Advisory Opinion

February 8, 1997

MEDIATOR QUALIFICATIONS ADVISORY PANEL c/o Dispute Resolution Center ! Supreme Court Building ! Tallahassee, FL 32399-1905

THE QUESTION:

I request advice as to whether Rule 10.070(a)(3) of the Professional Conduct Standards for Certified and Court-Appointed Mediators prohibits me from soliciting "letters of Reference" from people involved in matters I have mediated. Such letters are requested by the National Association of Securities Dealers, Inc. (NASD) to qualify as a mediator in its mediation program.

Enclosed is a copy of the portion of the NASD application form which requests letters of reference. Also enclosed is a copy of my letter to NASD forwarding my application wherein I explained why I did not include letters of reference anyone in matters I had mediated [sic]. Curiously, when I questioned NASD personnel about the ethics of soliciting letters of reference, the response I received was: "We have lots of Florida Certified Mediators in our program and they had no problem submitting letters of reference."

As a corollary to the above question, I would appreciate an opinion as to whether solicitation of a "Mediator Evaluation," like the enclosed (which was in the workshop materials form the 5th Annual Conference for Mediators and Arbitrators) is permissible under Rule 10.070(a)(3). I would like to use a similar questionnaire in my mediation practice for self-improvement and marketing, however, responses to such questionnaires are unquestionably an "item of value," and it would appear that the letter of Rule 10.070(a)(3) prohibits both solicitation and acceptance of same.

Thank you for your prompt attention to these questions.

Very truly yours,

Certified County and Circuit Mediator
Central Division

SUMMARY OF THE OPINION:

A truthful and accurate letter of reference is neither a gift, favor or loan or item of value from a person involved in the mediation process. Additionally, the panel does not believe that evaluations which are conducted in a fair and accurate manner should be categorically excluded from use in advertising.

AUTHORITY REFERENCED:

Rules: Florida Rules for Certified and Court-Appointed Mediators - 10.070, 10.080(c), 10.130, 10.150(b).

OPINION:

The panel believes that you raised two issues requiring separate answers. First, in relation to the letters of reference, the panel is of the opinion that a truthful and accurate letter of reference (not enhanced as a favor to the mediator) is neither a gift, favor or loan or item of value from a person involved in the mediation process. The panel believes that there are two alternate bases for such conclusion. First, the panel believes that if such a reference is truthful it is not a gift to or a favor for a mediator but merely a factual recitation. Second, the panel believes that even if such letter of reference were somehow believed to be a gift, favor or loan, it would, under normal circumstances, be of such little value as to be subject to the de minimus rule.

The second question which you raised is in relation to the use of mediator evaluations. This issue is somewhat more complicated. The panel believes that pursuant to rule 10.150(b) the mediator is allowed, even encouraged, to participate in research, evaluation, or other forms of professional development and public education, if such work is accomplished for the betterment of the mediator or the mediation profession. While the panel does not believe that such evaluations, which must be conducted in a fair and accurate manner, should be categorically excluded from use in advertising, it would note that all advertising must represent honestly the services to be rendered and shall accurately state the mediator's qualifications. See Rule 10.130. Therefore the panel believes that the use of evaluations for marketing purposes would be appropriate only when the evaluations are distributed in a non-discriminatory manner and the results of all evaluations are included in any advertising. The panel is aware, however, that parties may not be required to complete evaluation forms and, therefore, the mediator is not precluded from using the results of these evaluation forms if a good faith effort has been made to systematically collect this data. In conclusion, it should be observed that this opinion relates to what is precluded by the rules and should not be interpreted as an endorsement of the procedure of using evaluation forms for marketing purposes. In addition the collection of any evaluation material would be subject to rule 10.080(c), which requires the mediator to maintain the confidentiality in the storage and disposal of records related to mediation. This provision would not apply in situations where anonymous evaluation forms are used which do not contain identifying information.

The panel would also note that in relation to both questions the issue of whether there would be a breach of the impartiality requirement in rule 10.070 was considered and the panel decided that there was not a violation. However, under the facts of a particular case, a violation of the impartiality provision could occur if the mediator disregards impartiality for the purpose of obtaining a favorable evaluation from a party.

_____ _____

Date **Charles Rieders, MQAP Chair**