

# POST-ADR CONDUCT OF A MEDIATOR-ARBITRATOR

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## *Arbitration and Mediation Office of Lee Hornberger*

This article reviews *Hartman v Hartman*, unpublished opinion per curiam of the Court of Appeals, issued August 7, 2012 (Docket No 304026) (Donofrio, Ronayne Krause, and Boonstra). *Hartman* concerns the issue of the same person serving as both arbitrator and mediator and the post-arbitration/mediation conduct of the arbitrator-mediator and the defense counsel.

The Circuit Court ordered the parties to mediation. When mediation failed, the parties agreed to arbitrate using the mediator as the arbitrator. The arbitrator issued awards covering minor issues. Before arbitration on the major issues, the parties agreed to again mediate utilizing the arbitrator as a mediator. When this mediation failed, the parties agreed to a settlement.

At the entry of judgment hearing, plaintiff said he had concerns about the arbitrator acting as a neutral. He did not ask to have the settlement agreement set aside. The final judgment hearing was continued for four weeks. Plaintiff's counsel contacted the arbitrator to inform the arbitrator of the dates. The arbitrator informed plaintiff's counsel that the arbitrator was going to be in Florida and staying at the home of defense counsel while defense counsel would also be present. Plaintiff's counsel then contacted defense counsel to request a new arbitrator for the remaining issues, which request was refused.

Plaintiff filed motions to remove the arbitrator, appoint a new arbitrator, and obtain relief from the settlement agreement. Defendant argued that the arbitration awards

were moot because a settlement had been reached. Defense counsel argued that what had occurred between him and the arbitrator was hospitality and that numerous attorneys, including judges, had stayed at defense counsel's Florida home. The Circuit Court denied plaintiff's motion, stating that there was no appearance of impropriety because the parties ultimately reached a settlement agreement, and the trip to Florida occurred 30 days after the mediation. A judgment of divorce was entered. The Circuit Court held that there was no evidence of clear or actual bias by the arbitrator and no evidence to prove that what occurred between the arbitrator and defense counsel rose to the level of clear actual partiality.

The Court of Appeals affirmed the denial of plaintiff's motion to set aside the settlement agreement and judgment of divorce. The Court of Appeals stated that:

The totality of the circumstances in the case at bar rises to a level that would have required the arbitrator to be removed from arbitrating or mediating the remaining matters. However, the final matters that remained outstanding at the time of the arbitrator's and defense counsel's vacation together were settled by the judge. The arbitration awards issued before the settlement agreement became moot because the settlement agreement handled those matters. The only issue not moot is whether the settlement agreement can be set aside. We find that it cannot.

Hartman is an interesting case concerning the Circuit Court's refusal to set aside a settlement agreement and judgment of divorce on the basis of alleged apparent impropriety committed by the arbitrator-mediator, especially where, according to the Court of Appeals, "[t]he totality of the circumstances ... rises to a level that would have required the arbitrator to be removed from arbitrating or mediating the remaining matters."

The post-arbitration-mediation conduct in *Hartman* raises issues under several conduct guidelines for neutrals. For example, the Michigan Supreme Court State Court Administrative Office Standards of Conduct for Mediators indicates:

(4) Conflict of Interest ... (b) The need to protect against conflicts of interest also governs **conduct that occurs ... after the mediation**. A mediator must avoid the appearance of conflict of interest ... **after the mediation**. Without the consent of all parties, a mediator **shall not subsequently** establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances that would raise legitimate questions about the integrity of the mediation process. A mediator shall not establish a personal or intimate relationship with any of the parties that would raise legitimate questions about the integrity of the mediation process. Emphasis added.

The Model Standards of Conduct for Mediators (September 2005) of the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution states:

STANDARD III. CONFLICTS OF INTEREST ...

F. **Subsequent to a mediation**, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations **following a mediation** in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest. Emphasis added.

The Code of Ethics for Arbitrators in Commercial Disputes (March 1, 2004) indicates:

CANON I: AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS. ...

C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might

reasonably create the appearance of partiality. **For a reasonable period of time after the decision of a case**, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. . . . Emphasis added.

It is not clear from the Court of Appeals *Hartman* decision whether or how plaintiff argued that his negotiating positions in reaching the ultimate “settlement agreement” were influenced by the arbitrator’s prior arbitration decisions and/or the mediator’s viewpoints and comments. To the degree that there was a relationship between plaintiff’s negotiating positions and the arbitration decisions and mediation process, the question exists whether plaintiff was entitled to make settlement decisions in an environment without prior arbitration decisions and mediator comments that came from a neutral whose post arb-med conduct raised alleged apparent standards of conduct issues.

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#### **About the Author**

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