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FRIENDSHIP AND THE MEDIATOR/ARBITRATOR'S NEUTRALITY

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It is critical to the integrity of the mediation and arbitration process that the mediator and arbitrator be completely neutral and unbiased towards either side to a dispute. Actual bias casts doubt on the neutrality of a mediator's guiding statements or an arbitrator's decisions and the "appearance" of partiality has nearly the same negative impact. Friendship between ADR providers and attorneys can complicate the process if not handled properly. Upfront disclosure is important as illustrated in the following Michigan appellate court decision released on August 7, 2012.

The unpublished opinion in *Michael Hartman v. Andrea Harman, D*ocket No. 304026, reviews a divorce settlement that is attacked by a party charging that the parties' mediator/arbitrator was biased in favor of his wife's attorney due to their friendship. The Appeals court observes that "*[T]here is no case law directly on point dealing with the appearance of partiality by an arbitrator or mediator under similar circumstances to those at bar*." Although the facts are in dispute concerning the conduct of the mediation sessions, the following reported dispute resolution scenario in a Med/Arb proceeding has the ingredients for a perfect ADR storm.

After a 23-year marriage, the Hartmans submitted their divorce case to court- ordered mediation. The mediator agreed to by the parties did not initially get the parties to settle and the parties agreed to have her serve as an arbitrator for binding arbitration. The arbitrator reportedly issued awards on some "*minor"* issues and the parties agreed to have the arbitrator again serve as a mediator on some more "*major"* issues prior to the final arbitration of such issues.

The second Hartman mediation again failed to secure a resolution, but the parties nevertheless reached a settlement agreement that was reduced to writing and signed. A hearing was set for entry of a final judgment of divorce. A few issues still remained unresolved resulting in a continuance of the hearing. Mr. Hartman directed his attorney to make a court record of his concerns about the arbitrator/mediator serving as a "*neutral third party"* without requesting that the Court set aside the settlement. During the continuance, Mr. Hartman's counsel learned from the mediator/arbitrator that *she* had plans to be out of town for a period while staying in the Florida home of Mrs. Hartman's counsel while *he* was present. Mr. Hartman's counsel then requested that a new arbitrator decide the remaining unsettled issues and Mrs. Hartman's counsel refused the request. Mrs. Hartman's counsel argued that "*he felt what occurred between himself and the arbitrator was no more than ordinary hospitality and that numerous attorneys, including judges, have stayed at his Florida home*."

The trial court agreed with Mrs. Hartman's attorney that the arbitration awards were moot because the parties subsequently reached a settlement. The trial judge denied Mr. Hartman's motions to remove the arbitrator and set aside the parties' agreement. The judge decided the remaining issues and entered a Judgment. The judge ruled that there was no impropriety because the parties agreed to settle and the Florida situation occurred 30 days after the mediation.

The Court of Appeals in *Hartman* rejected Mr. Hartman's framing of the issues and instead states "…*it is truly only about setting aside a settlement agreement*." The Court also rejected Plaintiff's argument that the arbitration award should be reviewed "de novo" and found that the parties are bound by their signed settlement agreement unless there is a showing of "fraud, duress, or mutual mistake."

Mr. Hartman argued that a fraudulent misrepresentation resulted from a "false representation" that the arbitrator was "neutral." Mr. Hartman further argued a "mistake" concerning the impartiality of the arbitrator. The Court found the mistake to be unilateral. Mr. Hartman's inability to present evidence that the arbitrator actually acted with clear bias provided a basis for rejecting his arguments.

The Court agreed with Mr. Hartman that if the settlement agreement "violated public policy," it would be unenforceable, citing *Morris & Doherty, PC v Lockwood*, 259 Mich App 38 (2003) and the Michigan Rules of Professional Conduct. The Court noted that neither defense counsel nor the arbitrator were referred to the Attorney Grievance Commission. Such admission was apparently sufficient for the panel to find that it is unclear that a violation of the ethical rules occurred. Lastly, the Court rejected Mr. Hartman's argument of "unconscionability" noting his lack of argument on both the requisite elements of "procedural" and "substantive" unconscionability. Had he been able to establish how he would have obtained a different result but for the social relationship between the arbitrator and defense counsel, Mr. Hartman's appeal may have been successful.

The Court of Appeals observed that the standard of conduct for mediators is governed by MCR 3.216(k), which references State Court Administrator standards designed to promote "honesty, integrity and impartiality in providing court-connected dispute resolution services." The rule for disqualifying a mediator is the same as for a judge and *Gates v Gates*, 256 Mich App 420 (2003) instructs that "*actual bias or prejudice is not necessary where. . .the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable."* The Michigan Supreme Court's opinion in *Cain v Michigan Dep't of Corrections,* 451 Mich 470 (1996), establishes that "*the appearance of impropriety may be sufficient to disqualify a judge after evaluation of the totality of the circumstances*."

The *Hartman* Court expressly found that the "totality of the circumstances" did rise to a level that would have required the arbitrator to be removed from arbitrating or mediating the issues remaining at the time that the trial court conducted the hearing on entry of the Judgment. However, such issues were resolved by the trial court and the arbitration awards issued before the Hartman settlement agreement became moot because the settlement agreement addressed such matters.

The *Hartman* opinion makes it clear that parties attacking the impartiality of an arbitrator or mediator will have a difficult burden of proof where the challenging party raises impartiality issues in an untimely manner or without substantive evidence that the outcome would have been different. Changing back and forth between mediation and arbitration with one "neutral" raises another set of ethical and practical challenges not addressed by the Court.

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