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IF YOU ARE GOING TO BE A MEDIATOR – NEUTRALITY AND FULL DISCLOSURE ARE CRITICAL

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The California Court of Appeal recently sent a clear message to lawyers who serve as mediators: if you are going to mediate disputes, then you must fully disclose to each party any facts and circumstances which may affect your impartiality, or you may face liability.

In *Furia v. Helm*, 111 Cal. App. 4th 945 (2003), a lawyer agreed to serve as a mediator in a construction dispute between his clients and a contractor who was remodeling his clients' home. The lawyer sent a letter to both the contractor and his clients confirming his retention as their mediator. In that letter, the lawyer disclosed the attorney-client relationship he had with his clients and assured both sides that he would "do [his] very best to listen to all sides equally." However, at the same time the lawyer sent that letter, he also sent a separate letter to his clients. That letter not only stated that the lawyer was "not going to be truly neutral" as the mediator, but also set up a billing arrangement with his clients that would "avoid [the contractor from] knowing what [the mediator] was doing on [his clients'] behalf."

After relying on the lawyer's recommendations at the mediation and then discovering the lawyer's apparent bias, the contractor sued the lawyer for legal malpractice and fraudulent concealment. The California

Court of Appeal held that the lawyer did not establish an attorney-client relationship with the contractor by agreeing to mediate the dispute, but he did assume a duty to the contractor which "encompassed disclosing to [the contractor] any facts that reasonably might cause [the contractor] to believe that [the lawyer] was not impartial."

In finding that such a duty existed, the court referenced Standard III of the Standards of Conduct for Mediators ("Model Standards") and Section II of the Standards of Practice for California Mediators ("California Standards").¹ Standard III of the Model Standards requires a mediator "to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality." Section II of the California Standards requires a mediator to "identify and disclose potential grounds upon which [the] mediator's impartiality might be reasonably challenged."

¹ The Model Standards were approved by the American Arbitration Association and the American Bar Association Section of Dispute Resolution in 1994. The California Standards were adopted by a statewide organization of mediators and arbitrators known as the California Dispute Resolution Council in 1998 "to guide" mediators in California.

The attorney breached his duty of disclosure, the *Furia* court opined, because he did not "fully and fairly disclose to [the contractor] that he did not intend to be entirely impartial as a mediator, and in fact misrepresented his intentions." While the court ultimately determined that the attorney's breach did not cause any harm to the contractor, the court's opinion demonstrates that attorneys who mediate disputes owe a duty of disclosure to the mediation participants which can expose the attorney to liability.

While the facts in *Furia v. Helm* were particularly egregious, and while the risk of liability for most mediators in most situations is likely to be minimal, the court's opinion should serve as a warning to lawyers who plan to mediate or arbitrate. Indeed, the clear trend is towards increasing the disclosure obligations of both mediators and arbitrators.² With that backdrop in mind, we offer these practical tips for lawyers who plan to act as mediators.

² On July 1, 2002, the Judicial Council of California adopted standards which require arbitrators in contractual arbitrations to (among other things) "disclose all matters that could cause a person aware of the facts to reasonably entertain doubt that the proposed arbitrator would be able to be impartial." (Cal. Rules Ct. Appendix, Div. VI, Standard 7(d)).

First, become familiar with the Model Standards and any applicable state standards.³ While the Model Standards themselves say that they "serve [only] as a guide for the conduct of mediators," heed the warning that the *Furia* opinion provides and treat the Model Standards as mandatory – not voluntary – requirements. The following list highlights those requirements set forth in the Model Standards which deal with conflicts of interest and impartiality.

- The mediator shall mediate **only those matters in which the mediator can remain impartial and evenhanded**. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw. (Model Standards, std. II.)
- The mediator shall disclose **all actual and potential conflicts** that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. (A conflict of interest is defined as a dealing or relationship that might create an impression of possible bias.) If all of the parties do not consent after disclosure, or if the conflict casts "serious doubts on the integrity of the process," then the mediator shall decline to

³ For example, the Judicial Council of California adopted standards for mediators in court-connected programs that became effective January 1, 2003. Cal. Rules Ct. 1620-1622. Rule 1620.5 provides standards for determining impartiality and conflicts of interest, and sets forth the applicable disclosure requirements.

proceed. (Model Standards, std. III.)

- The mediator must avoid the appearance of a conflict of interest both during and 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 which would raise legitimate questions about the integrity of the mediation process. (Model Standards, std. III.)
- The mediator's commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle. (Model Standards, std. III.)

Second, take steps to protect yourself and your firm. Make sure that your existing malpractice insurance covers your acting as a mediator. For each matter for which you serve as a mediator, perform a conflicts check, as you would for any other matter. Likewise, be aware of possible ramifications for your (or your partners') ability to subsequently represent particular parties. (See In re County of Los Angeles, 223 F. 2d 990 (9th Cir. 2000): firm faced motion to disqualify where one of its partners had acted as a settlement judge in a related case.) Consider drafting a firm policy governing when and how attorneys within the firm can serve as mediators, including specifying any training requirements, subject area restrictions, or similar criteria. Where applicable, consider using

a waiver and consent form to be signed by the parties, limiting your possible liability and/or risk of later disqualification.

Acting as a mediator – whether in a court-supervised program or as a private mediator – can be a rewarding experience for a lawyer. However, it is important to exercise caution in an atmosphere of potentially increasing risks.

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