

## The Lawyer as Abider

The lawyer whose client is in mediation is an advisor, not a zealous advocate. To quote the rule,

“As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications.”

Preamble, A Lawyer’s Responsibilities, SJC Rule 3:07  
Professional Conduct.

This short article arises from several recent encounters with experienced family lawyers who are understandably confused and upset by trying to advocate zealously for their client in mediation. The lawyer has difficulty allowing the client to do what the clients thinks is best for him or her under the circumstances. The lawyer may even tell the client to stop talking to the other party or to the mediator for fear that the client may agree to something the lawyer does not think is appropriate. Some of these lawyers tell me they fear accusations of malpractice if they are not a zealous advocate. I tell them, “Read the rule.”

The rule is even more helpful in addressing the circumstance when the client, having been fully informed of his legal rights and obligations, and understanding their practical implications, tells his lawyer to accept a settlement offer which the lawyer feels is woefully inadequate and certainly less than what a court is likely to do under

established applications of existing law and well short of what the lawyer has been consistently demanding on behalf of his client. Guess what: it's not the lawyer's decision. I tell them, "Read the rule."

"A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." Rule 1.2, Scope of Representation, Rule 3:07.

It's hard to be more clear than that. Webster's New International Dictionary Second Edition defines "abide" as, among other things, "to acquiesce in, to conform to, to accept as valid and take the consequences of; as, to abide by a decision."

The lawyer for a client in mediation is in the most difficult position of anyone in the case, torn between gladiator and rubber stamp. For example: lawyers who have carefully analyzed the unanimous opinion and remarkable footnotes of the SJC in their July, 2010 decision in *Ansin v. Craven-Ansin* see many complex criteria for defining what sort of marital agreement between spouses may or may not be enforceable later on. The lawyer needs to make sure the client is informed of the practical implications of signing a proposed marital agreement, and may disagree with what the client insists upon or accepts. Thus many experienced family lawyers make sure they write a letter to the client explaining his or her choices and the recommendation of the lawyer; some lawyers keep a copy of that letter signed by the client to acknowledge receipt and understanding of the advice.

The role of the lawyer is so complex that the American Bar Association is now sponsoring Moot Court competitions in law schools for lawyers in mediation and gives an award annually to the team that best represents their clients in mediation. In addressing this challenge, I hope that lawyers representing clients in mediation can find guidance and comfort by going back to what they do best: when in doubt, read the rule.

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