

**ETHICAL CONUNDRUMS FOR THE 21<sup>ST</sup> CENTURY  
LAWYER/MEDIATOR  
“TOTO, I’VE GOT A FEELING WE’ RE NOT IN KANSAS ANY MORE”**

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The cyclonic winds which whisked Dorothy off to The Land of Oz are still spiraling. Now in the cone of danger – mediators who also are licensed attorneys. However, the ultimate land to which the at-risk lawyer/mediator may be transported has no yellow brick road. Instead, it is characterized by conundrums. The lawyer/mediator, like many tragic historic and mythical characters, is trapped between the Scylla of one of mediation’s bedrock principles (confidentiality) and the Charybdis of the lawyer’s whistle-blowing obligation, an ethical rule widely unknown or often observed in the breach. We question whether it is fundamentally unfair for the mediation participants’ expectations of confidentiality to be frustrated because the mediator happens to be a lawyer, a question we address again at the end of this article.

**Why this article should be read by every lawyer/mediator<sup>1</sup>**

The lawyer/mediator knows that litigation is intruding into the mediation process, often resulting in court challenges to mediated settlements and attempts to invade the confidentiality of the process. Stated differently, it has become not uncommon for parties to settle and sue, seeking to set aside mediated settlement agreements on various grounds, ranging from fraud in the inducement to duress. Consequently, what is said and done during the mediation process is increasingly the subject of pretrial discovery and, ultimately, trial testimony. While the initial target is the opposing party, the lawyer/mediator is in the line of fire.

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<sup>1</sup> The article should not be misinterpreted as any disregard to or disrespect of the many other dual profession mediators, including mental health professionals and others.

For example, take the classic case of counsel advising the client that the defendant's settlement offer is the best offer which the client could ever reasonably expect and recommending that it be accepted immediately and without condition. Not infrequently, the client has no idea of the value of the claim asserted and necessarily relies completely on counsel's advice. The client's vulnerability may be exacerbated by a multitude of after-settlement maladies (otherwise known as "buyer's remorse"), *e.g.* diminished mental or physical capacity (either from advanced age, hypoglycemia, or as a consequence of the defendant's alleged wrongful conduct at issue in the lawsuit) or language barriers (as where the client's native language is not English). This paradigmatic client may very well have permitted or invited counsel's over-reaching, gross negligence and, in some instances, borderline fraud. On such occasions, the lawyer/mediator may be all that stands between the vulnerable client and the unethical or incompetent lawyer. Assuming the lawyer/mediator concludes that counsel's conduct is incompetent, the lawyer/mediator may be obligated to report the unethical conduct to the appropriate professional authority regulating lawyers. Of course, any lawyer/mediator who does so will, to borrow a phrase made famous in Hollywood, "never work in this town again." On the other hand, failing to "blow the whistle" on the unethical lawyer may render the lawyer/mediator subject to discipline by the professional authority regulating lawyers and may increase the risk of being joined as a defendant in a subsequent civil suit by the disgruntled party who entered into a mediation settlement agreement.<sup>2</sup> This article hopes to provide awareness of and guidance for the lawyer/mediator caught in this conflict. To be clear, this "conflict" is not

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<sup>2</sup> In effect, the lawyer/mediator may be deemed a knowing abettor, especially where selected by that incompetent counsel or because of the expertise of the lawyer/mediator in a particular field of law. To the unsophisticated party participating in the mediation, the lawyer/mediator may be viewed as a target to be joined as a defendant in a lawsuit as another "apparent" lawyer who provided advice upon which the party relied, even though the advice was solicited.

merely hypothetical. To borrow a phrase used in other contexts, the lawyer/mediator is faced with a “clear and present danger,” as evidence by a recent Advisory Opinion of Florida’s Mediator Ethics Advisory Committee, discussed in detail below.<sup>3</sup>

This article begins by surveying the applicable provisions of the Model Standards of Conduct for Mediators (the “Model Mediator Standards”),<sup>4</sup> and the American Bar Association’s (the “ABA”) Model Rules of Professional Conduct (the “Model Lawyer Rules”).<sup>5</sup> We will then offer a possible protected path through this ethical labyrinth. Before concluding, we offer numerous caveats, so readers appreciate the issues we have not addressed but which are worthy of consideration and further discussion by the practicing lawyer/mediator as well as academics. In conclusion, we recommend changes to the applicable ethical standards and rules to eliminate, or at least minimize, the ethical conundrums in which the lawyer/mediator now finds herself.

## **I. Introduction**

21<sup>st</sup> Century civil mediation is increasingly dominated by lawyers escaping from private trial/commercial litigation practice. While these refugees, in fact, may leave behind the stress, strain, and aggravation of practicing law (*i.e.* judges, opposing counsel, clients, and partners),

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<sup>3</sup> Mediator Ethics Advisory Opinion (“MEAC”) Advisory Opinion 2006-005 (March 10, 2008).

<sup>4</sup> For a copy of the Model Mediator Standards *see* [http://www.abanet.org/dispute/documents/model\\_standards\\_conduct\\_april2007.pdf](http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf). To trace the genealogical development of the Model Mediator Standards *see* <http://www.abanet.org/dispute/webpolicy.html>.

<sup>5</sup> The Model Lawyer Rules may be found on line at the ABA’s web site: [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html). An alphabetical list of states which have adopted the Model Lawyer Rules in some form is found on the ABA’s web site at [http://www.abanet.org/cpr/mrpc/alpha\\_states.html](http://www.abanet.org/cpr/mrpc/alpha_states.html). No lawyer/mediator’s ethics library is complete without three books published by the ABA’s Center of Professional Responsibility: A LEGISLATIVE HISTORY – THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 (2006); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (6<sup>th</sup> ed. 2007); and LAWYER LAW – COMPARING THE ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH THE ALI RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2005).

they also may be engaged in self-deception, believing the mediation side of the fence is greener and carefree when that is far from the truth. That is because most mediators, either by choice or as a condition of mediator certification, maintain their licenses to practice law. Consequently, the lawyer/mediator's conduct is now guided and constrained by two sets of professional standards, those governing mediators and others regulating lawyers.<sup>6</sup>

The purpose of this article is not to pass judgment on the increasing growth of these rules and regulations. Rather, we examine the dynamic relationship, and in many instances the tension, between the mediator standards and lawyer ethical rules, specifically what happens when the confidentiality and the sanctity of the mediation session is challenged by the obligation of disclosure under a bar requirement.<sup>7</sup> In offering possible answers to this question, we begin by identifying the source of the conflict and then review some provisions of the Model Mediator Standards and the Model Lawyer Rules which form the basis for our discussion.

## **II. The Source of the Conflict**

A conundrum may be defined as a paradoxical, insoluble, or difficult problem.<sup>8</sup> The lawyer/mediator encounters ethical conundrums because of conflicts between the Model

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<sup>6</sup> Added to the disciplinary/regulatory mix are statutory mediation schemes, discussion of which is beyond the scope of this article. For example, any treatment of statutory mediation schemes is incomplete without reference to the Uniform Mediation Act. See <http://www.pon.harvard.edu/guests/uma/>. The genealogical development of the Uniform Mediation Act may be found on the web site of the ABA's Section of Dispute Resolution (hereinafter the "Section") at <http://www.abanet.org/dispute/webpolicy.html>.

<sup>7</sup> This issue was first recognized more than a decade ago. See Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715 (1977).

<sup>8</sup> See Conundrum, Dictionary.com, <http://dictionary.reference.com/browse/conundrum> ((quoting *The American Heritage® Dictionary of the English Language* (4<sup>th</sup> ed. Houghton Mifflin Co. 2004)).

Mediator Standards and the Model Lawyer Rules. These conflicts are recognized by the Preamble to the Model Mediator Standards and Comment [2] to Rule 2.4 of the Model Lawyer Rules. The provisions, in pertinent part, state as follows:

### **Preamble**

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. *These sources **may** create conflicts with, and **may** take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.*

### **Rule 2.4<sup>9</sup> Comment [2]**

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. *Lawyer-neutrals **may** also be subject to various codes of ethics, such as . . . the Model Standards of Conduct for Mediators jointly*

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<sup>9</sup> Rule 2.4 was added to the Model Lawyer Rules by the ABA as a recommendation of the Ethics 2000 Commission. See <http://www.abanet.org/cpr/e2k/home.html>.

Rule 2.4 provides as follows:

#### **Rule 2.4 Lawyer Serving As Third-Party Neutral**

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

*prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution. (footnotes, bold and italics added).*

The italicized language does not clearly identify the trump suit, for its circular logic renders the lawyer/mediator a dog chasing his or her own tail: the Model Lawyer Rules announce that the lawyer/mediator *may* be subject to the Model Mediator Standards, and the Model Mediator Standards prescribe that professional rules (like the Model Lawyer Rules) *may* take precedence in the event of a conflict. One such conflict arises between the mediator's duty of confidentiality and the lawyer's duty to report another lawyer's unethical conduct when the person conducting the mediation is wearing two professional hats (mediator and lawyer), and subject to two sets of professional rules.

### **III. Confidentiality**

Confidentiality is addressed in Standard V of the Model Mediator Standards, which states as follows:

*A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, **unless otherwise** agreed to by the parties or **required by applicable law**.*

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution. . . .

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

The “unless otherwise required by applicable law” clause is the gaping hole and disclaimer umbrella of mediation confidentiality. We turn now to the reporting requirement of Model Lawyer Rule 8.3.

#### IV. Whistle Blowing

Rule 8.3 of the Model Lawyer Rules contains what many refer to as a whistle blowing requirement. The rule, entitled “Reporting Professional Misconduct” states, in pertinent part, as follows:

*(a) A lawyer who **knows**<sup>10</sup> that another lawyer has committed a violation of the Rules of Professional Conduct that raises a **substantial**<sup>11</sup> question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. . . .*

*(c) **This Rule does not require disclosure of information otherwise protected by Rule 1.6**<sup>12</sup> or information gained by a lawyer or judge while participating in an approved lawyers assistance program. (footnotes, italics and bold added).*

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<sup>10</sup> Rule 1.0(f) of the Model Lawyer Rules defines “knows” as “actual knowledge of the fact in question,” but adds that “knowledge may be inferred from circumstances.”

<sup>11</sup> Rule 1.0(l) of the Model Lawyer Rules defines “substantial” “when used in reference to degree or extent [as] denot[ing] a material matter of clear and weighty importance.”

<sup>12</sup> Rule 1.6 of the Model Lawyer Rules, entitled “Confidentiality Of Information,” provides in subparagraph (a) as follows:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Comment [2] to Rule 8.3 makes clear that a “report about misconduct is not required where it would involve violation of Rule 1.6.”

A lawyer/mediator’s reporting obligation under Rule 8.3 is not diminished by the absence of an attorney-client relationship.<sup>13</sup> Hence, the issue for our consideration under Rule 8.3 is whether a lawyer/mediator is obligated to report the conduct of another lawyer in the mediation which violates the Model Lawyer Rules notwithstanding the confidentiality or privilege accorded mediation communications.

## **VI. The Lawyer/Mediator’s Conundrum In Action**

Lawyers have been called “workers in the mill of deceit.”<sup>14</sup> From a client’s perspective, however, “departure from truthfulness” is not a failing but often deemed “essential to the lawyer’s task,” as illustrated by the following:

Lawyer: Well, if you want my honest opinion –  
Client: No, no. I want your professional advice.<sup>15</sup>

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Because the lawyer/mediator is not acquiring information “relating to the [lawyer/mediator’s] representation of a client,” Rule 8.3(c) does not alleviate the lawyer/mediator’s reporting obligations under Rule 8.3(a).

<sup>13</sup> See Charles B. Plattsmier, *Self Regulation and the Duty to Report Misconduct: Myth or Mainstay?*, THE PROF. LAW. Nov. 2007, at 41-45; Mary T. Robinson, *A Lawyer’s Duty to Report Another Lawyer’s Misconduct. The Illinois Experience*, THE PROF. LAW. Nov. 2007, at 47-54; and Patricia A. Sallen, *Combating Himmel Angst*, THE PROF. LAW. Nov. 2007, at 55-63. See generally A.B.A.’S CENTER OF PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 569-574 (6<sup>th</sup> ed. 2007) (citing Greenbaum, *The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 Geo. J. Legal Ethics 259 (2003), Ott & Newton, *A Current Look at Model Rule 8.3: How It is Used and What Are Courts Doing About It?*, 16 Geo. J. Legal Ethics 747 (2003); Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 Geo. J. Legal Ethics 175 (1999)).

<sup>14</sup> MARC GALANTER, LOWERING THE BAR \* LAWYER JOKES & LEGAL CULTURE 36 (2005).

<sup>15</sup> *Id.* at 36 & n. 32.

Mediators may have become more skeptical since the ABA Standing Committee On Ethics and Professional Responsibility issued Formal Opinion 06-439.<sup>16</sup> But the ethical conundrum for the lawyer/mediator is not subtle or nuanced, turning on whether a statement is one of material fact or contextually viewed as mere puffery. To the contrary, the conflict between the lawyer/mediator's duty of confidentiality and the duty to report unethical conduct can arise in a variety of settings, such as:

- when a party is incapable of making an informed decision - either because of age, mental incapacity, insufficient education, life experience, or lack of sophistication - and the party's lawyer is effectively making decisions for the client, contrary to the requirements of Model Lawyer Rules 1.2(a) and 1.14;
- when a lawyer fails to explain a matter to the extent reasonably necessary to permit the client/party to make informed decisions regarding the representation and otherwise represents the client/party in an incompetent manner, contrary to the requirements of Model Lawyer Rules 1.1 and 1.4; or
- when a lawyer suffers from a conflict of interest and advises the client/party in a manner obviously designed to advance the lawyer's own personal interests (financial or otherwise) at the expense of the client/party, contrary to the requirements of Model Lawyer Rules 1.7 or 1.8.

By hypotheses, each situation involves a party's lawyer violating a clear, unambiguous rule of professional conduct which raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer. Model Lawyer Rule 8.3(a) would *not* obligate a lawyer for

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<sup>16</sup> The summary paragraph of this opinion states:

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules.

Interestingly, Formal Opinion 06-439 takes no position on the "validity" of the competing views of "deception synergy" (a phrase that may defy any clear definition) and "consensual deception," both of which are acknowledged as intrinsic to the mediation process.

another party in this situation to report the other lawyer's ethical misconduct to the appropriate professional authority because the information would be deemed confidential under Model Lawyer Rule 1.6 and, under Model Lawyer Rule 8.3(c), not subject to disclosure without the affected client's informed consent. In contrast, Model Lawyer Rule 8.3(a) *would* require the lawyer/mediator to report the unethical lawyer's misconduct to the appropriate professional authority because Model Lawyer Rule 8.3(c) is not applicable. Moreover, Reporter's Note 7 to Section 6 of the Uniform Mediation Act, quoted above, makes clear that the reporting requirements of Model Rule 8.3(a) operate independently of the mediation privilege and exceptions contained in the Act.

For a moment, we move from the hypothetical to the actual, a real life situation recently addressed in MEAC Advisory Opinion 2006-005.<sup>17</sup> The Florida Mediator Ethics Advisory Committee ("MEAC" or the "Committee") had the following question posed to it by a Certified Family Mediator:<sup>18</sup>

I have been recently involved in a mediation and during the mediation it was learned that there was an expenditure from funds held in escrow by one of the attorneys representing a party to the litigation.

The information about the expenditure from the escrow was made by the attorney responsible for preserving the escrowed funds while in private session with the mediator.

The mediator, in private session with the other party explained that certain monies were paid from the escrowed funds. It is not anticipated that either party will complain about the mediator.

The question is whether the confidentiality required during mediation prohibits a grievance being filed with the Bar relating to the attorney who released the funds from escrow. . . .

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<sup>17</sup> See note 3, *supra*.

<sup>18</sup> The Florida Supreme Court certifies county court, family, circuit court and dependency mediators. See Fla. R. Certified and Court-Appointed Mediators 10.100(a).

The question posed was answered, in summary, as follows:

The filing of a grievance with The Florida Bar is not necessarily precluded by statutory and rule confidentiality requirements. However, based on the facts of this question, the filing of a grievance with The Florida Bar is prohibited. **Whether any other persons may report the attorney litigant's action to The Florida Bar is beyond the scope of the Committee's function since it would involve an interpretation of the attorney ethics code.** (emphasis added)

In explaining this summary answer, the Committee noted that the revelation that funds had been expended from escrow was deemed a “mediation communication” within the statutory definition.<sup>19</sup> However, the communication was deemed not to fit with the statutory exception to mediation confidentiality under which it is permissible to “offer” a mediation communication “to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.”<sup>20</sup> The Committee concluded that “[s]ince the misconduct which would be the subject of the report, the escrow violation, did not occur during the mediation, the misconduct statutory exception does not apply.”<sup>21</sup> The Committee also wrote that:

The Committee notes that while the statutory exceptions to confidentiality apply to all mediation participants, mediators are additionally governed by the Florida Rules for Certified and Court-Appointed Mediators. Accordingly, mediators have the obligation to maintain confidentiality (rule 10.360) and impartiality (rule 10.330), along with their more general obligations to the process

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<sup>19</sup> See FLA. STAT. § 44.403(1) (“Mediation communication” means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication.)

<sup>20</sup> FLA. STAT. § 44.405(a)(6).

<sup>21</sup> One should note that under Florida law, see FLA. STAT. § 44.404(1)(a), a “court-ordered mediation begins when an order is issued by the court.” Hence, if the escrow violation occurred after entry of the order requiring mediation, the violation occurred “during the mediation.” In that instance, its revelation in a “mediation communication” falls squarely within the confidentiality exception codified in FLA. STAT. § 44.405(4)(a)(6), arguably leading to a conclusion opposite to that reached in MEAC Opinion 2006-005

(rule 10.400) and profession (rule 10.600). The Committee emphasizes that mediators are not *obligated* to report statutory exceptions by virtue of either the Mediation Confidentiality and Privilege Act, section 44.405(4)(a), Florida Statutes, or the Florida Rules for Certified and Court-Appointed Mediators. The only statutory exception requiring reporting is abuse and neglect of children and vulnerable adults, which exists by virtue of separate mandatory reporting statutes. Section 44.405(4)(a)3, Florida Statutes. **Mediators subject to other ethical codes, must, of course, guide themselves based on their concurrent codes of conduct.** (emphasis added)

As to the issue of whether the referenced communication is *required* to be reported to The Florida Bar by an attorney mediator, the Committee notes that rule 10.650 provides that in the course of providing mediation services, mediation rules control over conflicting ethical standards. **Given that the mediation communication does not appear to fit into any of the specified exceptions, the attorney mediator would be prohibited from making the disclosure to The Florida Bar.** (emphasis added, footnote omitted).

The footnote omitted from the preceding quotation states: “See also 4-1.12 Comments, Rules Regulating The Florida Bar, “A Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators.”

What MEAC Opinion 2006-005 does not address or even acknowledge is the conflict which appears to exist between the conclusion it reaches and the express lawyer reporting requirements of R. Regulating Fla. Bar 4-8.3(a), which provides:

(a) Reporting Misconduct of Other Lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

Simply stated, MEAC Opinion 2006-005 prohibits the lawyer/mediator from reporting misuse of escrowed funds by counsel for one of the parties to the mediation whereas the lawyer/mediator may be subject to discipline for “misconduct” for failing to report as required by Rule 4-8.3(a). This brings us to the recommended course of conduct – both prophylactic and remedial – for the lawyer/mediator.

## VII. What The Lawyer/Mediator Should Do

In recognition of this ethical conundrum, we recommend that the lawyer/mediator clearly inform all participants of the rules of confidentiality under which the mediation will be conducted.<sup>22</sup> Among the exceptions to such confidentiality, one of the most overlooked by mediators is the lawyer/mediator's possible obligation to report another lawyer's substantial violation of the Model Lawyer Rules.<sup>23</sup> The mediator's obligation to clearly inform all participants can be done in the mediator's engagement letter<sup>24</sup> or in any mediation confidentiality agreement which the mediation participants are asked to sign.<sup>25</sup> If despite these prophylactic measures a lawyer/mediator is confronted with a situation in which the obligation to report under Model Rule 8.3(a) arises, the lawyer/mediator should remonstrate privately with the subject lawyer, outside the presence of the lawyer's client, to explain the lawyer/mediator's concerns, to ask the subject lawyer to take all steps necessary to rectify the ethical violations, and to advise that, at a minimum, the lawyer/mediator must and will withdraw from serving as mediator unless the subject lawyer "does the right thing." Should the errant lawyer demur, the question becomes whether the lawyer/mediator must withdraw from the mediation. As to whether the lawyer/mediator in fact reports the unethical lawyer to the appropriate professional authorities,

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<sup>22</sup> See Standard V of the Model Mediator Standards C and D, *supra*.

<sup>23</sup> The type of misconduct for which an obligation to report does not include the characterization of an opposing party's negotiations being in "bad faith."

<sup>24</sup> In doing so, mediator engagement letters may begin to resemble the now typical multi-page retainer letters used by lawyers.

<sup>25</sup> Readers should note that we have not recommended this issue be covered in the mediator's opening statement. Using the opening statement for this disclosure almost certainly will have a chilling effect on communication and diminish the likelihood of achieving a mediated settlement. Hopefully, such a comment should not have a chilling effect on the attorney's candor in the mediation process. *See* note 16, *supra*.

the lawyer/mediator should consider whether failing to do so potentially subjects the lawyer/mediator to charges of unethical misconduct (under Model Lawyer Rule 8.4(a))<sup>26</sup> or potential civil liability for aiding and abetting the subject lawyer's breach of fiduciary duties owed to a client, or breach of other duties owed to non-clients.<sup>27</sup>

### VIII. Caveats

Before recommending rule and statutory changes which potentially eliminate the ethical conundrum of mediation confidentiality versus lawyer reporting obligations, we believe it

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<sup>26</sup> Rule 8.4(a) of the Model Lawyer Rules provides that it is "professional misconduct" for a lawyer to "(a) violate or attempt to violate the Rules of Professional Conduct, *knowingly assist* or induce *another* to do so, or do so through the acts of another . . . ." The issue for a lawyer/mediator presented by Rule 8.4(a) is whether failing to withdraw from a mediation or failing to report the professional misconduct of a lawyer representing a party in the mediation constitutes "knowing assistance" of a ethical rule violation, thereby subjecting the lawyer/mediator to discipline. The Model Lawyer Rules provide no guidance on what it means to "knowingly assist" another lawyer to violate the Rules of Professional Conduct, at least as that term is used in Rule 8.4(a).

<sup>27</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 876, which provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

See generally James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003). Under Florida law, a mediator conducting a court ordered mediation "shall have judicial immunity in the same manner and to the same extent as a judge." Fla. Stat. § 44.107(1). A person serving as a mediator in any noncourt-ordered mediation has immunity under Fla. Stat. § 44.107(2) under prescribed conditions and no immunity "if he or she acts in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."

appropriate to identify issues which we have not addressed above. We do so because these issues are worthy of consideration by the lawyer/mediator but simply beyond our ability to cover competently in this article.<sup>28</sup>

In pre-suit mediations involving multiple parties residing in different jurisdiction - unlike court ordered mediations where an action in a particular jurisdiction has been commenced - the dispute may pose conflict of law issues, *e.g.* what professional rules govern mediation privilege, confidentiality, and other relevant ethical standards. If the participants themselves cannot agree, the lawyer/mediator (or any mediator) should select clear rules, standards, and ethical guidelines to govern the process and make the participants aware of same (preferably in writing).

We have not addressed how the issues discussed above would play out in those states with lawyer reporting requirements similar to Model Lawyer Rule 8.3 but which do not have clearly defined statutes or rules providing for mediator certification and the confidentiality of mediations. Our hope is that this article will serve as a catalyst for action in such states. Nor does this article express any opinion as to a foreign jurisdiction holding the lawyer/mediator to the rules governing attorneys in their state, especially if that state considers mediation the practice of law.

Last, but not least, and perhaps most troubling, this article merely touches upon the potential professional liability of the mediator for a civil suit for damages for breaches of conduct or giving legal advice when trapped between Scylla and Charybdis. While immunity may exist in some states,<sup>29</sup> a cause of action may be pled by invoking an exception under the

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<sup>28</sup> It bears repeating that this article focuses on the lawyer/mediator and does not address similar problems encountered by other professionals acting in the role of a mediator.

<sup>29</sup> *See, e.g.* FLA. STAT. §44.107, which provides:

44.107 Immunity for arbitrators, mediators, and mediator trainees.--

immunity statute or by the creative plaintiff's attorney recharacterizing the mediator's conduct as attorney negligence. When the "settle and sue" situation arises, the allegations of the complaint filed against the mediator will characterize the lawyer/mediator as an "expert" attorney chosen to mediate the case for precisely that reason. Moreover, the party suing the mediator will likely allege something along the lines of the following: "I thought he was my attorney, since he told me he was an expert in the field and felt I should follow his 'advise, opinion, and experience'." This is the very language that can result in liability attaching when none was expected. Unfortunately, mediators create such potential exposure by marketing themselves with substantial expertise and knowledge to mediate cases in the areas of the mediator's prior experience and expertise as a lawyer.

## **IX. Recommendations**

Lawyer/mediator ethical conundrums can possibly be eliminated, in large part, by one change to the Model Mediator Standard's Preamble, one addition to Rule 8.3(c) of the Model Lawyer Rules, and one revision to the Uniform Mediation Act,

We recommend that the Preamble to the Model Mediator Standards be changed as follows:

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- (1) . . . [M]ediators serving under s. 44.102 [Court-ordered mediation] . . . shall have judicial immunity in the same manner and to the same extent as a judge.
  - (2) A person serving as a mediator in any noncourt-ordered mediation shall have immunity from liability arising from the performance of that person's duties while acting within the scope of the mediation function if such mediation is:
    - (a) Required by statute or agency rule or order;
    - (b) Conducted under ss. 44.401-44.406 by express agreement of the mediation parties; or
    - (c) Facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by ss. 44.401-44.406.The mediator does not have immunity if he or she acts in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources. Moreover, in the course of performing mediation services, these Standards prevail over any conflicting ethical standards to which a mediator may otherwise be bound. (double underlined words added).

This addition would have the Model Mediator Standards trump only conflicting *ethical standards* to which the lawyer/mediator may otherwise be bound. To the extent conflicts do not exist between the Model Mediator Standards and “applicable law, court rules, regulations, . . . mediation rules to which the parties have agreed and other agreements of the parties,” the Model Mediator Standards are trumped, occupying a subordinate role. In effect, therefore, the lawyer/mediator would not be obligated to report another lawyer’s ethical misconduct to the appropriate authorities, but, would be available to testify, as required by law.

This proposal is in part based on Rule 10.650 of the Florida Rules for Certified & Court-Appointed Mediators dealing with current standards. That rule provides:

Other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediation services, however, these rules prevail over any conflicting ethical standards to which a mediator may otherwise be bound.

In fairness to the mediation process and participants, clarity is required to extricate the dual professional mediator from this conflict. Contrary to the Model Mediator Standards, Florida’s mediation rules take the clear, unequivocal position that mediator rules trump all other conflicting ethical standards to which the lawyer/mediator is bound. There can be only one reason for doing so - the recognition that the empowerment bestowed by mediation is more important than the rationale underlying lawyer rules of professional conduct designed to govern

litigation and transactional paradigms. Moreover, a comment to Rule 4-1.12 of Florida's Rules of Professional Conduct states that: "A Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators." However, this comment does not address: (a) conflicts which may exist between Florida's certified mediator rules and the Rules of Professional Conduct governing lawyers; and (b) lawyers who are members of The Florida Bar who mediate cases but are not certified mediators under the standards prescribed by the Florida Supreme Court.

Interestingly, and perhaps paradoxically, Florida's Mediator Ethics Advisory Committee has opined that the filing of a bar grievance is not prohibited by the confidentiality requirements imposed by statute and rule.<sup>30</sup> By statute, Florida recognizes an exception to the confidentiality accorded mediation communications where a communication is "offered to report, prove or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct."<sup>31</sup> On the issue of whether the lawyer/mediator is **required** to "blow the whistle" this opinion states:

As to the question of whether the referenced communication is required to be reported to The Florida Bar by an attorney mediator, the Committee must defer to The Florida Bar and the provisions of rule 4-8.3, Rules Regulating the Florida Bar, which deals with the requirement of reporting such matters. While rule 10.650 provides that in the course of providing mediation services, mediation rules control over conflicting ethical standards, the rule also specifically states that other ethical standards to which the mediator is subject are not abrogated. Therefore, as seems to be the case in your situation, concurrent non-conflicting rules would be operative.<sup>32</sup>

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<sup>30</sup> MEAC Advisory Opinion 2006-005 (September 21, 2006).

<sup>31</sup> FLA. STAT. § 44.405(4)(a)6 (2007).

<sup>32</sup> MEAC Advisory Opinion 2006-00 at 3 (footnote omitted).

To provide a clear, unequivocal answer to this question, we recommend that Model Lawyer Rule 8.3(c) be amended as follows:

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 ~~or~~ information gained by a lawyer or judge while participating in an approved lawyers assistance program, or information gained by a lawyer while serving as a third-party neutral where such information is deemed privileged or confidential by applicable law, forum rules, regulations, or other professional rules. (deletions stricken and double underlined words added).

We also recommend that an additional comment be added to Model Lawyer Rule 8.3, to be denominated as comment [6], to read as follows:

[6] Information gained by a lawyer while serving as a third-party neutral, especially as a mediator, is typically deemed privileged or confidential. Where information gained by a lawyer serving as a third-party neutral is accorded such privileged or confidential treatment, the lawyer/third-party neutral is excused from Rule 8.3(a)'s disclosure and reporting requirements. As existing alternative dispute resolution mechanisms evolve and new procedures develop, it is contemplated that law, forum rules, regulations, professional rules, and agreements among participants can and must address the extent to which information gained by the lawyer serving as a third-party neutral should be deemed privileged or confidential as necessary to promote efficacy of the process.

The law favors settlements, whether mediated or achieved via direct lawyer or party negotiations. Mediated settlements, through the efforts of the third party neutral (the mediator), enhances and protects self-determination while simultaneously promoting empowerment. To achieve these goals, the mediator must be able to represent that the mediation process is confidential, and the participants must be able to rely on such confidentiality. This expectation of confidentiality, created by the process, is shared equally by the parties, their attorneys and the mediator. In the absence of such assured confidentiality, the mediation process is significantly impaired, if not totally compromised.

Clearly, as a matter of public policy, there should be and are limited exceptions to mediation confidentiality. In many instances, those exceptions are codified by statute. Such

statutory exceptions reflect the delicate balance between confidentiality and necessary disclosures. Hence, we believe it is fundamentally unfair for the parties' expectations of confidentiality to be frustrated because the mediator happens to be a lawyer.

We believe mediator and lawyer ethical standards/rules should permit lawyer/mediators to be, first and foremost, mediators when acting as a mediator. Therefore, in striking a balance between competing interests, we believe the lawyer/mediator should not be the catalyst for a bar grievance but should be available to testify. Any other position imperils the lawyer/mediator's impartiality and impairs his or her effectiveness in helping the parties achieve the common ground of a settlement. Our recommendations are designed to minimize lawyer/mediator ethical dilemmas while empowering parties to make informed, voluntary decisions without a chilling effect not only on the participants but on the attorneys as well. This, of course, is the prime objective of mediation.

The ability of the mediator and the mediation process to assure the users of confidentiality continues the effectiveness of this very empowering and successful settlement process. At the same time it is essential that the mediator be able to perform the mediator's functions without the fear or uncertainty of being caught between two different and conflicting sets of standards and ethics. The mediator while being under the duty to properly mediate should be held accountable only for those responsibilities and not those of another profession.

## **X. Closing Observation**

This article is clearly the result of the dual profession lawyer/mediator. The ethical issues which arise from wearing two professional hats will one day, we hope, become moot when the professional mediator is truly born!