

The Resolution Report

News on dispute resolution trends, laws and ethics

Volume 20, Number 1 • January 2005

Changes are in store for *The Resolution Report* in 2005. See page 12 for details on the new format for the newsletter.

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ADR Rules and Policy Committee Submits Report and Recommendations on Senior Judges as Mediators

by Sharon Press

On November 30, 2004, the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy submitted its final report and recommendations relating to senior judges¹ who also serve as mediators. The report was an amended version of a report filed March 24, 2004, and was the result of a year and a half of study by the Committee after having been assigned the task of reviewing the practice of senior judges as mediators by Supreme Court Clerk Thomas Hall in March 2003. The Committee was directed to:

- Evaluate how the current canon relating to senior judges as mediators is working
- Identify any problems or opportunities for improvement, and
- Offer recommendations regarding monitoring of the practice.

In addition, the committee was requested to specifically address the following three issues:

1. Whether reporting should be required in order to allow ongoing monitoring of the amount of senior judge time and mediator service performed by an individual.
2. Whether there should be a limit on the number of mediations performed by a senior judge on active status.
3. Whether any additional procedures are required to ensure that senior judges do not use their judicial status to gain mediation business/referrals.

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¹ A senior judge is a retired judge who has been certified by the Supreme Court as eligible to serve for temporary assignment to judicial duty.

Mediator Ethics Advisory Opinions

Question 2004-003

Which Rules for Certified and Court-Appointed Mediators, if any, are applicable to a certified circuit mediator when doing the following in a non-court appointed capacity as the issues are not in litigation:

- A. Assisting two neighbors in resolving a dispute over a barking dog;*
- B. Negotiating the purchase price with a local car dealer for a car my spouse is trying to purchase;*
- C. Assisting my local town council by negotiating the sale of town property to several town residents;*
- D. Assisting a state representative by negotiating with a bill's sponsor acceptable wording for an amendment to the bill.*

*Certified Circuit Civil Mediator
Central Division*

Authority Referenced

Rules 10.110(b), 10.200, 10.610, 10.620 and 10.650,
Florida Rules for Certified and Court-Appointed Mediators

Summary

The Florida Rules for Certified and Court-Appointed Mediators apply to any mediation conducted by a Florida Supreme Court certified mediator and to any court-ordered mediation, even if conducted by a non-certified mediator by agreement of the parties. The general standards (for example, integrity, advertising, and good moral character) will be applicable to certified mediators at all times while the applicability of the specific mediation standards to any given situation will depend on whether the activity is "mediation."

Questions

about the standards of conduct contained in the Florida Rules for Certified and Court-Appointed Mediators should be addressed to: Mediator Ethics Advisory Committee, c/o Dispute Resolution Center, Supreme Court Building, Tallahassee, Florida 32399.

These opinions are rendered pursuant to the authority of rule 10.900, Florida Rules for Certified and Court-Appointed Mediators and are based on the specific facts outlined in the question. They are based on the Committee's interpretation of the rules in effect on the date the opinions were rendered. The summary has been prepared for quick reference. Any inconsistency between the summary and the opinion should be rendered in favor of the opinion.

Opinion

The Standards of Professional Conduct (Part II) of the Florida Rules for Certified and Court-Appointed Mediators “provide ethical standards of conduct for certified and court-appointed mediators.” Rule 10.200. The Mediator Qualifications Board, which handles grievances filed against certified mediators, has consistently interpreted this to mean that the standards apply to any mediation conducted by a Florida Supreme Court certified mediator and to any court-ordered mediation, even if conducted by a non-certified mediator by agreement of the parties. Rule 10.200 provides the rationale for this interpretation by stating that the standards are “intended to both guide mediators in the performance of their services and instill public confidence in the mediation process. The public’s use, understanding, and satisfaction with mediation can only be achieved if mediators embrace the highest ethical principles.”

For certified mediators, the applicability of the Standards to any given situation will depend on whether the activity is “mediation.” For example, the act of “assisting two neighbors in resolving a dispute over a barking dog” may be covered if the activity was mediation. Alternatively, if one were to negotiate, on behalf of a spouse, the local town council, or a state representative, one would be in the role of advocate, not third party neutral, and thus, the mediation standards would not be applicable.

The Committee notes several qualifications to the general rule that the standards’ applicability depends on whether the activity is mediation. First, some of the standards are general in nature, and thus, applicable to all certified mediators. For example, rule 10.620, Integrity and Impartiality, states that a mediator “shall not accept any engagement, provide any service, or provide any act that would compromise the mediator’s integrity or impartiality.” See also rule 10.610 (Advertising). In addition, all certified mediators are required to possess, “as a requirement for continuing certification, the good moral character sufficient to meet all of the Mediator Standards of Professional Conduct...” Rule 10.110(b). Finally, a mediator may be subject to other standards of conduct and those ethical standards to which a mediator may be professionally bound “are not abrogated by these rules.” Rule 10.650.

Signed: Fran Tetunic, Chair
Dated: September 18, 2004

Question 2004-005

In a recent CME training, the following scenario presented itself and there were a number of different opinions as to a mediator's responsibility to adhere to rules 10.330 (c) and 10.610, Rules for Certified and Court-Appointed Mediators, in light of MEAC Opinions 97-007 and 2001-006.

The following occurred after a court-ordered small claims mediation had concluded:

The defendant and the mediator are walking from the mediation room on the way back to the courtroom (it is normal procedure in my county court that the case file be brought back to the mediation program director in the courtroom before being given to the judge) and the defendant asks the mediator for her business card. He says he often is involved in business deals that require mediation and would like to be able to call upon her to mediate future cases. (The plaintiff had stopped to use the rest room and was not witness to the request).

Is the mediator able to provide her business card to the disputant?

*Certified County Mediator
Northern Division*

Authority Referenced

Rule 10.330(a) and (c), 10.340 and 10.610, Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinion 97-007

Summary

Providing a party, upon request, with information which could have been provided at an earlier point in the mediation process does not constitute solicitation of services, and thus, is not a violation of these rules.

Opinion

A mediator is prohibited from soliciting or otherwise attempting to procure future professional services during the mediation process. Rule 10.330(c). A mediator is also obligated to maintain impartiality. Rule 10.330(a). The committee believes that providing one party, upon request, with information which could have been provided at an earlier point in the mediation process does not constitute solicitation of services, and thus, is not a violation of these rules. In addition, under the facts provided in the question, the Committee believes that such behavior neither created a conflict of interest (rule 10.340) nor constituted inappropriate advertising (rule 10.610). This is to be distinguished from the situation in MEAC 97-007, wherein the Committee opined that solicitation of real estate services by the mediator during the course of mediation was inappropriate.

Signed: Fran Tetunic, Chair
Dated: November 22, 2004

Question 2004-007

I would appreciate a clarification on the response to Question 2003-006 reported in the June 2004 Resolution Report

The Committee's opinion begins with the assumption that the present mediation is between the husband and wife who were involved in the dissolution 22 years earlier, in which the mediator had represented one of the parties. However, the language in the opinion then appears to be more general and, if taken literally, suggests that anytime a mediator has ever represented a party, the mediator could never mediate a matter in which the party was later involved, regardless of the passage of time, how unrelated the matters were, and the absence of any other common participant.

This would make it impossible for many mediators to evaluate whether they could mediate disputes, particularly with entities. For example, if a mediator has done a wide litigation or appellate practice, he or she may have represented hundreds or even thousands of clients over a 20 or more year period. The mediator may not be able to recall all of those clients, and may not even know many of them given for example: (1) mergers and acquisitions; (2) in situations when an insurer might pay for the defense of a particular client (if the attorney did not do the billing, he may not even know who the insurer was). These situations could be combined where an insurer who had paid for a defense for the client was later merged into some other entity.

In many situations, mediators who, as counsel, had represented a party (particularly an institutional party, such as an insurer) may have later appeared adverse to that party in other unrelated litigation. It would be hard to imagine how this situation could be reviewed as placing the mediator in a situation that would impair his or her impartiality, when the mediator has appeared as an advocate both for and against a party in the past.

I would appreciate the Committee's clarification as to whether the opinion addresses the particular factual situation of a mediation between the same two parties in a dissolution, or if it is intended to apply broadly to any prior representation of any party.

*Certified Circuit Civil Mediator
Central Division*

Authority Referenced

Rule 10.340, Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinion 2003-006

Summary

MEAC Opinions are based on the facts presented in the question. Prior representation of a party to a mediation, which involved different parties, a different case or different subject matter would be subject to disclosure and may be waivable based on a case by case determination.

Opinion

In light of your request for clarification, the Committee notes that all MEAC opinions are based on the Committee's understanding of the facts presented in the question. MEAC 2003-006 was in answer to a question which related to a mediation involving the same parties and the same case and subject matter. If the factual situation provides a different subject matter or party, the conflict, while still existing and thus subject to disclosure, may not rise to the level of a clear conflict, and thus, may be waivable by the parties. Rule 10.340. Any such determination would have to be made on a case-by-case basis.

Signed: Fran Tetunic, Chair

Dated: November 22, 2004

ethical opinions online

Ethical opinions can be found online at www.flcourts.org. From the main menu select Alternative Dispute Resolution to access the ADR Pages.

www.flcourts.org

Senior Judges as Mediators continued from page 1

Current Status

The Application section of the Code of Judicial Conduct currently states:

A retired judge who is subject to recall may serve as a mediator, may place his or her name on the mediator master list maintained by the chief judge, and may be associated with entities that are solely engaged in offering mediation or other alternative dispute resolution services but that are not otherwise engaged in the practice of law. However, such judge may in no other way advertise, solicit business, associate with a law firm, or participate in any other activity that directly or indirectly promotes his or her mediation services. A retired judge assigned to adjudicate a case shall disclose any services between the judge and any of the parties or counsel to the case. The purpose of these admonitions is to ensure that the judge's impartiality is not subject to question.

The commentary section to the rule, provides the following further guidance:

Although a retired judge subject to recall may act as mediator or arbitrator, attention must be given to relationships with lawyers and law firms which may require disclosure or disqualification. See Canon 5D(1). This provision is intended to prohibit a senior judge from soliciting lawyers to use his or her mediation services when those lawyers are or may be before the judge in proceedings where the senior judge is acting in a judicial capacity. If a senior judge is rendering mediation services for compensation in civil personal injury matters, he or she should not accept a judicial assignment for that type of case in the same court where the senior judge is mediating those cases. On the other hand, the senior judge could be assigned judicial duties in other jurisdictions of that same court, e.g., criminal, family law, or probate matters, or be assigned as a senior judge in other geographic areas in which the judge does not conduct mediation proceedings.

When the Court adopted this language in 1994, [In re Code of Judicial Conduct, 643 So2d 1037 (Fla. 1994)], the opinion suggested that the Court "will continue to monitor the application of this provision."

Prior to submitting its recommendations, the Committee conducted a survey of all senior judges who were also certified mediators (as of November 30, there were 135 senior judges or whom 29 were Supreme Court certified mediators), researched the practice in other states, and circulated drafts and solicited comments from liaisons from the Civil Rules Committee, Judicial Administration Rules Committee, Juvenile Rules Committee, Family Rules Committee and Judicial Ethics Advisory Committee.

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Recommendations

The Committee submitted three recommendations to the Supreme Court for consideration:

Recommendation I

There should be no absolute prohibition against a senior judge serving as a mediator provided that the following ethical recommendations are adopted in the appropriate rules:

(A) Senior judges who intend to mediate should be required to be certified by the Supreme Court as a mediator pursuant to Rule 10.100, Florida Rules for Certified and Court-Appointed Mediators.

(B) If a mediator who is a senior judge has presided over a case involving any party, attorney, or law firm in the mediation, the mediator should be obligated to disclose that fact prior to mediation.

(C) A senior judge should be required to disclose if the judge is being utilized or has been utilized as a mediator by any party, attorney, or law firm involved in the case pending before the senior judge. Absent express consent of all parties, a senior judge should be prohibited from presiding over any case involving any party, attorney, or law firm that is utilizing or has utilized the judge as a mediator within the previous three years.

(D) Any person who is or intends to be both a senior judge and a mediator should be required to attend a minimum of one judicial education course offered by the Florida Court Education Council. The course should specifically focus on the areas where violations of the Code of Judicial Conduct and/or the Florida Rules for Certified and Court-Appointed Mediators could be violated.

Recommendation II

There should be no limit on the number of mediations performed by a senior judge on active status, and no subject matter or geographic restrictions on mediations conducted by senior judges.

Recommendation III

The Clerk of the Supreme Court or appropriate entity should collect information from senior judges, in connection with senior judge certification renewal, regarding whether the senior judge has served as a mediator and, if so, in how many cases the judge served as mediator.

The report, which contains proposed amendments to civil, judicial administration, juvenile, mediation and family rules, as well as the Code of Judicial Conduct has been assigned case number SC04-2482. To access the full report and appendices online, go to www.floridasupremecourt.org and select “clerk” then “rule cases” and then SC04-2482.

MEDIATOR QUALIFICATIONS BOARD UPDATE

At the time of this printing, 79 cases have been filed with the Mediator Qualifications Board since the Board was created in 1992. Since the last update, six cases reached closure and two new cases have been filed. The information from the cases that were resolved is provided for educational purposes.

Cases by Division		Mediator Certification Type of Case Involved	
Northern - 15 (19%)	County Mediator County Case	15	Circuit Mediator Circuit Case
			22
Central - 34 (43%)	County Mediator CDS Case	2	Circuit Mediator Family Case
			2
Southern - 30 (38%)	County Mediator Arbitration	2	Circuit Mediator Federal Case
			3
Who Filed Case	County Mediator Condo Mediation (DBPR)	1	Circuit Mediator Mobile Home (DBPR)
			1
Parties Involved in Mediation	County Mediator No Mediation Involved	3	Circuit Mediator Workers' Compensation
60			1
Attorneys	Family Mediator Family Case	19	County, Family, Circuit Mediator No Mediation Involved
8			1
Other	Family Mediator Circuit Case	1	Court-Appointed Mediator Family Case
11			4
	Family, Dependency Mediator No Mediation Involved	1	Court-Appointed Mediator Circuit Case
			1

The first grievance involved a family (divorce) mediation conducted by a certified family mediator. The complainant alleged that: the mediation was conducted in an “unfair manner” in violation of rule 10.230(b) and (c) [mediation concepts]; the mediator used “coercion and intimidation” by not allowing the complainant to discuss issues of importance to her in violation of rule 10.310(a) and (b) [self-determination]; and the mediation resulted in unreasonable monetary and emotional costs to the complainant in violation of rule 10.420(b)(2) [adjournment or termination of mediation].

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The complaint committee found the complaint to be facially sufficient and requested a response from the mediator with regards to the complaint and the rules cited therein, in addition to, rules 10.380(a) and (b) [fees and expenses], 10.410 [balanced process], and 10.430 [scheduling mediation]. After reviewing the mediator's response and the pre-mediation agreement which was signed by the complainant, the committee dismissed any potential violations of 10.230 and 10.380 and retained an investigator on the remaining rules. Based on the investigation, the committee found that there was no probable cause to believe that there had been a violation of any of the standards and dismissed the complaint.



The next grievance involved a court-ordered family mediation which was scheduled initially with a family mediator whose certification had lapsed. On Thursday, February 5, 2004, the complainant received notice of a court-ordered mediation which was scheduled to take place on Monday, February 9, two working days hence. Upon receipt, the complainant immediately called to reschedule. The mediator allegedly refused to do so. In addition, the mediator had lapsed from Supreme Court certification on July 30, 2003. The complainant alleged violations of rules 10.110 (good moral character); 10.220 (mediator's role); 10.430 (scheduling mediation); 10.500 (mediator's responsibility to the courts); and 10.620 (integrity and impartiality).

The complaint committee found facial sufficiency and requested a response from the mediator with regards to rules 10.200 [scope and purpose], 10.220, 10.310(d) [self-determination], 10.430, 10.500, 10.520 [compliance with authority - specifically, 12.741(b), Florida Family Law Rules of Procedure], 10.620. The mediator responded that he had no recollection of the complainant or the circumstances of his case, but acknowledged that he had let his certification lapse and had continued to mediate. The complaint committee authorized the hiring of an investigator. Upon review of the investigator's report, the committee requested a meeting with the mediator and the complainant via teleconference. Prior to the meeting, the mediator fulfilled the requirements to be reinstated as a mediator. At that meeting, the mediator, Ramon David Feliu, accepted a written reprimand.



The next grievance was filed against a certified county mediator with regards to a landlord tenant county mediation. The complainant alleged that he was not an English speaker, but no interpreter was provided to him for the mediation; that the mediator "decided points of law," and that the mediation office denied the complainant with access to witnesses. The complainant did not identify any specific rule violations. The complaint committee reviewed the grievance and dismissed it as facially insufficient because there were no specific facts alleged to support the allegations.

The next grievance was filed against a certified county mediator in relation to private arbitration activities. The complainant alleged that the mediator “misused his office as a certified mediator” to attract users of his for profit arbitration corporation which is issuing “phony arbitration awards.” The complaint committee found the complaint to be facially sufficient and requested a response from the mediator in relation to rules 10.110 [good moral character]; 10.600 [mediator’s responsibility to the mediation profession]; 10.610 [advertising]; and 10.620 [integrity and impartiality]. The mediator responded that there was no evidence to support that he had used his Florida Supreme Court certification to advertise his arbitration practice because he had not done so. The complaint committee dismissed the complaint without prejudice pursuant to rule 10.810(h), Preliminary Review.



The next grievance was filed against a certified county mediator for a county mediation. The complainant alleged that he was suffering from anxiety during the mediation session and that the mediator violated rule 10.420(b)(2) [Adjournment or Termination]. The complainant did not allege any specific facts about the mediation. The complaint committee reviewed the grievance and dismissed it without prejudice as facially insufficient because the complainant did not include any allegation that the mediation took place or was not terminated appropriately.



The final grievance was filed against a certified county and family mediator for a county mediation. The complainant alleged that he had made some requests for accommodations in order to proceed to mediation. The requests were not honored allegedly in violation of rule 10.350 [Demeanor] and 10.370(a) [Providing Information]. The complainant also alleged that the mediator “forced him to trial” instead of providing another mediator in violation of rule 10.410 [Balanced Process] and 10.520 [Compliance with Authority]. The complaint committee reviewed the grievance and dismissed it without prejudice as facially insufficient because the complainant did not include any specific information to substantiate the allegations.

short Takes

New Format for the Newsletter

The Dispute Resolution Center is introducing a new format for *The Resolution Report* in 2005. The traditional published version will be printed and mailed in January and July. In April and October, you will find the newsletter online at www.flcourts.org. The online version allows us to get you news faster and more efficiently, while the published version will continue to feature all of the ethics advisory opinions and the MQB updates.

The Florida Court's website was recently redesigned and is full of information. You now can select "Alternative Dispute Resolution" right on the home page for immediate access to the ADR Index. The link to the Find a Certified Mediator search function is also located right on the front page. Be sure to visit soon and be looking for your first online newsletter in April.

We hope you will find this new format to be beneficial. Your feedback and suggestions for the newsletter are always welcomed.

Schedule of Certified Mediation Training Programs

Dispute Management, Inc.
(800) 541-7855

Family

April 6-10, 2005

Circuit Civil

March 2-6, 2005

June 15-19, 2005

Perry Itkin/Mediation Training Center
(954) 567-9746

Family

March 2-6, 2005

June 8-12, 2005

Circuit Civil

May 11-15, 2005

Mediation Services, Inc.
(305) 971-3556

Circuit Civil

May 13-15 & 21-22, 2005

Mediation Training Group, Inc.
(561) 241-0413

Circuit Civil

March 11-13 & 19-20, 2005

USF Conflict Resolution Collaborative
(800) 852-5362

Family

June 9-11 & 16-18, 2005

Dependency

April 14-16 & 21-23, 2005

Circuit Civil

March 4-6 & 12-13, 2005

July 8-10 & 16-17, 2005

Association of South Florida Mediators

(561) 241-0413

www.asfm.org

Annual Seminar: April 9, 2005

Mediation Training Center of Tampa Bay

(877) 777-6577 or (727) 446-4221

www.mctbinc.com

Art of Ethical and Effective Mediation: May 13, 2005

Ethics in Mediation: April 14, 2005

Ethical and Effective Family Mediation: March 25, 2005

Mediation Training Group

(561) 241-0413

www.mediationtraininggroup.com

All CME Programs contain 4 hours of ethics and

4 hours of DV training OR civil mediation:

February 26, 2005 (Fort Lauderdale) and April 2, 2005 (Miami).

USF Conflict Resolution Collaborative

(800) 852-5362

www.crc.usf.edu

Negotiating and Mediating Employment Disputes: May 6, 2005

CME Corner

If you have mediation news to share please forward it for possible inclusion in the newsletter.

News from the Field

The United States Court of Appeals for the Eleventh Judicial Circuit has amended its local rules effective October 1, 2004, to allow for the use of private mediators in certain civil appeals. See 11th Cir. Rule 33-1(g). The Eleventh Circuit's Private Mediator Procedures for Mediation Appeals can be obtained on the internet at www.ca11.uscourts.gov.

Mediation Program News

Alachua, Citrus, Orange and Palm Beach Counties reported successful mediation related awareness and educational activities for Mediation Week in November.

Warm wishes to Don Pace and Wendell Reed. Don retired as director of the Wakulla County Mediation Program and Wendell retired as director of the Citrus County Mediation Program. Welcome to Russ Hollingsworth new director in Citrus County.

CASE AND COMMENT

by Perry S. Itkin

What Does John Hancock Have to Do with Mediation?

COMMENT: In real estate the common theme is “location, location, location” and while in *The Resolution Report*, Volume 19, Number 1 (June 2004) we identified a parallel theme for mediation in “information, information, and information,” another parallel lies in “signatures, signatures, and signatures” [but, you knew that!]. The following case illustrates their importance!

In *Scott v. Tischler*, 882 So.2d 461 (Fla. 4th DCA 2004), when Ms. Scott’s case was dismissed by the trial judge who refused to vacate his order – she was not happy and she appealed. Here’s what happened.

The case settled in mediation. Among the terms listed in the handwritten summary of the settlement agreement was that mutual releases were to be executed “by all parties including Robert Watkins and Ann Frances Watkins” and that settlement was “contingent upon **execution of this agreement** by [the Watkins] within 5 days of this agreement.” [Emphasis added.]

As you might expect, the Watkins never signed the settlement agreement. Nonetheless, the trial court dismissed the case on January 15, 2003, retaining jurisdiction to enforce the settlement and giving the parties twenty-five days to “prepare and file a detailed settlement agreement should they elect to do so.”

Six days later, Ms. Scott filed a motion with the trial judge to vacate the dismissal, arguing that it had been prematurely entered because the Watkins neither agreed to the settlement *nor signed* the agreement. The Watkins also moved to vacate the dismissal of their counterclaim. Three months later the trial court denied Ms. Scott’s motion to vacate; however, the court granted the Watkins’ motion and allowed them to proceed on their counterclaim.

The appellate court, in reversing the trial judge, held that the trial judge abused his discretion by denying the motion to vacate the order of dismissal. There was no dispute that essential terms of the settlement were not met – two parties to the settlement refused to sign off on the mediated settlement agreement. The signatures were required by the agreement itself, as well as by the Florida Rules of Civil Procedure. In *City of Delray Beach v. Keiser*, 699 So. 2d 855 (Fla. 4th DCA 1997), the appellate court held that the trial court erred in enforcing a settlement agreement that had not been signed by all the parties to the agreement and determined that:

[T]he lack of the parties' signatures on the agreement was not a mere "technical detail," but a requirement of Florida Rule of Civil Procedure 1.730. City of Delray Beach v. Keiser, 699 So. 2d 855 at 856 (Fla. 4th DCA 1997); see also Gordon v. Royal Caribbean Cruises, Ltd., 641 So. 2d 515, 517 (Fla. 3d DCA 1994) (holding that party's failure to sign a settlement agreement rendered it "wholly insufficient" and not in compliance with rule 1.730(b)).

COMMENT: Florida Rules for Certified and Court Appointed Mediators, Rule 10.520, Compliance with Authority, provides:

A mediator shall comply with all statutes, **court rules**, local court rules, and administrative orders relevant to the practice of mediation. [Emphasis added.]

Among the court rules is Florida Rule of Civil Procedure 1.730(b) which provides:

(b) Agreement. If a partial or final agreement is reached, it shall be reduced to writing and **signed by the parties and their counsel, if any**. A report of the agreement shall be submitted to the court or a stipulation of dismissal shall be filed. By stipulation of the parties, the agreement may be electronically or stenographically recorded. In such event, the transcript may be filed with the court. The mediator shall report the existence of the signed or transcribed agreement to the court without comment within 10 days thereof. No agreement under this rule shall be reported to the court except as provided herein. [Emphasis added.]

"You're Just the Court-Ordered Mediator; I Didn't Get My Discovery and I'm Not Attending Mediation!" What's A Mediator to Do?

In *Poling v. Palm Coast Abstract and Title Company, Inc.*, 882 So. 2d 483 (Fla. 5th DCA 2004), Palm Coast filed a two-count complaint against the Polings for civil theft and, alternatively, conversion of money that had been overpaid to the Polings at the closing of the sale of their real property to a third party. The Polings filed an answer, counter-claim, and a third-party complaint that raised 18 separate defenses and alleged four counts of relief.

The trial court entered an order requiring the parties to hold a pre-trial conference, ordering mediation, and setting the matter for a one-day, non-jury trial. The Polings appeared for the pre-trial conference, but did not attend the mediation. In fact, they notified the mediator by fax that they would not attend until Palm Coast complied with their outstanding discovery demands. *After being notified by the mediator that they must reschedule the mediation before the trial and that they should contact the trial court and the opposing party, the Polings took no action.* [COMMENT: Good move by the mediator; not so good by the Polings, as you will see.] On the day of trial, the Polings also failed to appear.

The trial court entered a judgment in favor of Palm Coast and granted Palm Coast’s motion to strike the Polings’ pleadings for failure to comply with court orders, finding that the Polings had failed to comply with the pre-trial order, had failed to appear for trial, and had failed to attend mediation.

Of utmost importance to the appellate court in this case was the Polings’ contumacious flouting of court orders. They received notice of the mediation order and notice of trial – they elected to attend neither. Even after being notified by the mediator that they needed to contact the trial court and the opposing party to reschedule mediation before trial, the Polings did not comply. [COMMENT: The mediator properly fulfilled their ethical obligations both to the parties, Fla. R. Med. 10.300 et seq., and to the court, Fla. R. Med. 10.500 et seq.]

The 5th District Court of Appeals, in affirming the trial court, held:

The striking of pleadings and the entry of a default is the most severe of penalties and must be employed only in extreme circumstances. . . However, the penalty is appropriate where the trial court finds that a party willfully refuses to comply with court orders. . . The conduct must be flagrant, willful, or persistent. . . In this case, the trial court’s thorough findings in the final judgment demonstrate that on multiple occasions, the Polings willfully failed to comply with the court’s orders.

“I’m A Certified Family Mediator and A Lawyer and I Advertise. There are Florida Bar Rules on Advertising. Now What?”

In the August 15, 2004 issue of *The Florida Bar News* recent decisions of the Florida Bar’s Standing Committee on Advertising were published. The decisions were based on appeals from staff opinions on lawyer advertising.

Here’s the advertisement under review:

.....

•

• Try to Solve Your Divorce/Custody

• Disputes Through Mediation

• [lawyer’s name]

• Attorney/Mediator

• Free Consultations Payment Plans Available

• Mediators Certified by the Florida Supreme Court

•

•

.....

The Committee determined that an advertisement for an attorney/mediator's services does not have to contain the hiring disclosure required by *Rules Regulating the Florida Bar*, Rule 4-7.3(b), for print advertisements by attorneys because the ad is only for mediation services and is therefore *exempt* from the filing requirement and from review. Further, the committee noted that although the advertisement contains the designation "attorney," it is informational only and does not advertise attorney services, but rather mediation services.

COMMENT: If you have any questions regarding lawyer advertising, call the Florida Bar Ethics Hotline at 1-800-235-8619. You may also review the advertising rules and sample advertisements on the Florida Bar's website at www.flabar.org. Remember also that Florida Rules for Certified and Court Appointed Mediators, Rule 10.610 Advertising provides:

A mediator shall not engage in marketing practices which contain false or misleading information. A mediator shall ensure that any advertisements of the mediator's qualifications, services to be rendered, or the mediation process are accurate and honest. A mediator shall not make claims of achieving specific outcomes or promises implying favoritism for the purpose of obtaining business.

Challenging Events at Mediation for the Attorney-Client Relationship - A Quiz About Coercion Consequences!

If you had to choose one, which would it be:

- (A) Settle or I Quit!
- (B) You Have to be Out of Your Mind Not to Take this Deal!
- (C) Both of the Above
- (D) None of the Above

The consequence of your answer is . . . well, let's see what these cases say!

(A) Settle or I Quit!

In *Cicale v. The Paul Revere Life Insurance Company*, 8 Fla. L. Weekly Supp. 724a (Circuit Court, 17th Judicial Circuit in and for Broward County, Robert Lance Andrews, Judge, August 9, 2001) an attorney [hereafter referred to as "former counsel"] requested that the trial judge give full force and effect to his charging lien for attorney's fees. The Court was asked to determine both whether the client's former counsel was discharged from further representation pursuant to the contingency arrangement and, if discharged without cause, whether former counsel is entitled to a fee.

The dispute arose from an original breach of contract suit brought by client who, at the time was represented by former counsel. The professional relationship between the former counsel and client deteriorated and this forms the basis for the attorney's fee and charging lien dispute.

Attempts at resolution of the original breach of contract case turned increasingly difficult. For instance, an effort at mediation did not result in an agreement. Responding to a settlement offer, the client made additional demands to which former counsel expressed disapproval. The events at the mediation proved to be insurmountably challenging to the professional relationship. It appeared to the court that former counsel made a withdrawal ultimatum to pressure a settlement and the client characterized his former attorney's threat as effectuating an actual withdrawal from representation. As you might expect, former counsel rejected the notion that he withdrew, and proposed that the client discharged him in favor of a substitute counsel.

This matter was heavily contentious and both parties were derisive in their respective depictions of the events. Nevertheless, there was no withdrawal filed with the court. [COMMENT: Under the Rules of Judicial Administration 2.060(i), an attorney may not withdraw from representation without leave of court.] Within a week of the mediation the client obtained substitute counsel and thereafter former counsel filed a charging lien for fees to protect his financial interest in the work already performed. The sum of money at issue was approximately \$90,000 which was held in a trust account.

The trial judge, after careful study, believed the client discharged his former counsel and did not believe that former counsel actually withdrew from representation:

Contrary to Cicale's suggestion a mere threat to withdraw does not constitute a withdrawal. Cf. Law Firm of Goldfarb, Gold, Gonzalez & Wald v. Fiore, 1999 WL 1260010 (Fla. 4th DCA 1999); Searcy, Denney, Scarola, Barnhart & Shapely, P.A. v. Scheller, 629 So.2d 947 (Fla. 4th DCA 1993). [Emphasis added.]

It is important to note that an attorney employed under a valid contract who is discharged *without cause* before the contingency has occurred, or before a client's matters have concluded, can recover only the reasonable value of his services rendered prior to discharge on basis of quantum meruit, limited to the maximum fee set in the contract entered into for those services.

The trial judge found that, despite former counsel's machinations, he did not appear to cease representation of his own volition. The client obtained new counsel before a final settlement was achieved and the client's e-mail letter to former counsel suggested an attempt to discharge for cause. This letter characterized the relationship as insurmountably adverse, which the client believed established a cause for discharge.

In commenting on the evidence the court found that there was "little evidence to support [the client's] depiction of the facts sustaining a discharge for cause." The court found that client's characterizations of former counsel's conduct were indefensible and appeared to be mere disagreement over settlement negotiations and that the contingency for which the contract was entered occurred and former counsel's lien was appropriate. The client's dissatisfaction with former counsel's settlement negotiations notwithstanding, the client was unable to discharge his attorney without the attorney preserving his entitlement to some compensation.

The trial judge concluded:

[T]he client made a decision to hire another attorney. It is crucial here [the client] hired substitute counsel who then settled with the insurer on work [former counsel] almost completed. As well, because the client lacked cause to discharge, therefore, consonance requires a finding for the discharged attorney's fees in quantum meruit.

(B) You Have to be Out of Your Mind Not to Take this Deal!

In *Sharick v. Southeastern University of the Health Services, Inc., et al.*, 2004 Fla. App. LEXIS 17045 (Fla. 3rd DCA 2004), Sharick appealed an order enforcing a settlement agreement which he claims his attorney had no authority to enter. The trial court, which did not resolve the authorization dispute, nonetheless ordered enforcement of the purported agreement. The appellate court reversed because the attorney's lack of authority to settle was dispositive and because the record demonstrated no clear and unequivocal grant of authority to the attorney.

The facts are important as well as fascinating [just use your imagination as you read them]! Here they are:

Sharick was dismissed from the College of Osteopathic Medicine (Southeastern) two months short of graduation. He prevailed in a jury trial against Southeastern on a single claim of breach of implied-in-fact contract but was able to recover only damages relating to tuition expenses because the trial court disallowed his demand for, among other things, past and future lost earning capacity. He appealed and the case was remanded to provide Sharick with an opportunity to prove loss of earning capacity.

The parties attended court-ordered, pre-trial mediation. At mediation, Southeastern offered Sharick \$600,000 and a D.O. degree to settle. Sharick unequivocally rejected this offer despite the urging of the mediator (a former circuit court judge), defense counsel, and his own attorney, Donald Tobkin. Two days later, Sharick's attorney, who had been handling this case on a contingency fee basis for over ten years, advised the trial court that he felt the settlement proposal made at mediation "*was beyond reasonable, would be one hundred percent totally impossible to achieve in the imminent retrial on damages, and [that] no reasonable competent individual would have refused.*" Tobkin then asked the trial court to appoint a guardian ad litem for his own client for the purpose of assisting the trial court in determining if the settlement offer made and unequivocally rejected by his client at mediation, was "*fair, reasonable and in [Sharick's] best interests.*" The trial court, without evidence to suggest Sharick was unable to act in his own best interests or was incompetent, granted the motion, appointing a guardian ad litem to "represent the interests" of this mentally competent, adult litigant.

The guardian, another former circuit court judge, issued a report confirming Sharick to be *“intelligent, alert, not under the influence of any drugs or medications and completely familiar with all the facts in this case.”* He found Sharick to be *“perfectly competent to make his own decision as to whether to accept this offer or not.”* The guardian also confirmed that Sharick and his attorney, Tobkin, *“are at odds and extremely hostile to one another,”* and that Tobkin was pressuring Sharick to settle: *“Mr. Tobkin told the plaintiff that if he does not accept this offer he intends to withdraw from the case and place a charging lien on the file.”*

Sharick also testified that it appeared to him that Tobkin used the motion to appoint a guardian to pressure him into settlement:

Q. And did [Tobkin] pressure you in any way after that mediation to accept settlement?

A. Yes, he did.

Q. How did he do that?

A. He filed a motion with this court appointing - asking this court to appoint a guardian ad litem to represent me. And right before that motion [to appoint a guardian] was to be heard by this judge, he asked me, do you want to take the \$600,000 and D.O. degree. And he said he would drop the guardian ad litem request, and I told him I would not do that. And he told me he was going forward with the guardian ad litem.

Q. Did it appear to you that he was using the imposition of a guardian as leverage to get you to settle?

A. Yes.

Although Sharick continued to reject settlement, Tobkin did not withdraw as threatened. Tobkin continued, instead, to negotiate with opposing counsel, telling opposing counsel that Sharick had given him express authority to settle for any amount above \$780,000 and a D.O. degree.

One week before trial, Sharick appeared for an updated deposition. He was met by Tobkin, a settlement agreement for \$785,000 [COMMENT: Remember the attorney's testimony reflected above about the \$600,000 offer!] and a D.O. degree in hand. For the next forty-five minutes Tobkin attempted to persuade Sharick, in a transcribed and videotaped “discussion,” to accept the settlement he had negotiated. Sharick refused, repeatedly denying that Tobkin had authority to settle for him. At the conclusion of this discussion, Sharick's deposition commenced with opposing counsel spending at least twenty minutes attempting to convince Sharick – in Tobkin's presence and without objection – to accept the settlement proposal. Sharick refused to budge and the deposition proceeded. Some time after the deposition concluded and both attorneys had left, Sharick returned and stated to the court reporter that he had come “back to settle.”

The following morning, after having been informed of this comment, Tobkin filed an emergency motion to enforce the agreement that he had previously negotiated with opposing counsel. He obtained a hearing on this motion for later that same afternoon and attempted to notify Sharick by leaving a message with Sharick's mother. Sharick claims not to have received notice and did not appear at the hearing. The trial court ordered enforcement of the settlement agreement.

As you might imagine, by now Sharick obtained another attorney who filed a motion with the court for a rehearing. At the hearing on that motion, Tobkin reiterated his earlier testimony regarding his authority to settle on Sharick's behalf which Sharick denied. Opposing counsel testified that although Tobkin had informed him that he had authority to settle for Sharick, he did not believe that the case was settled when Sharick appeared for his deposition. The trial court, concluding that Tobkin's disputed authority to settle was "not dispositive," again ordered enforcement of the agreement because there was "no dispute that Mr. Tobkin on behalf of the Plaintiff did submit a verbal offer of Settlement . . . [and] that after conferring with his client [opposing counsel] accepted the offer . . . [resulting in] an enforceable settlement Agreement." The appellate court determined that the trial court's conclusion that Sharick's authorization was "not dispositive," was the critical error made in this case and the reason that the case must be reversed.

The appellate court reviewed applicable case law on an attorney's authority to settle on behalf of a client pointing out principles such as a party seeking to compel enforcement of a settlement bears the burden of proving that an attorney has the clear and unequivocal authority to settle on the client's behalf and that employment of an attorney to represent a client does not confer on the attorney implied or apparent authority to compromise or settle the client's claims. Further, an attorney's belief that he or she has the authority to settle does not alone establish such authority.



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The appellate court concluded that, absent clear and unequivocal authority from Sharick, Tobkin could make neither a binding offer nor a binding agreement on Sharick's behalf and that Tobkin's lack of authority to settle on Sharick's behalf is, therefore, dispositive. The court agreed with Sharick that there is no evidence of a clear and unequivocal grant of authority to Tobkin to settle on Sharick's behalf.

[COMMENT: Note the appellate court's illustration of party self-determination!]

*Sharick **consistently** denied Tobkin's authority to bind him to a settlement and **repeatedly** resisted the efforts of two former circuit court judges, one a mediator and one a guardian ad litem, opposing counsel and his own attorney, to persuade him to accept settlements Tobkin supposedly negotiated with his blessing. When viewed in context of the facts . . . , remand for a determination on the issue of authorization would serve no purpose, because a clear and unequivocal grant of settlement authority simply cannot be found. [Emphasis added.]*

The appellate court reversed the order enforcing settlement and remanded the case for a trial on damages.

Best Wishes for a Happy, Healthy and Prosperous New Year!

Case and Comment

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Message from the Director . . .

As I write this, 2004 is coming to a close and we are anticipating the arrival of 2005. The changing of the calendar always provides an opportunity for reflection on the past year and for making plans for the coming year. 2004 was a busy year at the DRC. Some highlights include:

- Passage and implementation of the Mediation Confidentiality and Privilege Act
- Circulation for comment a proposal which would change the qualifications for mediator certification to recognize the multiple paths one might take to achieve competence as a mediator
- Consideration of twelve new advisory ethics opinions for mediators
- Completion of recommendations to the Florida Supreme Court relating to Senior Judges who also serve as mediators
- A successful annual conference
- Certification of over 700 new mediators
- Implementation of Revision 7 to Article V which included the transfer of nearly 100 county ADR employees to the state payroll and the expansion of the availability of mediation services to underserved populations.

Needless to say, these accomplishments are the result of hard work by the fabulous DRC staff with whom I have the good fortune to work and countless hours of contributions by the members of the Supreme Court Committee on ADR Rules and Policy and its subcommittees on Mediator Qualifications, Appellate Mediation, Arbitration, and Senior Judges as Mediators; the Mediator Ethics Advisory Committee; the Mediator Qualifications Board; the Mediation Training Review Board; the Parenting Coordinator Workgroup; the Subject Matter Experts for the Mediation Training Program Standards Review.

I am also very appreciative of the ADR Program Directors, Coordinators and staff in the trial courts and all of you who are out there mediating. Without your efforts, there would be no Florida ADR Program. In addition, many of you took time from your busy schedules to provide comments on the various proposals the Committee has circulated and I believe that the final products will be greatly improved because of the insightful comments received. Thanks to all!

In order to keep in step with improvements in technology, in 2005, we will institute a new format for our newsletter. In January and July, you can expect to receive your *Resolution Report* via your mailbox. In April and October, you will be able to read (or download) a copy of the *Resolution Report* from our new and improved website located at www.flcourts.org. Just select "Alternative Dispute Resolution" off of the home page and you will be able to access a wealth of helpful information - including the latest newsletters. We hope that this new format will enable us to get you the news you need faster and meet our goal of a quarterly publication. As always, we welcome your feedback and suggestions.

It remains an honor and privilege for me to serve as the Director of the Dispute Resolution Center. I am looking forward to another exciting year and wish each of you health, happiness and peace. Until next time... Sharon

Two-Year Training Reminder

If you have completed a certified mediation training program, but have not yet applied for certification, this serves as a reminder that the administrative order governing certification of mediators (AOSC00-8) requires individuals to apply for certification within two years of the completion of such training.

If you have a question about when you completed mediation training, or if you need a current application package, please call the Center at (850) 921-2910 and we will be happy to assist you with that information.

The Resolution Report

NEWSLETTER

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