



*Commercial/Business, Intellectual Property, Technology,  
Entertainment, and Employment Disputes*

## **Justice Marie L. Garibaldi American Inn of Court for ADR**

### *ADR Ethics Through Movies and Television*

April 13, 2023

#### I. Negotiation: Truthfulness to Others

##### A. “It’s a Negotiation” from *Intolerable Cruelty* (Universal Pictures 2003)

1. Available at <https://www.youtube.com/watch?v=6PpQk63iIWw>
2. In this romantic black comedy about divorce and lawyers set in Los Angeles, private investigator Gus Petch is tailing the wealthy and married Rex Rexroth (Edward Herrmann) on a drunken night out with a blonde. When they stop at a motel, Petch bursts in and tapes them with a video camera. He takes the evidence of infidelity to Rexroth’s wife, Marilyn Rexroth (Catherine Zeta-Jones), whose primary motivation is obtaining wealth and independence through a divorce. Mr. Rexroth hires Miles Massey (George Clooney), a top divorce attorney and the inventor of the “Massey pre-nup,” a completely foolproof prenuptial agreement. In this scene, Mrs. Rexroth and her lawyer, Freddy Bender (Richard Jenkins), fail to reach an agreement with Massey and Mr. Rexroth.

##### B. Question for Discussion

To what lengths may an attorney go in terms of the things s/he says to an opposing party or counsel during the course of a negotiation?

##### C. Potentially Relevant Authority

1. N.J. Rule of Professional Conduct (RPC) 4.1 – Truthfulness in Statements to Others
  - (a) In representing a client a lawyer shall not knowingly:
    - (1) make a false statement of material fact or law to a third person; or
    - (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

II. Mediation: Self-Determination, Impartiality, and Quality of the Process

A. Opening Scene from *Wedding Crashers* (New Line Cinema 2005)

1. Available at [https://www.youtube.com/watch?v=h\\_HyeLhmF0](https://www.youtube.com/watch?v=h_HyeLhmF0)
2. This comedy follows two Washington, D.C. divorce mediators, John Beckwith (Owen Wilson) and Jeremy Grey (Vince Vaughn) who crash weddings under false identities in an attempt to meet and seduce women. In this opening scene of the film, a couple (played by Dwight Yoakam and Rebecca De Mornay) in a highly contentious and emotionally charged divorce proceeding are participating in a mediation session co-mediated by John and Jeremy.

B. Questions for Discussion

1. What conduct of the two mediators fell below prevailing ethical standards of practice?
2. What did the two mediators do well?
3. Did the attorneys' conduct fall below prevailing ethical standards in any way?

C. Potentially Relevant Authority

1. Model Standards of Practice for Family and Divorce Mediation (Model Standards of Practice)
  - a. Standard I: A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.
  - b. Standard III: A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.
  - c. Standard IV: A family mediator shall conduct the mediation process in an impartial manner.
  - d. Standard XI: A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reason. . . . A. Circumstances under which a mediator should consider suspending or terminating the mediation, may include, among others: 1. the safety of a participant or well-being of a child is threatened; . . . 3. a participant is unable to participate due to the influence of drugs, alcohol, or physical or mental condition.

2. Model Standards of Conduct for Mediators (Model Standards of Conduct)

- a. Standard I.A.: A mediator shall conduct a mediation based on the principle of party self-determination. . . . 2. 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 them make informed choices.
- b. Standard II.B.: A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality. . . . 2. 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. Standard VI.A.: 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. . . . 10. 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.
- d. Standard VI.C.: 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.

3. N.J. Standards of Conduct for Mediators in Court Connected Programs (Standards in Court-Connected Programs)

- a. Standard I.B.: The primary role of a mediator is to facilitate a voluntary resolution of the dispute, allowing the parties the opportunity to consider all options for settlement.
- b. Standard I.C.: Because a mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, a mediator should make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.
- c. Standard VI.A.: A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties. To further these goals, a mediator shall:

A. Work to ensure a quality process and to encourage mutual respect among the parties, including a commitment by the mediator to diligence and to procedural fairness.

d. Standard VI.C.: Provide adequate opportunity for each party in the mediation to participate fully in the discussions, and allow the parties to decide when and under what conditions they will reach an agreement or terminate the mediation.

4. D.N.J. L. Civ. R. 301.1(g)

(1)(A): A mediator shall maintain impartiality while raising questions for the parties consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.

(1)(C): A mediator shall not accept or give a gift, request, favor, loan or any other item of value to or from a party, attorney, or any other person involved in and arising from any mediation process.

5. NJ RPC 1.1 – Competence

A lawyer shall not:

(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.

(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

III. Mediation: Self-Determination, Impartiality, and Confidentiality

A. Interview of Ice-T for his show *The Mediator with Ice-T* (Fox 2021)

1. Available at <https://www.youtube.com/watch?v=SogAiENJNa4>
2. In this reality television series, Ice-T purports to assist parties resolve their civil disputes after hearing from them both and consulting with various experts. This clip is an interview of Ice-T by Amy Kaufeldt of FOX35 Orlando about his show.

B. Questions for Discussion

1. What portions of Ice-T's purported conduct as a "mediator" implicate prevailing ethical standards for mediators?
2. What does Ice-T do well?

C. Potentially Relevant Authority

1. Model Standards of Practice

- a. Standard I: A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.
- b. Standard III.A.: A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate. . . .  
A. Before family mediation begins a mediator should provide the participants with an overview of the process and its purposes, including: . . . 7. informing the participants that the presence or absence of other persons at a mediation, including attorneys, counselors or advocates, depends on the agreement of the participants and the mediator, unless a statute or regulation otherwise requires or the mediator believes that the presence of another person is required or may be beneficial because of a history or threat of violence or other serious coercive activity by a participant.
- c. Standard IV: A family mediator shall conduct the mediation process in an impartial manner.
- d. Standard VII: A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.

2. Model Standards of Conduct

- a. Standard I.A.: A mediator shall conduct a mediation based on the principle of party self-determination.
- b. Standard II.B.: A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
- c. Standard V.A.: A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
  - 1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
  - 2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A family mediator shall conduct the mediation process in an impartial manner.

3. Standards in Court Connected Programs

- a. Standard I.B.: The primary role of a mediator is to facilitate a voluntary resolution of the dispute, allowing the parties the opportunity to consider all options for settlement.
- b. Standard II.A.: A mediator shall therefore avoid any conduct that gives the appearance of either favoring or disfavoring any party.
- c. Standard V.: To protect the integrity of the mediation, a mediator shall not disclose any information obtained during the mediation unless the parties expressly consent to such disclosure, or unless disclosure is required by applicable rules or law.

4. D.N.J. L. Civ. R. 301.1(g)

(1)(A): A mediator shall maintain impartiality while raising questions for the parties consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.

5. N.J. Rev. Stat. § 2A:23C-8 (Confidentiality)

Unless made during a session of a mediation which is open, or is required by law to be open, to the public, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

IV. Mediation: Self-Determination, Impartiality, and Quality of the Process

A. “Mediation” from *The Break-Up* (Universal Pictures 2006)

1. Available at <https://www.youtube.com/watch?v=yiZpb7GPLYs>
2. In this romantic comedy, Gary Grobowski (Vince Vaughn) and Brooke Meyers (Jennifer Aniston) meet at Wrigley Field during a Chicago Cubs game and begin dating, eventually buying a condominium together. Their relationship comes to a head after the latest in an escalating series of arguments. Initially, neither is willing to move out of their condo, and so they compromise by living as roommates. But they each begin acting out to provoke the other in increasingly elaborate ways. In this scene, their friend and realtor Mark Riggleman (Jason Bateman) attempts to “mediate” a resolution of their living situation.

B. Questions for Discussion

1. What conduct on the part of Mark fell below prevailing ethical standards of practice?
2. What did he do well?

C. Potentially Relevant Authority

1. Model Standards of Practice

- a. Standard IV.C.: A family mediator should not accept a dispute for mediation if the family mediator cannot be impartial.
- b. Standard IV.D.: A family mediator should identify and disclose potential grounds of bias or conflict of interest upon which a mediator's impartiality might reasonably be questioned. Such disclosure should be made prior to the start of a mediation and in time to allow the participants to select an alternate mediator.
- c. Standard IV.I.: A family mediator should withdraw pursuant to Standard XI, sub.A(7) ["if the mediator believes the mediator's impartiality has been compromised in accordance with Standard IV"] if the mediator believes the mediator's impartiality has been compromised or a conflict of interest has been identified and has not been waived by the participants.

2. Model Standards of Conduct

- a. Standard II.B.: A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality. . . .  
2. 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.
- b. Standard III.A.: 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 can arise from involvement by a mediator 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, that reasonably raises a question of a mediator's impartiality.
- c. Standard III.E.: 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.

3. Standards in Court Connected Programs

- a. Standard II.: A mediator shall only mediate a dispute in which there is reason to believe that impartiality can be maintained. When a mediator is unable to conduct the mediation in an impartial manner, the mediator must withdraw from the process.

- b. Standard III.A.: A mediator must disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator may proceed with the mediation only if all parties consent to mediate. Nonetheless, if the mediator believes that the conflict of interest casts doubt on the integrity of the mediation process, the mediator shall decline to proceed.
  - c. Standard III.B.(1).: Related Matters: A mediator who has served as a third party neutral, or any professional member of that mediator's firm/office, shall not subsequently represent or provide professional services for any party to the mediation proceeding in the same matter or in any related matter.
4. D.N.J. L. Civ. R. 301.1(g)
- (1)(B): A mediator shall withdraw from mediation if the mediator believes the mediator can no longer be impartial.
- (2)(E): A mediator shall not use the mediation process to solicit, encourage, or otherwise incur future professional services with any party.

V. Mediation: Impartiality and Quality of the Process

A. "The Mediator" from *Life of the Party* (Warner Bros. Pictures 2018)

- 1. Available at <https://www.youtube.com/watch?v=IPvDN8DW9sY>
- 2. In this comedy, after dropping off their 22-year-old daughter Maddie (Molly Gordon) for her senior year at Decatur University in Atlanta, Daniel Miles (Matt Walsh) tells his wife Deanna (Melissa McCarthy) that he wants a divorce because he has fallen in love with another woman, realtor Marcie Strong (Julie Bowen). Eventually, Deanna returns to college to complete her degree and ends up bonding with her daughter's friends. In this scene, Deanna, supported by her good friend Christine Davenport (Maya Rudolph), joins Dan, supported by Marcie, at a mediation session before the Mediator (Karen Maruyama) to prepare their divorce papers.

B. Questions for Discussion

- 1. What mediator ethical issues are raised by this scene?
- 2. What potential issues does Davenport's conduct raise?

C. Potentially Relevant Authority

- 1. Model Standards of Practice
  - a. Standard III.: A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to



mediate before the participants reach an agreement to mediate. . . .

C. The family mediator should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and throughout the process. A mediator should not agree to conduct the mediation if the mediator reasonably believes one or more of the participants is unable or unwilling to participate.

- b. Standard IV.C.: A family mediator should not accept a dispute for mediation if the family mediator cannot be impartial.
- c. Standard IV.D.: A family mediator should identify and disclose potential grounds of bias or conflict of interest upon which a mediator's impartiality might reasonably be questioned. Such disclosure should be made prior to the start of a mediation and in time to allow the participants to select an alternate mediator.
- d. Standard IV.I.: A family mediator should withdraw pursuant to Standard XI, sub.A(7) ["if the mediator believes the mediator's impartiality has been compromised in accordance with Standard IV"] if the mediator believes the mediator's impartiality has been compromised or a conflict of interest has been identified and has not been waived by the participants.
- e. Standard XI.: A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reason.

## 2. Model Standards of Conduct

- a. Standard II.B.: A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
- b. Standard VI.A.: 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. . . . 3. 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.

## 3. Standards in Court Connected Programs

- a. Standard II.B.: A mediator shall only mediate a dispute in which there is reason to believe that impartiality can be maintained. When a mediator is unable to conduct the mediation in an impartial manner, the mediator must withdraw from the process. . . . B. A mediator shall guard against prejudice or lack of impartiality because of any

party's personal characteristics, background, or behavior during the mediation.

- b. Standard VI: A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties. To further these goals, a mediator shall:
  - A. Work to ensure a quality process and to encourage mutual respect among the parties, including a commitment by the mediator to diligence and to procedural fairness.

4. D.N.J. L. Civ. R. 301.1(g)

(1)(B): A mediator shall withdraw from mediation if the mediator believes the mediator can no longer be impartial.

5. N.J. Rev. Stat. § 2C:21-22 (Unauthorized practice of law, penalties)

- 1. a. A person is guilty of a crime of the fourth degree if the person knowingly engages in the unauthorized practice of law.
  - b. A person is guilty of a crime of the third degree if the person knowingly engages in the unauthorized practice of law and:
    - (1) Creates or reinforces a false impression that the person is licensed to engage in the practice of law; or
    - (2) Derives a benefit; or
    - (3) In fact causes injury to another.
  - c. For the purposes of this section, the phrase "in fact" indicates strict liability.

VI. Mediation/Arbitration: Mixing Processes

A. "Mediation in Disclosure" from *Disclosure* (Warner Bros. 1994)

- 1. Available at <https://www.youtube.com/watch?v=0wtThDkhOO0>
- 2. In this thriller based on the Michael Crichton novel of the same name, the main focus of the story involves the issue of an alleged act of sexual harassment that took place in the offices of a computer technology company that was committed by Meredith Johnson (Demi Moore), a female superior, against Tom Sanders (Michael Douglas), a male subordinate. Meredith files a sexual harassment complaint against Tom, who, in turn, sues the company, alleging that it was Meredith who had harassed him. The parties engage in a mediation, the opening of which comprises the scene we will watch.

B. Questions for Discussion

What mediator ethical issues are raised by this scene?

C. Potentially Relevant Authority

1. Model Standards of Practice

- a. Standard II.A.: A family mediator shall be qualified by education and training to undertake the mediation. . . . A. To perform the family mediator's role, a mediator should: . . . 3. have education and training specific to the process of mediation.
- b. Standard III.: A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate. . . . A. Before family mediation begins a mediator should provide the participants with an overview of the process and its purposes, including: . . . 2. distinguishing family mediation from other processes designed to address family issues and disputes.

2. Model Standards of Conduct

- a. Standard VI.A.5., 6., and 8.:
  5. 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.
  6. 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.
  8. 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.

3. Standards in Court Connected Programs

- a. Standard IV.A.: A mediator appointed by the court shall have training and education in the mediation process, and shall have

familiarity with the general principles of the subject matter involved in the case being mediated.

D. “Beverly Goldberg Tries Representing Herself in Arbitration” from *The Goldbergs* (ABC 2013-present)

1. Available at <https://www.youtube.com/watch?v=RdC-uKSshtk>
2. *The Goldbergs* is an American sitcom television series that premiered on ABC on September 24, 2013. The show is produced by, among others, Adam F. Goldberg and is based on Adam’s childhood and family in the 1980s, with a childhood version of himself. It is set in an alternate version of the 1980s in the Philadelphia suburb of Jenkintown, Pennsylvania, and shows the reality of the 1980s through a preadolescent’s and, later in the series, teenager’s eyes. In this scene, Beverly Goldberg (Wendi McLendon-Covey), the mother, drags her daughter Erica (Hayley Orrantia) with her into a mediation (mistitled/mischaracterized as an arbitration), demonstrating that her knowledge of the law only comes from television.

VII. Arbitration: Integrity and Fairness of the Process, Impartiality, and Just Decision Making

A. “Drug Company Hearing – SNL” from *Saturday Night Live* (NBC, March 4, 2017)

1. Available at [https://www.youtube.com/watch?v=UPx\\_X3DjXy8](https://www.youtube.com/watch?v=UPx_X3DjXy8)
2. In this skit, a woman (Octavia Spencer) sues her former employer (Vanessa Bayer and Alex Moffat) for intellectual property theft in an arbitration proceeding.

B. Questions for Discussion

What arbitrator ethical issues are raised by this scene?

C. Potentially Relevant Authority

1. Code of Ethics for Arbitrators in Commercial Disputes
  - a. Canon I.D.: Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.
  - b. Canon I.F.: An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision.

- c. Canon IV.A.: An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.
  - d. Canon IV.B.: The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.
  - e. Canon V.A.: The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.
  - f. Canon V.B.: An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.
2. Code of Professional Responsibility for Arbitrators of Labor-Management Disputes
- a. 1.A.1.: Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters. An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions.
  - b. 1.C.3.: An arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator's impartiality.
  - c. 5.A.1.: An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.
- D. "Silicon Valley: Season 2 Episode 10 Clip | HBO" from *Silicon Valley* (HBO, June 7, 2015)
1. Available at <https://www.youtube.com/watch?v=L0mbOfJLTkc>
  2. This series, which ran from 2014-2019, parodied the culture of the technology industry in Silicon Valley, focusing on Richard Hendricks (Thomas Middleditch), a programmer who founds a startup company called Pied Piper, and chronicling his struggles to maintain his company while facing competition from larger entities. In season 2, Richard finds out that a rival company (Hooli) is suing Pied Piper for copyright infringement, falsely claiming that Richard developed Pied Piper's compression algorithm on Hooli time using company equipment. The parties ultimately agree to binding arbitration. In this scene, the arbitrator announces his final award.