

**MEDIATOR QUALIFICATIONS BOARD**  
Southern Division

In Re: Clayton D. Simmons

Case Number: MQB 2015-003

Panel:           The Honorable Rodney Smith, Chair  
                  Kimberly Mann  
                  Nancy Mag  
                  Carmen Stein  
                  Eugene Walker

Advisor to the Panel: Irv J. Lamel, Esq.

**APPEARANCES**

Prosecutor: Melvia Green, Esq.

Mediator: Clayton D. Simmons

Counsel for Mediator: Michael J. McGirney, Esq.

Also Present: Janice Fleischer, Esq., Director of DRC

**DECISION INCLUDING FINDINGS AND CONCLUSIONS OF THE PANEL**

The Mediator Qualifications Board, Southern Division, by its duly designated five member Panel, held a formal hearing in this matter on January 22, 2016.

**FORMAL CHARGES**

1) The Mediator fails to possess good moral character as required by Rule 10.110, Florida Rules for Certified and Court Appointed Mediators, for continuing certification by the Florida Supreme Court as a circuit mediator.

2) The Mediator violated Rule 10.230(f), Florida Rules for Certified and Court Appointed Mediators, by failing to disclose his former attorney/client relationship with William Wieland, Esq.

3) The Mediator violated Rule 10.330(c), Florida Rules for Certified and Court Appointed Mediators, by using the mediation of October 30, 2014, to procure a paid special magistrate position for Carmine Bravo.

4) The Mediator violated Rule 10.340(a) and (b), Florida Rules for Certified and Court Appointed Mediators, by failing to disclose before and during the mediation his former attorney/client relationship with William Wieland, Esq.

5) The Mediator violated Rule 10.370, Florida Rules for Certified and Court Appointed Mediators, by conducting independent research and advising the parties based on that research to appoint Carmine Bravo as a "special magistrate."

## HEARING

## EXHIBITS

During the hearing, the following exhibits were admitted into evidence as exhibits for the prosecution:

- Exhibit P1 Letter from Clayton D. Simmons to Grace Ann Glavin, Esq. and William J. Wieland, Esq. dated October 24, 2014.
- Exhibit P2 William J. Wieland's Mediation Summary.
- Exhibit P3 Mediated Settlement Agreement.
- Exhibit P4 Defendant's Motion to Set Aside Mediation Agreement and Request for Hearing.
- Exhibit P5 Email from Melvia Green to William Wieland. dated August 18, 2015, and Affidavit of William Wieland.
- Exhibit P6 Email from Grace Glavin to Melvia Green dated July 20, 2015, at 5:09 PM with email chain and Carmine Bravo Time Sheet.
- Exhibit P7 Email from Grace Glavin to Melvia Green dated July 20, 2015, at 4:04 PM with email chain.
- Exhibit P8 Mediator Grievance by Ernest Horne.
- Exhibit P9 Letter from Janice Fleischer to Clayton D. Simmons dated May 21, 2015.
- Exhibit P10 Letter from Clayton D. Simmons to Janice Fleischer dated May 28, 2015 with Mediator Response.
- Exhibit P11 Mediator Qualifications Advisory Panel, Advisory Opinion 96-002.
- Exhibit P12 Mediator Ethics Advisory Committee, Advisory Opinion 2003-006.
- Exhibit P13 Rule 1.490, Florida Rules of Civil Procedure.
- Exhibit P14 Sworn Confidential Interrogatories to Clayton Simmons with attached responses.

## WITNESSES

Witnesses called by the prosecution:

William Wieland, Esq.

Karen Horne Morris

Grace Glavin, Esq.

Janice M. Fleischer, Esq., Director of the DRC

Clayton Simmons, Mediator

## FINDINGS OF FACT

Based on the oral and documentary evidence presented at the hearing, the Hearing Panel makes the following findings of fact:

1. The Clayton Simmons has been a lawyer since 1971, and was appointed as a Circuit Judge in 2003. He was elected as Chief Judge of the Eighteenth Circuit and served as Chief Judge until 2009. He was certified as a Florida Supreme Court family mediator from 1996 to 1998, and from 2002 to 2004. He was certified as a Florida Supreme Court circuit mediator from 2002 to 2004, and from 2011 to the present.

2. Clayton Simmons was selected as the mediator for the consolidated cases styled Karen Morris Co-Trustee and Beneficiary and Sherman Horne as Beneficiary of the J.D. and Kathleen L. Horne Revocable Trust Dated June 11, 2002 v. Ernest Horne as Co-Trustee of The J.D. Kathleen L. Horne Revocable Trust Dated June 11, 2002, and The Estate of J.D. Horne, pending in the Ninth Judicial Circuit. The cases concerned a dispute in which Karen Morris and Ernest Horne were co-trustees of their parents' trust and beneficiaries along with their brother, Sherman Horne, and Ernest Horne was also the Personal Representative [PR] of the parents' estate. The trust and the estate had a total value of approximately seven million dollars consisting of six million dollars in real property and one million dollars in cash and personal property. Karen Morris and Sherman Horne were represented by attorney Grace Glavin [Glavin], and Ernest Horne was represented by attorney William Wieland [Wieland]. Ernest Horne was deceased at the time of the Panel Hearing. The positions of the parties in the underlying litigation were that Karen Morris and Sherman Horne wanted Ernest Horne removed as a trustee and as PR because he was not properly performing his duties and, if he agreed to be removed, Karen Morris would likewise relinquish her position as a trustee and allow a third party to be appointed as trustee and PR; and Ernest Horne wanted Karen Morris removed as trustee while he remained as trustee and PR.

3. Wieland, formerly a certified mediator himself, and Glavin both knew Clayton Simmons. Glavin knew him as a former judge before whom she had appeared in cases but did not know he was a mediator. Wieland knew him because Clayton Simmons had represented Wieland in Wieland's divorce case until Clayton Simmons became a judge. In addition, Wieland and Clayton Simmons worked at the same law firm although not at the same time. Although Wieland could not remember who suggested Clayton Simmons as the mediator, Glavin remembers that Wieland suggested him and she accepted. Wieland also could not recall if he told Ernest Horne that Clayton Simmons had been his lawyer.

4. After it was agreed that Clayton Simmons would be the mediator, he sent to the lawyers a letter dated October 24, 2014, which set forth the scheduling of the mediation, and his fees and policies regarding the mediation. In addition, the letter stated in the section titled "Disclosure":

Pursuant to Rule 10.340 of the Rules for Certified and Court-Appointed Mediators, I request that you inform me of any potential or actual conflict you or your client may be aware of regarding my serving as mediator in this matter. **I am unaware of any such conflict at this writing but should I become aware of conflict I will so advise instanter.** [Emphasis added].

The letter contained no reference to or disclosure of the fact that Clayton Simmons had been William Wieland's lawyer and represented Wieland in his divorce. Clayton Simmons agreed at the Panel Hearing that the "Disclosure" section of the letter would have been the place to disclose any conflict.

5. Prior to the mediation, Clayton Simmons had a conversation with Carmine Bravo [Bravo], a certified mediator and former judicial colleague who was reestablishing his mediation practice. Clayton Simmons told Carmine Bravo about the scheduled mediation with Wieland and Glavin. The recollections of Clayton Simmons, Glavin and Wieland varied as to who called whom about permission for Bravo to attend: Wieland and Glavin both recalled that Clayton Simmons called each of them about Bravo attending the mediation while Simmons recalled that he told Bravo to contact the lawyers for permission to attend. No one objected to Bravo attending and he did so, ostensibly to observe.

6. At the mediation, Clayton Simmons gave an opening statement. While Wieland could not recall whether Clayton Simmons disclosed his attorney/client relationship with Wieland in his opening statement, Glavin and Karen Morris specifically recalled that he made no mention of previously representing Wieland as his lawyer, and Clayton Simmons agreed no mention was made.

Glavin was firm that she was not told and did not know that Clayton Simmons had represented Wieland in his divorce or that there was any attorney client relationship between Clayton Simmons and Wieland, and that she never told Clayton Simmons that she had no problem with that relationship. She recounted that she has faced a similar situation since she was represented in her divorce by a lawyer whom she subsequently has used as a mediator and both she and the mediator are careful to disclose the fact of the prior representation when the lawyer is or may be a mediator for any case in which she is counsel. Therefore, she would remember if Clayton Simmons had mentioned the relationship with Wieland and he did not do so.

The extent to which Bravo participated in the mediation was also subject to varying recollections. Glavin recalled that Bravo made only one comment during the joint sessions, but Clayton Simmons and Bravo spent most of the time outside her presence, presumably with Ernest Horne and Wieland. Wieland recalled that Bravo participated actively including asking Ernest Horne if he had a problem with his sister because she was adopted. At some point in the mediation, there was discussion about appointing a third party to take control of the trust and estate properties. Clayton Simmons made a reference to appointing a third party, noting it could be a CPA or "a retired judge like Judge Bravo."

Wieland was specific that Clayton Simmons suggested Bravo. Since Ernest Horne agreed to appointing Bravo in some capacity, Karen Morris also agreed although Glavin was unsure that it was appropriate to appoint Bravo since he was at the mediation. However, she considered the agreement of Ernest Horne to be such a big breakthrough that she recommended that Karen Morris also agree. Glavin is not and was not a mediator but had she known at the time that appointing Bravo was a conflict because he was at the mediation, she would not have agreed or recommended agreement.

The lawyers and Clayton Simmons also considered the question of what to call Bravo's position. Previous to this point, no one had used the terms "special magistrate" or "special master". According to both Glavin and Wieland, Clayton Simmons proposed using "special magistrate" or "special master" but settled on "special magistrate" because Bravo was a former judge.

As the mediation neared a conclusion, Bravo advised that since he had spent about three hours participating in the mediation, he was going to charge for the three hours of his time.

7. Within a short time after the mediation, Ernest Horne sought to set aside the Mediation Agreement for a variety of reasons, including his concern about Bravo's billings in light of his statement of intent to bill for attending the mediation. As a result of Ernest Horne's desire to set aside the agreement, Wieland withdrew as his lawyer. Subsequently, Ernest Horne filed a Mediator Grievance against Clayton Simmons.

8. During the investigation which followed the filing of the grievance, the Prosecutor, then serving as Investigator, served Interrogatories on Clayton Simmons. Specifically, Interrogatories 14 and 15 and Clayton Simmons answers to those Interrogatories are as follows:

Interrogatory #14

Prior to the mediation, had you had a past attorney/client relationship with William J. Wieland, Esq.? If so, state the dates and the general nature of such a relationship.

Answer:

Yes. In 2002 and early 2003 I represented Mr. Wieland in a dissolution of marriage case. I went on the bench in May 2003 and one of my partners finished the case.

Interrogatory #15

If the answer to 14 is yes, state whether you disclosed the relationship to all parties and counsel at or prior to the mediation?

Answer:

Mr. Wieland knew of this past relationship so I did not need to disclose it to him or his client. I am certain I discussed it with Mrs. Glavin but I am not exactly sure when that discussion occurred. I believe that when Mrs. Glavin called me to inquire of my availability to mediate this case I told her that prior to my service on the bench I had represented Mr. Wieland. I also believe that she indicated she had no problem with that, did not consider it to be a conflict and was sure her clients would not mind. I assume she discussed it with her clients and would have told me if her clients were troubled by that remote representation.

Before serving his answers, Clayton Simmons emailed the questions and proposed answers to Glavin with a cover email which stated, in part: "The thing won't go away. They have now sent me interrogatories. The only ones that I want to make sure I got correct are: [text of Interrogatories 14 and 15, and proposed answers]. This is what I recall but I want to make sure it comports with your recollection." Glavin believed this email highly inappropriate, and untrue, and she forwarded it to the Prosecutor.

### CONCLUSIONS

Based on the foregoing findings of fact, the Panel concludes as follows:

A. Pursuant to Rule 10.110, Florida Rules for Certified and Court-Appointed Mediators, the Mediator has the burden of proving his good moral character.

B. Mediator Ethics Advisory Committee or MEAC Opinion 2003-006 provides that a mediator who once acted as an advocate for one party has a clear conflict of interest in conducting a mediation involving that party and cannot ethically do so irrespective of the passage of time and waivers from all parties.

C. Clayton Simmons did not inform Grace Glavin in advance of the mediation that he had a conflict of interest or that he had an attorney client relationship with William Wieland in the past, nor did he inform the mediation participants at the mediation that he had a conflict of interest or that he had an attorney client relationship with William Wieland in the past. Further, it was the responsibility of the Mediator to inform the participants about the conflict.

D. The charges set forth in Paragraph 1(a)(ii) and 1(b) of the Formal Charges have been proven and, therefore, Clayton Simmons lacks the good moral character required of a Florida Supreme Court Certified Mediator. The Panel finds particularly egregious the attempt by Clayton Simmons in his email to persuade or influence Glavin to support his untrue account of his failure to disclose his relationship with Wieland.

E. The charge set forth in Paragraph 2 of the Formal Charges has been proven and, therefore, Clayton Simmons has violated Rule 10.230 (f), Florida Rules for Certified and Court-Appointed Mediators.

F. The charge set forth in Paragraph 4 of the Formal Charges has been proven and, therefore, Clayton Simmons has violated Rule 10.340 (f), Florida Rules for Certified and Court-Appointed Mediators.

G. The charges set forth in Paragraph 1(a)(i), Paragraph 3 and Paragraph 5 of the Formal Charges have not been proven.

H. Mediator Qualifications Advisory Panel or MQAP (now Mediator Ethics Advisory Committee or MEAC) Opinion 96-002 provides that a mediator should not accept the appointment as a special master for a dispute arising out of a mediated settlement agreement because the mediator has received confidential information during the course of the mediation that might be carried over to the decision making of a special master. As a result, it was not appropriate for Carmine Bravo to be appointed special master or special magistrate since he participated in the mediation. Therefore, it is a cause for concern and disturbing to the Panel that Clayton Simmons did not raise the issue at the mediation that Carmine Bravo should not be appointed as a special master or magistrate pursuant to Rule 1.490, Florida Rules of Civil Procedure.

I. The Panel imposes the following sanctions:

a. The Mediator shall read and become familiar with the MEAC and MQAP opinions on conflicts of interest.

b. The Mediator shall take 8 hours of continuing mediator education in courses to be approved in advance by the Director of the Dispute Resolution Center which courses and credits shall not count toward the required continuing mediator education and credit requirements for certification or renewal.

c. The Mediator is suspended for three (3) months beginning on a date 30 days from the date of this Decision to allow time to complete any pending scheduled mediations to avoid hardship to the parties to those mediations.

d. The Dispute Resolution Center is awarded its reasonable costs, such costs to be determined by the Panel Chair. The Dispute Resolution Center shall submit and serve on the Mediator its motion and affidavit for such costs within 30 days of the date of this Decision and the Mediator shall serve any response within 10 days of service of the motion and affidavit.



Honorable Rodney Smith  
Panel Chair

2/24/16

Date