

**THE WEST VIRGINIA STATE BAR
AGENDA - BASIC MEDIATOR TRAINING
Flatwoods, West Virginia - June 17-18, 2014**

DAY ONE - TUESDAY, JUNE 17, 2014

- 8:30 - 8:40** *Late Registration/Welcome/Introduction*
Anita R. Casey, Esq., Executive Director
The West Virginia State Bar
- 8:40 - 10:30** *Overview of Mediation – Part I*
Tom Patrick, Esq., Associate Teaching Professor
West Virginia University College of Law
- 10:30 - 10:40** **BREAK**
- 10:40 - 11:30** *Overview of Mediation – Part II*
Tom Patrick, Esq., Associate Teaching Professor
West Virginia University College of Law
- 11:30 - 12:20** *Mediation - A Comprehensive Approach to Conflict
Resolution*
The Honorable Michael J. Aloï
16th Judicial Circuit Court
- 12:20 - 1:20** **LUNCH**
- 1:20 - 2:35** *Elements of Mediation – Orientation and Information
Gathering*
Donald B. O’Dell, Esq.
O’Dell Law/Mediation, PLLC
Huntington, WV
- 2:35 – 3:05** *Orientation Role Play*
- 3:05 – 3:25** **BREAK**
- 3:25 – 4:40** *Elements of Mediation - Option Generation, Resolution
and Closure*
James M. Wilson, Esq.
Grafton, WV
- 4:40 – 5:00** *Wrap up*

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DAY TWO - WEDNESDAY, JUNE 18, 2014

- 8:30 - 8:40** *Late Registration*
- 8:40 - 9:00** *Introduction to Role Plays*
Room and Coach Assignments
Explanation and Distribution of Packets
Anita R. Casey, Esq., Executive Director
The West Virginia State Bar
- 9:00 - 10:30** *Mediation Role Plays – Round 1*
- 10:30 - 10:40** **BREAK**
- 10:40 - 12:30** *Video - Mediation Demonstration*
Discussion and Analysis of Video and Role Plays
Debra Scudiere, Esq.
Kay Casto & Chaney, PLLC, Morgantown, WV
- 12:30-1:30** **LUNCH**
- 1:30-2:45** *Mediation Role Plays – Round 2*
- 2:45-3:15** *Role-Play Wrap Up*
Draft Skeleton Settlement Agreement
- 3:15-3:30** **BREAK**
- 3:30 - 4:20** *Ethics*
Andrea J. Hinerman, Esq.
Office of Disciplinary Counsel
- 4:20 - 4:30** *Evaluation and Closure*

Professor Thomas O. Patrick
WVU College of Law



Professor Tom Patrick has completed twenty-two years of law school teaching, primarily at the West Virginia University College of Law. He has also served as Visiting Professor at the Notre Dame Law School in 2002-03 and as Director of Lawyering Process at the Charlotte School of Law in 2009-10. He received his law degree from West Virginia where he served on the editorial boards of the *West Virginia Law Review* and the *Journal of College and University Law*. Following graduation, he clerked for seven years for the Honorable Robert E. Maxwell, United States District Judge. He is admitted to practice in West Virginia and North

Carolina.


During his tenure, Professor Patrick has taught legal research and writing, appellate advocacy, alternative dispute resolution, interviewing, counseling, negotiation, and mediation. As an extension of his teaching, Professor Patrick has provided continuing legal education seminars and skills training for the West Virginia State Bar, the West Virginia Supreme Court, the Department of Education, Health and Human Services, the Public Service Commission, and many other entities. He has developed mediation initiatives and has trained mediators throughout West Virginia for its magistrate, family, circuit, and federal courts. He directs West Virginia University's Faculty and Staff Mediation Program.

Professor Patrick was selected for the West Virginia University College of Law Faculty Service Award in 1997; he received the West Virginia State Bar recognition for "Outstanding Leadership and Dedication to ADR in West Virginia" in 2002; he was awarded a West Virginia State Bar Certificate of Merit in 2008; and he was selected as a West Virginia Bar Foundation Fellow in 2012. Professor Patrick was promoted to Teaching Professor in the Spring of 2014.


WVU_{LAW}

Overview of Mediation

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THE WEST VIRGINIA STATE BAR



WVU_{LAW} Mediation Overview

Primary-party dispute resolution processes

Do nothing	Rights	Power/Position
Control	Positions	Aggression
Safety	Interests	Dominance
Save emotional costs	Priorities	Ego-centric behavior
	Needs	Expend everything
	Values	



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Mediation Overview

Third-party dispute resolution processes

Rights/proof Positions	Judicial Settlement Conference	Rights/reasons Interests
Judge/jury	Early Neutral Evaluation	Court-annexed
Arbitration	Summary Jury Trial	Federal agencies
Voluntary/binding	Neutral Fact Finder	Special Education
Compulsory/non-binding	Ombudsman	Workers' Comp
ALJs	Mini-trial	Family Mediation
Private Judge/Jury	Med-Arb	Peer Mediation
		Private Mediation

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Mediation Overview

Advantages of Dispute Settlement

- Preserves confidentiality
- Reduces delay and expense
- Avoids creation of precedent
- Tailors the resolution to the parties'
 - Priorities
 - Values
 - Needs
 - Interests
 - Rights

WVULAW **Mediation Overview**

Adjudication	Mediation
Focus—the past	Focus—the future
Focus—facts/law	Focus—relationships
Liability/fault	Restructured responsibility
Win—Lose	Win—Win
Result—rule of law	Result—custom resolution
Attorney-guided	Disputant-guided
Governed by court rules	Governed by the disputants' interests

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Interest-based Mediation

Encourages _____

Facilitates a frank exchange of _____

Promotes a productive level of _____

Helps each party

feel that his/her views are _____

understand the other person's viewpoint

AND appreciate its reasonableness

—at least from _____

Shifts the focus—from the _____ to the _____

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WVULAW **Mediation Overview**

Interest-based Mediation

- Provides the parties more _____ than court-ordered resolution
- Preserves or enhances the _____ of the parties
- Provides greater party _____ with the resolution
- Ensures greater _____ with the requirements of the resolution
- Enhances each party's _____ and returns to them _____ over their own lives

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WVULAW **Mediation Overview**

Why does conflict remain unresolved?

Public

Private

Event

Adjudication

1.

2.

3.

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WVULAW **Mediation Overview**

Scope and purpose of rules. Rule 1, W. Va. R. Civ. P.

These rules govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature whether cognizable as cases at law or in equity, with the qualifications and exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

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WVULAW **Mediation Overview**

Why are civil disputes not resolved *earlier* ?

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WVULAW Mediation Overview

What are the barriers to negotiation?



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Mediation Defined


_____ third person—the mediator

_____ the parties to resolve—by agreement— some

or all of the differences between them

Decision-making authority _____

Mediator _____ to decide any issue



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Role [skill] of the Mediator

- _____ the parties to reach their _____ / _____
- _____ agreement
- _____ communication
- _____ issues and interests
- _____ information to be collected or exchanged
- _____ joint problem-solving
- _____ settlement alternatives

Flexible process—tailored to the _____ needs

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WVULAW **Mediation Overview**

Stage I Orientation

Stage II Information

Stage III Option

Stage IV Resolution

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WVULAW **Mediation Overview**

Stage I Orientation

- Mediator's Opening Statement
- Bringing decision-makers face-to-face
- "Playing field" and "ground rules"
- Helping the participants "agree" to mediation
- Setting tone; building rapport; establishing an atmosphere for resolution

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WVULAW **Mediation Overview**

Stage II Information

- Establishing an agenda
- Using Passive and Active Listening
- Facilitating the flow of information
 - Facts—Perceptions—Issues
 - Rights—Positions—Interests
 - Wants—Needs—Priorities
 - Inclinations: "Leaps of Faith"
- Asking questions

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Stage III Option

- Spotting Dispute Resolution Barriers
- Keeping Negotiation—in focus? clear agenda?
- Generating Options
- Establishing objective criteria
- Testing Reality—viability? value?
- Helping the parties Select/Merge Options

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Stage IV Resolution

- Progress—movement
- Caucus
- Impasse
- Conditional agreement
- Full agreement
- Memorialize

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WVULAW **Mediation Overview**

Mediator Characteristics—Skills

- Effective in building _____ and _____
- Skillful at _____
- Ability to create a _____, _____ - _____ atmosphere between the disputants
- Ability to help the disputants _____ that may extend beyond their own perceived resolutions of the dispute

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WVULAW **Mediation Overview**

“Appropriate” cases—*perhaps*

- What are your client’s _____ for dispute resolution?
- What are the _____ to a successful negotiation?

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WVU**LAW** **Mediation Overview**

Client goals

- ✓ minimize cost
- ✓ minimize delay
- ✓ privacy
- ✓ maintain/improve relationships
- ✓ client participation desired/input critical
- ✓ develop skill in dispute resolution
- ✓ creative solution with lasting effect
- ✓ compliance with agreement or judgment
- ✓ neutral opinion (case evaluation)
- ✓ neutral decision (establish or overturn precedent)
- ✓ minimize/maximize recovery
- ✓ vindication

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WVU**LAW** **Mediation Overview**

Negotiation barriers

- ✓ communication breakdown
- ✓ unknown expectations
- ✓ posturing
- ✓ unrealistic expectations
- ✓ poor negotiation skills
- ✓ need for emotional outlet
- ✓ lack of preparation
- ✓ divergent lawyer/client interests or objectives
- ✓ reluctance to make the first "offer"
- ✓ divergent principles/values involved
- ✓ "sleeping" file problems
- ✓ wrong people or no people at the table
- ✓ disparate bargaining power
- ✓ information deficit
- ✓ factual determination critical
- ✓ legal determination critical

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WVULAW **Mediation Overview**

“Inappropriate” cases—*perhaps*

- Seeking to establish a right of recovery in a novel area of law
- Establish/overtake precedent
- Nature of the personalities/constituencies
- Resolution is not a high priority for the client

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WVULAW **Mediation Overview**

Mediation—it may be a matter of “style”

Evaluative	Facilitative	Transformative

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WVULAW **Mediation Overview**

Mediation—it may be a matter of “style”

Evaluative	Facilitative	Transformative

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MICHAEL JOHN ALOI
MARION COUNTY CIRCUIT COURT JUDGE

MICHAEL JOHN ALOI was born in Farmington, West Virginia, the youngest child of Sam and Frances Aloï and the grandson of Italian Immigrants. He attended Marion County Public Schools.

Judge Aloï graduated from West Virginia Wesleyan College in 1980 with honors where he served as Student Body President and received the Sheridan Watson Bell Award for Outstanding Christian Leadership. In 1983, Judge Aloï graduated from the West Virginia University College of Law, where he was the only member of his class to receive both Order of the Coif (top 10% of class) and Order of the Barristers. Upon graduation from law school, Judge Aloï entered into the private practice of law with his cousin and law partner Timothy J. Manchin, and they practiced together in Fairmont for 28 years.

Judge Aloï is Past President of the West Virginia State Bar (2002-2003) and was the first Marion County lawyer to serve as President of the West Virginia State Bar since Herschel Rose was President in 1968-1969. He served as President of the Marion County Bar Association from 1996-1997. In 2009-2010, he served as President of the Association for Conflict Resolution, a national association.

Judge Aloï was recognized as Pro Bono Attorney of the Year by the Appalachian Center for Law and Public Service in 1997, and was also recognized as the West Virginia Association for Justice Member of the Year in 2001. In April 2006, Judge Aloï was honored as a Foundation Fellow by the West Virginia State Bar Foundation. He received a Certificate of Merit from the West Virginia Bar in 2008 for outstanding service.

He has been selected for inclusion in "The Best Lawyers in America" and "Super Lawyers" for ADR. Judge Aloï is the only lawyer in West Virginia to be a Fellow of the American College of Civil Trial Mediators, and has received an A V rating from Martindale Hubble (the highest possible peer review rating for Legal Ability and Ethical Standards - only 5% of lawyers in Marion County have an AV rating.)

Judge Aloï was selected as one of the original mediators by the United States District Court for the Northern District of West Virginia for settlement week in 1987 and has mediated over 2,500 cases. He also served as an Arbitrator for the American Arbitration Association. Judge Aloï was selected as an Impartial Hearing Officer for the West Virginia Department of Education and served as Hearing Examiner pro tempore for the West Virginia Department of Human Rights and as a Hearing Examiner for the West Virginia Ethics Commission. He presently serves on the Board of the West Virginia Bar Foundation and is past Chairperson of the West Virginia State Bar Commission on Judicial Independence.

Judge Aloï is a graduate of Leadership Marion and a Past President of Action Marion. He has served as President of the United Way of Marion County, and President of the South Fairmont Rotary. He has also served as President of Family Service for Marion and Harrison Counties.

On July 8, 2011, Governor Earl Ray Tomblin appointed Judge Aloï as Circuit Judge for the 16th Judicial Circuit serving Marion County. Judge Aloï's appointment became effective August 1, 2011.

Judge Aloï is married to Dr. Susan Aloï and together they have four grown children, Joey, Alexander, Hannah Rose, and Iris.

BASIC MEDIATION TRAINING

Mediation – A Comprehensive Approach to Conflict Resolution

West Virginia State Bar

June 17, 2014
Flatwoods, WV

Presented by:

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Mediation – A Comprehensive Approach to Conflict Resolution

Michael John Aloï, Esq.

INTRODUCTION

The notion of healing and invoking higher principles to deal with a range of contemporary problems is weaving its way into the mainstream....This movement raises two questions for the mediation professionals.

First, have we, as mediators, been constrained by our role definition as a neutral from sharing more of our humanity? Have we been prohibited from drawing upon our higher consciousness or spiritual center to be present to the dispute in a way that might foster healing and inspire parties to seek the highest good? One could say we have preciously guarded neutrality as the standard at the expense of examining the role of compassion. We have honed our skills as conflict technicians, not conflict healers. I think we have an opportunity to ask if there is a way we can bring who we are at a higher level into our practice.

Second, are we asking enough of our disputants? Can we raise their goal aspirations, asking them to reach deeper into themselves than their self-interest to look at resolutions that bring genuine peace and healing or that address the greatest good? Are we doing enough as conflict interveners merely to bring about settlement without encouraging healing between parties who have continuing obligations or impact on the wider community? We are never just one against the other; we are always two parts of something larger. Should we have a responsibility to the whole – the greater good?

When we talk about augmenting the healing potential of mediation, we are talking about a twofold approach. **How can we remain connected to the highest and the best within ourselves? How can we inspire the highest and best within our clients?** There is more to all of us than the elements of the dispute, and calling all of who we are into play is the untapped potential of mediation – Lois Gold (Bowling pp183-84).

I. CIVIL MEDIATION

Few mediators question that ethics should play an important role in our work. However, there is not the same consensus concerning the role of spirituality in our work.

Ken Cloke, in his discussion of “Elements in a Unified Theory of Conflict Resolution” under the category of “Likely Level, Percent, Style of Resolution” provides an excellent context in which to discuss the place of spirit in our work. The following outcomes are listed:

Stop the Fighting (20%) *Conciliation*
Settle the Issues (60%) *Settlement*
Resolve the Underlying Reasons for the Dispute (90%) *Resolution*
Reach Forgiveness (98%) *Transformation*
Reconcile (100%) *Transcendence*
Synergy, Community (100%+) *Systems Design*

As civil mediators we spend 90% of our work – stopping the fight – settling the issues – and resolving the underlying issues. But what about the remaining 10% where Forgiveness and Transformation, Reconciliation and Transcendence take place? It is our belief that the remaining 10% is encouraged by inviting spirit into our mediation practice.

This is not an ideological directive. Imposing one's view of spirit in the mediation process can be as harmful as failing to recognize the presence of spirit in the process as evidenced by the parties' words and actions.

Upon reflection of my work (Michael John Aloï) as a mediator, the most satisfying moments (moments of light) were those where forgiveness and reconciliation occurred. The most disappointing moments (moments of darkness) were those when these opportunities were missed.

Upon further reflection it became clear to me that the more intentional I was about being open to the presence of spirit at the mediation, the more these moments of light occurred – and all of us were better for them having occurred. These moments took place in every type of civil mediation – be it personal injury cases, contract disputes, property disputes, and medical malpractice cases, moments occurred that involved matters of the spirit – recognizing the highest and best within all of us.

We cannot recognize spirit unless we discipline ourselves to do so. This recognition takes the same amount of energy as the “knowing” and “doing” of our work – if not more so. What we offer below, in Section II on Spirituality, is our thoughts on how to become more intentional about inviting spirit into our work and recognizing it in those we work with.

Finally, a review of the Ethics of Mediation as set forth in the Model Standards of Conduct for Mediators, support the position that inviting spirit into our practice may well be an ethical obligation.

II. LAWYERS AS PEACEMAKERS/HEALERS OF CONFLICT

PEACEMAKER

“Abraham Lincoln's Advice to Young Lawyers”

“The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for tomorrow which can be done today. Never let your correspondence fall behind. Whatever piece of business you have in hand, before stopping, do all the labor pertaining to it which can then be done...

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 peace-maker, the lawyer has a superior opportunity of being a good man.** There will still be business enough...

There is a vague popular belief that lawyers are necessarily dishonest. I say vague because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief; **resolve to be honest at all events; and if in your judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer.**”

-Abraham Lincoln

HEALERS OF CONFLICT

“The entire legal profession – lawyers, judge, law teachers – has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflict. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not prosecutors? Healers, not hired guns? For many claims and trials by adversarial contest must in time go the way of trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.”

-Former US Supreme Court Justice Warren Burger

UNITE PARTIES DRIVEN ASUNDER

“My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men’s hearts. I realized that the true function of a lawyer was to **unite parties driven asunder**. The less was so indelibly burnt into me that a large part of my practice as a lawyer was occupied in bringing about private compromises in hundred of cases. I lost nothing thereby – not even money, certainly not my soul.”

-Mahatma Ghandi

MOST CREATIVE SOCIAL EXPERIMENTS OF OUR TIME

Former Harvard President and Law School Dean, Derek Bok predicts that society’s greatest opportunity in the next generation “will be in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshaling cooperation and designing mechanisms which allow it to

flourish, they will not be at the center of one of the **most creative social experiments of our time.**”

-Derek Bok “What are America’s Law
Schools Doing Wrong? A Lot.”
12 Student Lawyer 46 (1983)

HOW DO WE APPROACH OUR WORK IN A MORE HOLISTIC MANNER – SOME THOUGHTS

Mediation is a sacred space because it is a place where our hopes and fears are expressed, where healing and growth; forgiveness and reconciliation; confession and acceptance take place. Where our best and worst of qualities are exposed.

1. Acknowledge (Accept-embrace-celebrate!) that the space you are occupying in mediation is sacred.
 - a. There have been times during the course of a mediation or facilitation, when I have had the impression that something happens in the room, something more important than the agreement that is emerging, that the conflict is itself just a vehicle for the creation of something sacred, something whole, something holy. –Sara Cobb (Bowling p215).
 - b. Today if we have no peace, it is because we have forgotten that we belong to each other – that man, that woman, that child is my brother or sister. If everyone could see the image of God in his neighbor do you think we would still need tanks and generals? ...The suffering must know that we love them, that they are wanted.....we are trying to bring peace to the world through our work. But the work is the gift of God (Mother Teresa/Collopy)

SPIRITUAL PRACTICES FOR BUILDING PEACE – A POEM

Three Spiritual Practices for Building Peace:

To Listen –

Seek and embrace the voice behind the voice

To Love –

Find that God in the other even the enemy

To Accompany -

Walk and share bread along the way

Oh people, yours is not work or a job.

Can you not hear it calling.

The voice inside,

The wellspring of vocation?

“Go. Go on my friend.
Take courage. Trust yourself.
Let your life speak
This is who on earth you were meant to be”

-Excerpts from the Poem, “Do You Hear It Calling,” John Paul Lederach

LISTEN

“Listening is an act of love.” The Story Corps Project, NPR

Mindfulness means paying attention in a particular way: on purpose, in the present moment, and non-judgmentally. This kind of attention nurtures greater awareness, clarity, and acceptance of present moment reality (Kabat-Zinn p.4).

That all of us are humans and as such inhabit our own stories, the historic traditions that make each of us unique not just a “case.” In fact, each patient’s traditions not only are continued in the uniqueness of this moment, to be listened to and savored, but are integral to the generation of the suffering and healing of this particular human. Listening, not just hearing, is essential to the healing process. (Adams pp)

Non-Judgmentally

In the course of knowing Mother (Teresa) I always saw her receive each person the same way. She saw the face of God in everyone, always approaching each person with love, compassion, and the gift of her complete self. Time was never an issue. I once asked her, “How is it that you never seem to judge anyone who comes to you?” She said, “I never judge anyone because it does not allow me to love them.”(Collopy pp).

“Reserving judgment is a matter of infinite hope.”

– Francis Scott Fitzgerald

When we make a judgment, we stop listening, when we stop listening we stop caring, when we stop caring we are no longer of use to anyone.

TO LOVE

My Uncle June (Joe Manchin Jr.) was a physical therapist. He was treating the grandchild of a dear friend of his. After several days of no “hands-on” therapy but simply visits with the child, his friend became frustrated and said, “Joe – when are you going to do something for my grandchild?” My Uncle June responded, “You don’t understand – I can’t help her until she trusts me – she loves me – then I will be able to help her.”

I always try to follow a simple rule. “You only have to have two loves in your life – for God – and for the person in front of you at any particular time”(Carter 218).

TO ACCOMPANY

If we expect those with whom we share this Sacred Space to share their most intimate thoughts with us, we too must become vulnerable and we must walk with them and share along the way.

LET GO OF EGO NEEDS

To evaluate

For recognition

Free yourself from forcing, expecting, or wanting someone to receive what you think they should take -- it could be your idea, opinion, or an opportunity you think they should accept -- you can't make anyone take anything -- your own experience probably confirms this.

Offer humbly. Offer gently.

Offer as you are a master, and then let go, and retire like a shy child.

When you dance the dance being master and child, you'll be surprised how much more others will accept what you have to say,

And how much more they appreciate your offerings.

MEDIATOR ABC'S

Accept.
Be Present.
Clarify.

REFEREE TO TRANSFORMER

Embark on a journey from **establishing and enforcing rules of behavior** to **offering aspirations for participants to bring their highest selves to the forefront.**

The Three R's—Respect for Self, Respect for Others, and Responsibility for One's Actions

PRESENCE (BEING) THE THIRD PHASE

There are three phases of Professional Development. The first phase is **doing**. We have a clear sense of how to develop skills....The second phase is **knowing**. Again, we have a clear sense of how to respond to what we know. We read, study, and find a teacher or guide.....The third phase is **being**.

Qualities that contribute to being are numerous: for example, acceptance, morality, empathy, compassion, patience, non-judgment, trust, creativity, flexibility and optimism. Each quality can be developed, yet one quality encapsulates all and is synonymous with being – **presence**. Etymologically speaking, *present* is from the present participle of the Latin (*pre*) *praesens*, *present*, meaning, “to be before: in the sense of to be before one at hand.” Thus, *presence* is being exactly where we are and mentally focused before whoever is with us in this moment of now. Presence is possible only when we are aware now, not lost in the past or future. Presence expands as we elevate our own healing and is therefore developmental, not magical. Presence is the context for resolving conflict. (Bowling, ACR p12)

GETTING IN SPIRITUAL SHAPE

- (a) Mindfulness Practice
- (b) Prayer
- (c) Music
- (d) Poetry
- (e) Meditation
- (f) Silence

We all must spirituality exercise daily so that in the most difficult and stressful of moments, we will be “Spiritually Strong” and respond to the moment in a kind, thoughtful, and meaningful way.

To make possible true inner silence, practice:

Silence of the eyes, by seeking always the beauty and goodness of God everywhere, closing them to the faults of others and to all that is sinful and disturbing to the soul;

Silence of the ears, by listening always to the voice of God and to the cry of the poor and needy, closing them to all other voices that come from fallen human nature, such as gossip, tale-bearing, and uncharitable words;

Silence of the tongue, by praising God and speaking the life-giving Word of God that is the Truth, that enlightens and inspires, brings peace, hope, and joy, and by refraining from self-defense and every word that causes darkness, turmoil, pain, and heath;

Silence of the mind, by opening it to the truth and knowledge of God in prayer and contemplation....and by closing it to all untruths, distractions, destructive thoughts, rash judgments, false suspicions of others, revengeful thoughts, and desires;

Silence of the heart, by loving God with our heart, soul, mind, and strength and one another as God loves, and avoiding all selfishness, hatred, envy, jealousy, and greed. I shall keep the silence of my heart with greater care, so that in the silence of my heart I hear His words of comfort and from the fullness of my heart I comfort Jesus in distressing disguise of the poor, for in the silence and purity of the heart God Speaks. (Mother Teresa/Miller pp 83-84).

III. ETHICS

ETHICAL GUIDANCE FROM THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS TOWARD A MORE HOLISTIC APPROACH TO MEDIATION

Introduction

The Model Standards of Conduct for Mediators are the result of the joint efforts of the American Bar Association, American Arbitration Association, and the Association for Conflict Resolution. The August 2005 edition is attached for your convenience.

The standards are as follows:

- I. Self-Determination
- II. Impartiality
- III. Conflicts of Interest
- IV. Competence
- V. Confidentiality
- VI. Quality of the Process
- VII. Advertising and Solicitation
- VIII. Fees and Other Charges
- IX. Advancement of Mediation Practice

Other than what I refer to as “practice management” standards, that being Standard III Conflict of Interest, Standard VII Advertising and Solicitation, and VIII Fees and other Charges, the significant majority of the standards address issues that support viewing the mediation process in a more holistic manner.

Standard I. Self-Determination.

- a. A mediator shall conduct mediation based on the principle of party self determination. Self-Determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to the process and outcome.

- b. A mediation shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, outside pressure from Court personnel, program administrators, provider organizations, the media, or others.

Standard II. Impartiality.

- a. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias, or prejudice.
- b. A mediator shall conduct mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
 - 1. A mediator should not act with partiality of prejudice based on any participant's personal characteristics, background, values, beliefs, or performance at a mediation or any other reason.
- c. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

Standard IV. Competence.

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
 - 1. Any person may be selected as mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings, and other qualities are often necessary for mediator competence. A person who offers to serve as mediator creates the expectation that the person is competent to mediate effectively.
 - 2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
 - 3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience, and approach to conducting a mediation.
- B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practical and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
- C. If a mediator's ability to conduct a mediation is impaired by drug, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

Standard V. Confidentiality

- A. A mediator shall maintain confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

Standard VI. Quality of the Process

- A. A mediator shall conduct a mediation in accordance with the Standard and in a manner that promotes diligence, timeliness, safety, presence of the appropriate parties, party participation, procedural fairness, party competency, and mutual respect among all participants.
- a. **A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.**
 - b. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

Standard IX. **Advancement Mediation Practice**

- A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:**
- a. Fostering diversity within the field of mediation.
 - b. Striving to make mediation accessible to those elect to use it, including providing services at a reduced rate or on a *pro bono* basis as appropriate.
 - c. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
 - d. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
- B. A mediator should demonstrate respect for differing point of view within the field, seek to learn from other mediators, and work together with other mediators to improve the profession and better serve people in conflict.

“Be the change you wish to see in the world.”

- Gandhi

South African Prayer

“For Courage to Do Justice”

Open my eyes that I may see the needs of others;
Open my ears that I may hear their cries;
Open my heart so that they need not be without care during their time of distress;
Let me not be afraid to defend the weak because of the anger of the strong,
nor afraid to defend the poor because of the anger of the rich.
Show me where love and hope and faith are needed,
and use me to bring them to those places.

And so open my eyes and my ears
that I may this coming day be able to do some work of peace.

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The West Virginia State Bar

BASIC MEDIATION TRAINING

June 17 – 18, 2014

Flatwoods, West Virginia

“Elements of Mediation – Orientation and Information”

Presented by:

Donald B. O’Dell, Esquire



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“Lawyer as Peacemaker”

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them that the nominal winner is often the real loser. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”

-Abraham Lincoln

I. MEDIATION

“Mediation is an informal, non-adversarial process whereby a neutral third person, the mediator, assists disputing parties to resolve by agreement or examine some or all of the differences between them. A judge or hearing officer who renders a decision or who makes a recommendation to the decision-maker in the mediated case is not a neutral third person. In mediation, decision-making discretion remains with the parties; the mediator has no authority to render a judgment on any issue of the dispute. The role of the mediator is to encourage and assist the parties to reach their own mutually acceptable resolution by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring resolution alternatives, and other similar means. The procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute. Nothing in this rule shall be construed to deprive a court of its inherent authority to control cases before it or to conduct settlement conferences, which are distinguished from mediation.” TCR 25.02.

II. ORIENTATION

A. JOINT SESSION OR NOT?

B. INTRODUCTIONS

C. JOINT SESSION

1. OPENING STATEMENT / COMMENTS FROM THE MEDIATOR

- - Goals / Objectives
- - Content

2. OPENING STATEMENT / COMMENTS FROM COUNSEL?

- - "The Great Debate"
- - Pros and Cons

3. OPENING STATEMENT / COMMENTS FROM THE PARTIES?

- - Apologies

III. INFORMATION

A. PRE-MEDIATION

1. Initial Contacts
2. Statements / Submissions
3. Mediator - Initiated Contacts
4. Independent Investigation and Research

B. DURING MEDIATION

1. Joint Session
2. Private Caucuses
3. Sidebars
 - - With counsel
 - - With the parties

C. POST-MEDIATION, IF UNRESOLVED

IV. MEDIATION TRIAL COURT RULES (ATTACHED)

25. MEDIATION.

Rule 25.01. Scope.

These rules govern mediation in the judicial system in West Virginia. These rules are to be read *in pari materia* with Rules 31 through 39 of the West Virginia Rules of Practice and Procedure for Family Court.

History. Amended by order effective March 8, 2004.

Rule 25.02. Mediation Defined.

Mediation is an informal, non-adversarial process whereby a neutral third person, the mediator, assists disputing parties to resolve by agreement or examine some or all of the differences between them. A judge or hearing officer who renders a decision or who makes a recommendation to the decision-maker in the mediated case is not a neutral third person. In mediation, decision-making discretion remains with the parties; the mediator has no authority to render a judgment on any issue of the dispute. The role of the mediator is to encourage and assist the parties to reach their own mutually acceptable resolution by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring resolution alternatives, and other similar means. The procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute. Nothing in this rule shall be construed to deprive a court of its inherent authority to control cases before it or to conduct settlement conferences, which are distinguished from mediation.

History. Amended by order effective March 8, 2004.

Rule 25.03. Selection of Cases for Mediation.

Pursuant to these rules and W. Va. R.Civ.P. 16, a court may, on its own motion, upon motion of any party, or by stipulation of the parties, refer a case to mediation. Upon entry of an order referring a case to mediation, the parties shall have fifteen (15) days within which to file a written objection, ~~and~~

Rule 25.05. Selection of Mediator.

Within fifteen (15) days after entry of an order or stipulation referring a case to mediation, the parties, upon approval of the court, may choose their own mediator, who may or may not be a person listed on the State Bar listing. In the absence of such agreement, the court shall designate the mediator from the State Bar listing, either by rotation or by some other neutral administrative procedure established by administrative order of the chief judge of the circuit court.

Rule 25.06. Compensation of Mediator.

If the parties by their own agreement choose a mediator who requires compensation, the parties shall by written agreement determine how the mediator will be compensated. If the parties do not select a mediator by agreement, the court may designate a mediator who may require compensation. If it has established a budget approved by the Supreme Court of Appeals for this purpose, the court may reimburse a volunteer mediator for reasonable and necessary expenses, according to Supreme Court of Appeals travel regulations.

History. Amended by order effective March 8, 2004.

Rule 25.07. Mediator Disqualification.

A mediator shall be disqualified in a mediation in which the mediator's impartiality might reasonably be questioned, including but not limited to instances where: (a) the mediator has a personal or financial interest concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts relating to the mediation; (b) the mediator served as a lawyer in the matter in controversy, or a lawyer with whom the mediator previously practiced law served during association as a lawyer in the matter, or the mediator has been a material witness concerning the matter; (c) the mediator knows that, individually or as a fiduciary, or the mediator's spouse, parent or child wherever residing, or any other member of the mediator's family residing in the mediator's household, has an economic interest in the subject matter in controversy or is a party to the matter or has any other more than de minimis interest that could be substantially affected by the proceeding; (d) the mediator or the mediator's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person: (i) is a party to the matter, or an officer, director or trustee, of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the mediator to have more than de minimis interest that could be substantially affected by the matter; (iv) is to the mediator's knowledge likely to be a material witness in the matter.

A mediator shall keep informed about their own personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the mediator's spouse and minor children.

Any party may move the court to disqualify a mediator for good cause. In the event a mediator is disqualified, the parties or the court shall select a replacement in accordance with TCR 25.05 and 25.06.

History. Amended by order effective March 8, 2004.

Rule 25.08. Provision of Preliminary Information to the Mediator.

Before the first mediation session, the court or mediator may require the parties to provide to the mediator pertinent information including but not limited to pleadings, transcripts, and other litigation-related documents.

History. Amended by order effective March 8, 2004.

Rule 25.09. Time Frames for Conduct of Mediation.

Unless otherwise agreed by the parties and the mediator or ordered by the court, the first mediation session shall be conducted within sixty (60) days after appointment of the mediator. Mediation shall be completed within forty-five (45) days after the first mediation session, unless extended by agreement of the parties and the mediator or by order of the court. The mediator is empowered to set the date and time of all mediation sessions, upon reasonable notice to the parties.

Rule 25.10. Appearances; Sanctions.

The following persons, if furnished reasonable notice, are required to appear at the mediation session: (1) each party or the party's representative having full decision-making discretion to examine and resolve issues; (2) each party's counsel of record; and (3) a representative of the insurance carrier for any insured party, which representative has full decision-making discretion to examine and resolve issues and make decisions. Any party or representative may be excused by the court or by agreement of the parties and the mediator. If a party or its representative, counsel, or insurance carrier fails to appear at the mediation session without good cause or appears without decision-making discretion, the court *sua sponte* or upon motion may impose sanctions, including an award of reasonable mediator and attorney fees and other costs, against the responsible party.

History. Amended by order effective March 8, 2004.

Construction. — Use of the term "persons" in W. Va. Trial Ct. R. 25.10 to introduce the list of those who may be required to attend mediation clearly indicates that some individuals whose attendance may be required at mediation will not be parties to the underlying lawsuit because those "persons" are subsequently identified as a "party's representative," a "party's counsel," and "a representative of the insurance carrier for any insured party"; these phrases demonstrate that the term "party" as used in Rule 25.10 is intended to mean a party in the legal sense, as in a plaintiff or defendant, and this usage of the term "party" is further demonstrated by the plain language of the sentence setting out the consequences for the failure of a required person to appear at the mediation without good cause or without the requisite decision-making discretion. *Casaccio v. Curtiss*, — W. Va. —, — S.E.2d —, 2011 W.

Va. LEXIS 306 (2011).

Imposition of sanctions improper. — Trial court erred in imposing sanctions against an insurer pursuant to W. Va. Trial Ct. R. 25.10 for its failure to attend mediation because the insurer's failure to attend was not sanctionable since the insurer received no notification of the mediation; pursuant to Rule 25.10, certain designated individuals, which include a representative of the insurance carrier for any insured party, are required to attend mediation only if furnished reasonable notice. *Casaccio v. Curtiss*, — W. Va. —, — S.E.2d —, 2011 W. Va. LEXIS 306 (2011).

Trial court erred in imposing sanctions against an insurer and its representative pursuant to W. Va. Trial Ct. R. 25.10 due their failure to attend mediation because the insurer received three days notice of the second mediation, which was unreasonable, and the representative attempted to be present at that mediation but was unsuccessful due to a missed

mediator may identify any pending motions, discovery, or issues which, if resolved, would facilitate the possibility of settlement or resolution.

History. Amended by order effective March 8, 2004.

Rule 25.16. Statistical Information.

The Supreme Court of Appeals shall determine the repository of statistical records and the method for statistical reporting on court-based mediation. The courts, mediators, parties, and counsel shall cooperate with requests for information under this rule. Court-based mediation statistics compiled at the direction of the Supreme Court of Appeals shall be accessible by the public in the same manner as other court records.

History. Amended by order effective March 8, 2004.

Biography for CLE

Andrea J. Hinerman has served as Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel since January 26, 2004, and as Senior Disciplinary Counsel since 2008. Prior to joining ODC, she served as a law clerk for the Honorable Irene C. Burger, when she was a Circuit Judge for Kanawha County and for the late Honorable Robert E. Maxwell, Senior District Court Judge for the Northern District of West Virginia. She also spent two years in private practice. She earned her J.D. degree from the West Virginia University College of Law in 1998.

ETHICS IN MEDIATION

June 18, 2014

Basic Mediation Training
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- I. WEST VIRGINIA HAS NOT ADOPTED SPECIFIC RULES OF ETHICS FOR MEDIATORS, ALTHOUGH SOME PRINCIPLES ARE ENCOMPASSED WITHIN THE RULES FOR MEDIATION.
- II. MEDIATION IS AN INFORMAL, NON-ADVERSARIAL PROCESS WHEREBY A NEUTRAL THIRD PERSON, THE MEDIATOR, ASSISTS DISPUTING PARTIES TO RESOLVE BY AGREEMENT OR EXAMINE SOME OR ALL OF THE DIFFERENCES BETWEEN THEM. (RULE 25.02, TRIAL COURT RULES)
 - A. Decision making discretion remains with the parties; the mediator has no authority to render a judgment on any issue of the dispute.
 - B. The role of the mediator is to encourage and assist the parties to reach their own mutually acceptable resolution by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring resolution alternatives, and other similar means.
 - C. Procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute.
 - D. Remember, however, nothing in Rule 25.02 shall be construed to deprive a court of its inherent authority to control cases before it or to conduct settlement conferences, which are distinguished from mediation.

III. BOTH THE RULES OF MEDIATION AS THEY EXIST FOR THE TRIAL COURT AND THE RULES OF MEDIATION AS THEY EXIST FOR THE FAMILY COURT IMPOSE A DUTY OF CONFIDENTIALITY.

Rule 43(d) - Family Court Rules
Rule 25.12 - Trial Court Rules

IV. RULE 43(D) OF THE FAMILY COURT RULES CITES RULE 25.12 OF THE TRIAL COURT RULES.

- A. Rule 25.12 presumes there will be individual sessions and provides for confidentiality of information obtained in those sessions for the opposing party in a manner agreed upon by the parties and mediator. Rule provides that mediation shall be regarded as confidential settlement negotiations, subject to W.Va. R.Evid 408. Mediator shall maintain and preserve the confidentiality of all mediation proceedings and records. Mediation may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated.
- B. Rule 43(d) also provides that all persons involved in premediation screening and mediation shall preserve the confidentiality of negotiations, of all written materials utilized in the processes, of all information obtained in the processes, and of all agreements; and with the exception of the abbreviated premediation screening report, the Mediation Outcome Reports, and any mediated agreement shall keep such matters confidential from the court.

V. THE CONFIDENTIALITY CONCEPT IN THE MEDIATION RULES IS SIMILAR TO THE CONCEPT SET FORTH IN RULE 1.6 OF THE RULES OF PROFESSIONAL CONDUCT FOR LAWYERS.

- A. Based on concept of loyalty.
- B. Exceptions:
 - 1. Prevention of criminal conduct pursuant to Rule 1.6(b).
 - 2. Report suspected child abuse or neglect.
 - 3. Trial Court Rule 25.12 does not address if there is an exception.

VI. RULE 42 OF THE FAMILY COURT RULES PROVIDES: "ALL MEDIATORS SHALL BE SUBJECT TO CANON 3 OF THE CODE OF JUDICIAL CONDUCT REGARDING DISQUALIFICATION."

- A. Requires written motion "for good cause."
- B. Court must rule in ten (10) days.
- C. If granted, Court must then appoint new mediator in five (5) days.

VII. RULE 25.07 OF THE TRIAL COURT RULES PROVIDES FOR MEDIATOR DISQUALIFICATION

- A. Does not specify written motion, but does require "good cause."
- B. If granted, parties, by agreement and with court approval, or the Court, if the parties cannot come to agreement, may select a replacement in accordance with Trial Court Rule 25.05 and 25.06.
- C. You must disqualify yourself if your impartiality might reasonably be questioned. You should disclose on the record information that you believe the parties or their lawyers might consider relevant to questions of disqualification even if you believe there is no real basis for disqualification.
 - 1. Personal Bias/Prejudice concerning a party or party's lawyer or a personal knowledge of the disputed evidentiary facts relating to the mediation.
 - 2. Served as a lawyer or partner/associate or former partner/associate served as lawyer in the matter or have been a witness in it.
 - 3. Economic interest (including as a fiduciary) of self, spouse, parent or child, wherever residing, or other family member living in your household
 - 4. You or your spouse or a person within third degree of relationship to either of you, or the spouse of such person (great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece)
 - (i) Is a party to the proceeding;
 - (ii) Acting as lawyer;
 - (iii) Is known to have a more than de minimis interest which could be affected by the proceeding;
 - (iv) Is likely to be a material witness in the proceeding.
- D. You have duty to keep yourself informed about your personal and fiduciary economic interests and make reasonable effort to be informed about personal economic interest of your spouse and minor children.

VIII. YOU SHOULD PERFORM DUTIES WITHOUT BIAS OR PREJUDICE. THIS MEANS WORDS AND CONDUCT.

- A. Facial expressions / body language.
- B. Nor permit staff or others under your control to do so.

IX. ATTORNEY ATTENDANCE AT MEDIATION.

- A. Trial Court Rule 25.10 requires counsel of record and decision making representatives to be present and if you and/or the decision making

- representative fails to appear without good cause, the court sua sponte or upon motion may impose sanctions, including award of reasonable mediator and attorneys fees and other costs against the responsible party.
- B. Family Court Rule 43(a) provides "Counsel may attend mediation."

X. WHO ENFORCES MATTERS OF CONDUCT REGARDING MEDIATORS?

- A. The Courts
B. The Office of Disciplinary Counsel
C. Other licensing boards

XI. EVEN WHEN ACTING AS MEDIATOR, LAWYER STILL BOUND BY THE RULES OF PROFESSIONAL CONDUCT.

- A. Rule 1.1 - Competence
B. Rule 1.2(a) - Scope of Representation & abiding by client's decision to accept or reject offer of settlement
C. Rule 1.3 - Diligence
D. Rule 1.4 - Communication
E. Rule 1.5 - Fees - Bottom Line - must be reasonable
F. Rule 1.6 - Confidentiality
G. Rule 1.7 - Conflict of Interest - Current Client
H. Rule 1.9 - Conflict of Interest - Former Client
I. Rule 1.10 - Imputed Disqualification
J. Rule 1.12 - Former judge or arbitrator
K. Rule 3.5 - Impartiality and decorum in the tribunal
L. Rules 7.1 - 7.5 - Advertising
M. Rules 8.4(c) and 8.4(d) - Professional misconduct to engage in conduct involving dishonesty, fraud, deceit or misrepresentation and in conduct that is prejudicial to the administration of justice
N. L.E.I. 88-03 - Settlement Agreements Requiring Complainants to Withdraw Ethics Complaints - DON'T DO IT!
O. Rule 2.4 of the Rules of Lawyer Disciplinary Procedure – The Office of Disciplinary Counsel shall evaluate all information coming to its attention by complaint or from other sources alleging lawyer misconduct or incapacity.

XII. TYPICAL ALLEGATIONS MADE AGAINST LAWYERS WHO ARE ACTING AS MEDIATORS BY PARTIES WHO ARE NOT CLIENTS.

- A. Did not understand mediator's role.
B. Felt intimidated by the mediator and the mediation process.
C. Mediator exhibited bias towards the other side.
D. Mediator coerced them into accepting a settlement.

XIII. TYPICAL ALLEGATIONS MADE AGAINST LAWYERS REPRESENTING PARTIES IN MEDIATION.

- A. Did not understand mediation process.
- B. Felt intimidated by their lawyer, by the other lawyers, and parties (i.e. the whole mediation process).
- C. In domestic matters, felt abandoned by lawyer because lawyer did not attend mediation.
- D. Felt their lawyer did not defend their interests during mediation.
- E. Felt they were pressured to accept settlement at mediation.

XIV. CALL THE OFFICE OF DISCIPLINARY COUNSEL FOR INFORMAL ETHICS ADVICE.

- A. If you have a question, call before you take action.
- B. If you take action before you call, then we will have a different conversation called a "Self Report."
- C. Be advised, we will not tell you what we think about another attorney's conduct or whether that other attorney is violating the Rules of Professional Conduct. If you want to know, then file a complaint if you believe it is a violation of the Rules and if the misconduct raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. This is Rule 8.3(a) of the Rules of Professional Conduct.

XV. PROPOSED REVISIONS TO THE WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT AND ANCILLARY MATTERS
available on the WV Supreme Court website - www.courtswv.gov