

## MEDIATION CONFLICT OF INTEREST

*“Let us work without disputing. It is the only way to render life tolerable.”*

Voltaire.

The basic requirement behind the mediation process is found in the rules governing impartiality and conflicts of interest. In the same manner that a litigant has the right to know that a judge will be impartial in rendering a decision and will withdraw from a case when a conflict of interest is present, so too does a mediation participant have the right to impartiality and the absence of a conflict of interest in the mediator. The appearance of impropriety must be eliminated in both circumstances. In the case of a mediation, a violation of the conflict of interest rules may constitute mediator misconduct that can be grounds to set aside a settlement agreement. Both mediators and attorneys should be aware of potential problems in this area.

Rule 10.330 of the Florida Rules for Certified and Court Appointed Mediators provides that a mediator must maintain impartiality. Impartiality means freedom from bias or favoritism in word, action, or appearance and includes a commitment to assist all parties as opposed to any one individual. The committee notes for Rule 10.330 state that a mediator cannot accept or continue any engagement for mediation services in which the duty to maintain impartiality is reasonability impaired or compromised. A mediator should inquire as to the identity of the parties or other circumstances which could compromise the mediator’s impartiality.

Rule 10.340 addresses Conflicts of Interest and provides:

(a) A mediator cannot mediate a case that presents a clear or undisclosed conflict of interest in which a relationship between the mediator and the mediation participants compromises or appears to compromise the mediator’s impartiality.

(b) Disclosure of the potential conflict of interest rests with the mediator and must be disclosed as soon as practical.

(c) A mediator can serve after disclosure if all parties agree unless there is a clear conflict of interest. (emphasis added)

The committee notes state that a clear conflict of interest arises when circumstances or relationships involving the mediator cannot reasonably be regarded as allowing the mediator to maintain impartiality. If there is a clear conflict of interest, there can be no waiver by the parties and it is not resolved by disclosure. A mediator who is a member of a law firm is obliged to disclose any past or present client relationship that firm may have with any party involved in the mediation.

Rule 10.620 states that a mediator shall not accept any engagement, provide any service, or perform any act that would compromise the mediator’s integrity or impartiality.

The rules were created in 2000 by the Florida Supreme Court. Subsequently the Mediator Ethics Advisory Committee (MEAC) has applied the ethical policies in the Rules to

specific factual situations submitted by mediators in the form of opinions, including a consideration of the circumstances which constitute a “clear conflict.” The MEAC opinions are found at the Florida Dispute Resolution Center website. Mediators and attorneys are well advised to review the MEAC Opinions regarding conflict of interest issues that may impact the enforcement of settlement agreements.

For example, MEAC Opinion 2002-005 deals with a conflict in the context of a mediator who is also an attorney in a law firm. A mediator was asked to serve in a case involving a party to the mediation against whom the mediator’s law firm had pending cases. The opinion states that the circumstances create a clear conflict of interest that cannot be waived by the parties. The opinion further states that there is no difference between the firm representing one of the parties in the matter, or representing a party involved in other litigation against one of the parties to the mediation. In either case, the firm is part of an adversary process involving a party to the mediation and it is a clear conflict in violation of Rule 10.340 that cannot be waived.

MEAC Opinion 2008-007 states that a clear conflict of interest exists when a law firm in which a mediator is a partner is part of an adversary proceeding involving a party to the mediation regardless of the size of the firm, the location of other cases, or the mediator’s lack of involvement. The conflict is a violation of Rule 10.340 that cannot be waived.

MEAC Opinions 2003-006 and 2010-008 state that a clear conflict exists if a mediator once acted as an advocate for one of the parties or against one of the parties.

A violation of the Florida Rules for Certified and Court Appointed Mediators has been held to support an action to set aside a mediated settlement agreement. In the case of *Vitakis-Valchine v. Valchine*, 793 So.2d 1094 (4<sup>th</sup> DCA 2001), the husband and wife entered into a marital settlement agreement after mediation and the settlement was incorporated into a judgment of divorce. The wife later moved to set aside the mediated agreement on grounds of coercion and duress by the husband, his attorney, and the mediator. The circuit court denied the motion.

The wife alleged that the mediator (1) advised her that the court would never find in her favor; (2) threatened to report to the trial court that settlement failed because of her; (3) exerted pressure to sign the agreement within five minutes; and (4) told her the judge would never give her custody of frozen embryos. The wife further alleged that she entered into the settlement agreement as a direct result of this misconduct.

The Fourth District Court of Appeal held that misconduct by a mediator, acting as an agent of the Court, was a valid basis to set aside a settlement agreement.

The Court provided a thorough review of court ordered mediation in Florida, and noted §44.102(1), *Florida Statutes*, provides that a mediation must be conducted in accordance with rules of practice and procedure adopted by the Florida Supreme Court. The court cited to several portions of the Rules that applied to the alleged actions of the mediator in the case. The court noted, “During a court ordered mediation, the mediator is no ordinary third party, but is, for all intent and purposes, an agent of the court carrying out an official court-ordered function. We

hold that the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court ordered mediation settlement agreement obtained through violation and abuse of the judicially prescribed mediation procedures. ...We hasten to add that no findings were made as to whether the mediator actually committed the alleged misconduct. Nevertheless, at least some of the wife's claims clearly are sufficient to allege a violation of the applicable rules. On remand, the trial court must determine whether the mediator substantially violated the Rules for Mediators, and whether that misconduct led to the settlement agreement in this case.”

The wife filed a grievance against the mediator for violation of several of the Rules, including the failure to maintain impartiality. The Mediator Qualifications Board issued a reprimand against the mediator but chose not to pursue any further action because the mediator was no longer certified by the Florida Supreme Court.

The ruling in *Valchine* is that mediator misconduct can provide a basis for setting aside a settlement agreement, and violation of the Florida Rules for Certified and Court Appointed Mediators constitutes such misconduct. In the context of a judicial conflict of interest that involves the disqualification of a judge, a final judgment entered by the disqualified judge can be vacated by the successor judge (see Rule 2.330(h)) and *Schlesinger v. Chemical Bank*, 707 So.2d 868 (4th DCA 1998).

Consider a case in which a mediator is a member of a law firm, and another attorney in the firm is actively involved as part of an adversary process involving a party to the mediation. Such a situation might occur where a mediator is asked to serve in a personal injury case and the mediator's firm also represents the insurance carrier in other matters. A clear conflict of interest exists that cannot be waived and is a violation of Rule 10.340. The mediator and counsel may be aware of a conflict, but are not aware of the MEAC Opinions interpreting Rule 10.340, which make it a nonwaivable situation, or neither the mediator nor counsel checks to confirm that no conflict of interest exists. In either event, the conduct of the mediation would be in violation of the Rules and, by extension of *Valchine*, can provide a party with “buyer's remorse” a basis to set aside the agreement.

If a party determines that the mediation was conducted in violation of the rules, an action to set aside the agreement could be filed. If a mediation party hires different counsel to set aside the settlement agreement or to defend such an action, will prior counsel be subject to a grievance or malpractice for permitting the mediation to occur? Does the attorney have an ethical obligation under the Rules of Professional Conduct to know the MEAC Opinions and the Florida Rules governing mediators, and thereby avoid a situation for a client in which a clear conflict of interest exists? (See Rules 4-1.2(a), 4-1.4(b), and 4-1.1) Should counsel be accountable for allowing a client to enter into an agreement that may have enforcement issues? If the conflict rules prohibit the mediation from occurring in the first place, is any agreement voidable because of a nonwaivable presumption of partiality?

If the mediation was prohibited, then there is a clear violation of the rules regarding the conflict of interest. The court in *Valchine* stated that the trial court should find if the misconduct led to the settlement agreement in the case. One can argue that “but for” the conduct of a

mediation that was not legitimate because of a violation of Rule 10.340, the settlement agreement would not have occurred. It would be impossible to determine if the mediator was impartial at the mediation. Thus, there is a strict prohibition per MEAC Opinion 2002-005 and MEAC Opinion 2008-007.

### **PRACTICE TIPS:**

#### **MEDIATORS:**

1. Circulate a memorandum among the attorneys and legal assistants in your firm which identifies the parties and the attorneys to the mediation, and inquires as to a potential conflict of interest. Explain the importance of identifying a conflict prior to the mediation. If your office manager or bookkeeper maintains a list of clients, make the same request for a conflict check.

2. In your engagement letter to the mediation attorneys, state that you will make every effort to confirm that there is no conflict of interest. However, ask counsel to inquire of their client as to the existence of a conflict of interest under the Rules. Explain the examples of a clear conflict of interest. Have the client sign a copy of the letter to acknowledge there is no conflict.

3. If a party to the mediation is a business entity, obtain the names of the principals from the attorneys and circulate those names for your conflict check.

#### **ATTORNEYS:**

1. Send a letter, fax or email to the mediator identifying your client and requesting a conflict check.

2. Send the mediator's engagement letter to your client and request that the client advise you as to any conflict of interest. Explain to the client the nature of a conflict of interest as defined by the rules and the MEAC Opinions.

3. Confirm within your firm that there is no attorney-client relationship between your firm and the mediator's firm. MEAC Opinion 2009-009 states that these circumstances are a clear conflict.

4. Have your client sign a copy of the mediator's engagement letter, or a letter from you, which confirms that the client is not aware of any conflict of interest.

Attorneys and mediators need to be aware of the rules governing mediators, the MEAC Opinions interpreting those rules, and the case law in order to avoid both ethical issues and problems with the enforcement of settlement agreements. Clients are entitled to know that the mediation is legitimate and will not create an agreement that is subject to further expensive litigation on a basis that was easily avoided.

