MEDIATOR-ARBITRATOR CONDUCT AFTER ARBITRATION AND MEDIATION

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Arbitrator and Mediator

Introduction

An interesting decision by the Michigan Court of Appeals demonstrates the ethical challenges posed by long standing, close relationships between attorneys and the arbitrators and mediators they select. *Hartman v Hartman*, unpublished opinion per curiam of the Court of Appeals, issued August 7, 2012 (Docket No 304026), concerned the same attorney serving as both arbitrator and mediator and post-arbitration/mediation alleged conduct of the arbitrator-mediator and defense counsel. *Hartman* reminds us that "[n]o part of the arbitration process is more important than that of selecting the person who is to render the decision[,]" Elkouri & Elkouri, *How Arbitration Works* (8th ed.), p. 4-39, and "[c]hoosing an arbitrator may be the most important step the parties take in the arbitration process." Abrams, *Inside Arbitration* (2013), p. 37. See generally James J. Harrington, III, "Family Law Arbitration: Successful Strategies and Tactics," *The ADR Quarterly* (July 2016), p. 2; and Martin C. Weisman and Sheldon J. Stark, "Is Med/Arb the Process for You," *Michigan Bar Journal* (June 2015), p. 26.

Circuit Court

In *Hartman*, a contentious, escalated divorce matter, the Circuit Court ordered the parties to mediation. An attorney neutral was mutually selected to be the mediator. When the first mediation did not result in a mediated settlement agreement, 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 once

again utilizing the arbitrator as a mediator. When this mediation did not result in a mediated settlement agreement, the parties eventually agreed to a settlement on their own.

At the entry of judgment hearing, plaintiff said he had concerns about the arbitrator acting as a neutral. The 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 where defense counsel would also be present.

The plaintiff filed motions to remove the arbitrator, appoint a new arbitrator, and obtain relief from the settlement agreement. The defendant argued that the arbitration awards were moot because a settlement had been reached. Defense counsel argued that what had occurred in Florida 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 an agreement, and the trip to Florida occurred 30 days after the mediation. A judgment of divorce was entered. The Circuit Court held there was no evidence of clear or actual bias by the arbitrator and no evidence to prove that what occurred rose to the level of clear actual partiality.

Court of Appeals

The Court of Appeals affirmed the denial of plaintiff's motion to set aside the settlement agreement and judgment of divorce. However, the Court of Appeals also 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.

It is not clear whether plaintiff argued that his negotiating positions in reaching settlement were influenced by the arbitrator's prior arbitration decisions and/or the mediator's comments. To the degree that there was a relationship between plaintiff's negotiating positions and the arbitration decisions and mediation process, the key question is whether plaintiff was entitled to a process different from the alleged post-arbitration-mediation conduct of the neutral.

Standards of Conduct for Neutrals

The SCAO former Standards of Conduct for Mediators (effective until January 31, 2013) indicated:

> (4) Conflict of Interest. (a) A conflict of interest is a dealing or relationship that might create an impression of possible bias or could reasonably be seen as raising a question about impartiality. A mediator shall promptly disclose all actual and **potential** conflicts of interest reasonably known to the mediator. ... (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.

SCAO's current Mediator Standards of Conduct Standards (February 1, 2013) provide:

> **Standard III. Conflicts of Interest**
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> A. A mediator should avoid a conflict of interest or the appearance of a conflict of interest **both during and after mediation**. A conflict of interest is a dealing or

relationship that could reasonably be viewed as creating an **impression of possible** bias or as raising a **question** about the impartiality or self-interest on the part of the mediator. …

G. In considering whether establishing a personal or another professional relationship with any of the **participants after the conclusion of the mediation process** might create a **perceived** or actual conflict of interest, the mediator should consider factors such as time elapsed since the mediation, consent of the parties, the nature of the relationship established, and services offered. 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.

Michigan Attorney Grievance Commission

On December 14, 2016, the Grievance Administrator of the Michigan Attorney Grievance Commission issued formal complaint No 16-143-GA against the attorney who had served as the arbitrator and mediator in *Hartman*. MCR 9.109(B)(6). It is too early to determine where this will end up or to predict the outcome. Charges in the complaint are currently allegations only. They suggest, however, that ADR providers proceed cautiously, make certain their disclosures are complete and detailed, and be ever mindful about even the appearance of bias or conflicts when serving as mediator or arbitrator for good friends and close colleagues.

The complaint alleges that, as a licensed Michigan attorney, an attorney is subject to the jurisdiction of the Supreme Court and the Attorney Discipline Board whether or not the attorney's acts or omissions occurred in the course of an attorney-client relationship. MCR 9.104.

The complaint further alleges that SCAO is required to develop and approve standards of conduct for mediators designed to promote honesty, integrity, and impartiality in providing court-connected dispute resolution services, MCR 2.411(G); and SCAO is further required to develop and approve standards of conduct for domestic relations mediators designed to promote honesty, integrity, and impartiality in providing court-connected dispute resolution services. MCR 3.216(K).

The complaint further alleges that the Agreement to Arbitrate in *Hartman* provided the case was being submitted to arbitration pursuant to the Domestic Relations Arbitration Act, MCL 600.5070-5082. MCL 600.5070 provides, in part:

> This chapter provides for and governs arbitration in domestic relations matters. Arbitration proceedings under this chapter are also governed by court rule except to the extent those provisions are modified by the arbitration agreement or this chapter. This chapter controls if there is a conflict between this chapter and chapter 50 [MCL 600.5001] or between this chapter and the [U]niform [A]rbitration [A]ct [MCL 691.1681].

MCL 600.5075 provides, in part:

> (1) An arbitrator, attorney, or party in an arbitration proceeding under this chapter shall disclose any circumstance that may affect an arbitrator's impartiality, including, but not limited to, bias, a financial or personal interest in the outcome of the arbitration, or a past or present business or professional relationship with a party or attorney. Upon disclosure of such a circumstance, a party may request disqualification of the arbitrator and shall make that request as soon as practicable after the disclosure. ...

The Uniform Arbitration Act (UAA) provides:

1. (1) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(a) a financial or personal interest in the outcome of the arbitration proceeding; and

(b) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrators.

(2) An **arbitrator has a continuing obligation to disclose** to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator. MCL 691.1692. Emphasis added.

The complaint further alleges that the attorney committed the following misconduct and is subject to discipline under MCR 9.104:

1. Engaged in conduct prejudicial to the administration of justice by failing to adhere to and conduct the arbitration in conformity with the SCAO Standards of Conduct for Mediators, in violation of MCR 9.104(1) and MRPC 8.4(c);

2. Engaged in conduct that exposes the legal profession or the court to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2);

3. Engaged in conduct that violated the standards or rules of professional responsibility adopted by the Supreme Court, in violation of MRPC 9.104(4);

4. Engaged in conduct involving deceit or misrepresentation, in violation of MRPC 8.4(b);

5. Violated or attempted to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another, in violation of MRPC 8.4(a); and,

6. Failed to disclose a circumstance that may have affected an arbitrator's impartiality, in violation of MCL 600.5075.

As of the present time the complaint only involves allegations. There has apparently been no hearing, no findings, and no discipline.

Conclusion

The *Hartman* saga shows that the SCAO Standards of Conduct for Mediators and Michigan statutes concerning arbitration impose ethical obligations on an attorney while functioning as an arbitrator or mediator. Michigan attorneys functioning as neutrals must follow these requirements. This includes the conflict of interest and disclosure provisions concerning pre- and post-mediation or arbitration situations.

The *Hartman* saga is far from over. Nonetheless, there are important lessons that can be drawn from it. These lessons include:

1. Disclosure obligations for attorney neutrals include disclosure of post-retention activity.
2. Disclosure obligations can include social relationships and related activity.
3. An attorney neutral's disclosure obligations are also ethical obligations for attorneys under the Michigan Code of Professional Conduct.
4. When in doubt, disclose.
5. The obligation to disclose is a continuing one.

In short, we often utilize our friends and colleagues to serve as arbitrators or mediators for us, but there must be complete and full disclosure.

Lee Hornberger is an arbitrator and mediator. He was selected to the 2016 Michigan Super Lawyers list, is a recipient of the George N. Bashara, Jr. Award from the Alternative Dispute Resolution Section of the State Bar of Michigan in recognition of exemplary service, and is a member of The National Academy of Distinguished Neutrals. He is Chair-Elect of the State Bar's Alternative Dispute Resolution Section, Editor of *The Michigan Dispute Resolution Journal*, Chair of the ADR Committee of the Grand Traverse-Leelanau-Antrim Bar Association, former member of the State Bar's Representative Assembly, former President of the Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top mediators. He is an arbitrator with the American Arbitration Association, Federal Mediation and Conciliation Service, Financial Industry Regulatory Authority, Forum, Michigan Employment Relations Commission, and National Futures Association. He is a Hearing Officer for the Grand Traverse Band of Ottawa and Chippewa Indians; and is on the Hearing Officer list of the Little Traverse Bay Bands of Odawa Indians. He received his B.A. and J.D. *cum laude* from The University of Michigan and his LL.M. in Labor Law from Wayne State University. He can be reached at 231-941-0746 and leehornberger@leehornberger.com .

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