

December 5, 2008

## The Question:

### Factual Background

On **October 31, 2007** I served as a mediator in a dispute between the State of Florida, Department of Transportation [ the Department] and a property owner. The mediation was held ...at the Department's offices. The dispute concerned attorney's fees due to the property owner's counsel for the results achieved in the eminent domain **trial** proceedings. A hearing before the trial judge, on the issue of attorney's fees due to owner's counsel for trial level litigation, began on September 5, 2007. The hearing was not completed and continued to November 20, 2007. Between the two hearing dates the parties attempted to mediate the attorney's fee dispute on October 31, 2007. After a brief mediation session, the parties reached an impasse with regard the eminent domain **trial** attorney's fees.

The dispute over attorney's fees for the **trial** level litigation resumed at the November 20, 2007 continued hearing. Thereafter, the trial court entered an "Order Awarding Attorney's Fees" (the Order). The Order was dated January 30, 2008, but not rendered (filed) until February 8, 2008. On February 18, 2008, the Department paid the amount awarded by the trial court's Order for the trial level litigation. The check was received and processed by counsel for the owner.

On March 6, 2008, the Department appealed to the Second District Court of Appeal, seeking review of the Order Awarding Attorney's Fees. The case was styled by the district court as [Case Name], and was assigned Case Number . . . .

On March 13, 2008, counsel for the property owner moved to dismiss the appeal and for an award of appellate attorney's fees. The Department responded. On **April 24, 2008** the Second District Court of Appeal entered its order granting the motion to dismiss. In the same order, the District Court granted the motion to tax appellate attorney's fees, remanding the determination of such fees to the trial court. **At the time this occurred, I was unaware that the Order Awarding Attorney's Fees had been entered, that the matter had been taken on appeal by the Department, or that the matter had been dismissed by the District Court.**

Subsequent to the dismissal of the appeal, I was contacted by the Department of Transportation and was asked to serve as an expert witness regarding appellate attorney's fees. I do not recall the date, but believe it was late May or early June 2008. The name or style of the matter was not discussed. Counsel began to describe the issue on appeal as involving attorney's fees awarded by the trial court. He did not indicate that the Department's appeal

had been dismissed for payment of the amount awarded. His continued description of the attorney's fee dispute began to sound similar to a case I had mediated in 2007. When I related that the fee dispute sounded vaguely familiar to a matter I had mediated for the Department, counsel took a moment to review his file. He then concluded that I had served as the mediator with regard to the trial level attorney's fee dispute. I indicated that given my past participation, offering an opinion on appellate attorney's fees relating to an appeal of that same matter, may give rise to a conflict of interest. Counsel for the Department agreed and our conversation ended.

Approximately two months later, on August 11, 2008, I was called by the property owner's trial counsel and asked if I would be available to testify as an expert witness of the issue of **appellate** attorney's fees in an eminent domain matter. The hearing was set for August 18, 2008, the Monday of the following week. It was revealed that the property owner had successfully moved to dismiss the Department's appeal on the basis that the condemnor had paid the amount awarded, and by doing so, had mooted the appeal. I was told that the district court had granted a motion to tax appellate fees and costs against the Department. The only issue to be considered was a reasonable **appellate** attorney's fee for successfully having the appeal dismissed. I agreed to serve as the expert witness and asked that all of the appellate documentation and time summaries for the appeal be forwarded for my review. There was no recollection by either side that I had served as mediator with regard to the disputed **trial** litigation attorney's fees. When the appellate documents arrived, they all reflected the style of the matter as [Same Case, Different Name on Appeal] . All discussions with property owner's counsel related to what occurred after the matter was appealed and the motion to dismiss was researched and prepared. Thereafter, I prepared my opinion of a reasonable appellate attorney's fee for obtaining the dismissal.

At the time I agreed to serve as an expert witness with regard to a reasonable **appellate** attorney's fee for obtaining the dismissal of the appeal, I did not recognize that the [ ] appeal arose from the same eminent domain matter in which I had mediated the disputed **trial** attorney's fee.

### **Hearing on Appellate Attorney's Fees**

I traveled to [another city] on August 18, 2008 and appeared at the hearing. A court reporter transcribed the proceedings. While waiting for the trial judge, I was greeted by counsel for the Department of Transportation. As the trial judge took the bench, counsel for the Department quickly stated to me that this was the case he had called me about several months ago, and which I thought there may be a conflict of interest. Needless to say, I was quite surprised by the revelation. When the trial judge directed the parties to begin, I was introduced as the expert witness for the property owner. Counsel for the Department referred to our previous discussion and my comments about a potential conflict. Upon inquiry by the trial judge, I apologized that I did not recognizing the fact that the case discussed by the Department with me in the earlier phone conference was the same as that for which I had been hired as an expert witness. Through counsel and my own comments, it was pointed out to the trial judge

the attorney's fee issue that I had previously mediated, relating to the trial, was unrelated to the attorney's fee issue for which I was appearing as an expert witness. It was pointed out that there was nothing relating to the previous mediation that was considered in arriving at an opinion of a reasonable appellate attorney's fee for successfully dismissing of the appeal. I also pointed out that because my opinion would have been the same regardless of whether I appeared as the Department's witness, or that of the property owner, there was no prejudice to the Department.

The trial court ruled that my testimony would be permitted given that the attorney's fee issues were not the same. However, the time allotted for the hearing was consumed by the direct and cross-examination of the attorney that had primary responsibility for appellate representation of the property owner. I did not testify, or otherwise offer my opinion as an expert witness, and the hearing was continued. A date has not been set for the continued hearing. Counsel for the property owner and I agreed that I would seek an advisory opinion from the DRC in the interim.

Considering the above factual recitation, I would appreciate an advisory opinion with regard to whether there is a conflict of interest. Thank you for your attention to this matter.

Submitted by  
Certified Circuit Civil Mediator  
Central Division

### **Authorities Referenced**

Rules 10.340 (a)-(c), 10.620, and 10.650, Florida Rules for Certified and Court-Appointed Mediators  
MEAC Opinions 94-002, 94-003, 96-002, and 2005-004  
Rules 4-1.12 and 4-2.4, Rules Regulating the Florida Bar

### **Summary**

There is a clear conflict of interest when a mediator, having mediated a dispute, subsequently represents or otherwise takes a position for or against a former party in a related matter.

### **Opinion**

Yes, there is a clear conflict of interest. A clear conflict exists when a mediator, having mediated a dispute, subsequently represents or otherwise takes a position for or against a former party in a related matter.

Under rule 10.340(a), Florida Rules for Certified and Court-Appointed Mediators, “[a] conflict arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator’s impartiality.” Though the burden of disclosure is upon the mediator, rule 10.340(b), the parties may waive any conflict not *clearly* impairing the mediator’s impartiality, rule 10.340(c). A clear conflict, however, may not be waived. As noted in the commentary to rule 10.340, a clear conflict occurs “when circumstances or relationships involving the mediator cannot be reasonably regarded as allowing the mediator to maintain impartiality.”

The circumstances in this instance are analogous to those of prior opinions in which the Committee has identified clear conflicts of interest prohibiting lawyer mediators from providing legal representation for parties to a prior mediation. See MEAC 2005-004, 94-003, and 94-002. As rule 10.620 precludes a mediator from accepting *any* engagement or providing *any* service compromising the mediator’s integrity or impartiality, a lawyer mediator in the circumstances described will be similarly precluded from providing expert testimony on behalf of either party to a prior mediation. See also MEAC 96-002 (mediator impartiality jeopardized by acceptance of dual, conflicting roles in resolution of the same case).

It is beyond the Committee’s jurisdiction to provide guidance regarding rules regulating other professional standards. Mediators should be mindful, however, that under the Florida Rules for Certified and Court-Appointed Mediators, other ethical standards to which a mediator may be professionally bound are not abrogated. Rule 10.650. In particular, lawyer mediators may wish to refer to bar rules relating to conflicts of interest involving mediators and other third party neutrals. See R. Regulating Fla. Bar 4-1.12 and 4-2.4.

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Date

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Fran Tetunic, Committee Chair