral communication made in the course of mediation is subject to discovery or admissible in court.

EC 1120 – Documents or statements discoverable outside of mediation are not made confidential by disclosure in mediation.

EC 1122 – Materials prepared for mediation (such as memos, charts, etc.) are not discoverable unless all parties agree.

EC 1123 -- Settlement agreement is released from confidentiality if parties want it to be; e.g. they say it is binding or enforceable, or if it is needed to show fraud or duress.