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Mediator Ethical Breaches: Implications for Public Policy

Abstract

Court-connected mediation, which includes both court mandated and court encouraged mediation, has become a well-established part of the judicial system in the United States. There are many public policy implications of this phenomenon. These include the underlying goals of the development of court-connection mediation and the responsibility to the public once a court-connected mediation program is established to ensure that the public has access to quality providers of mediation services. Once a court-connected mediation program has established qualifications and ethical standards for mediators, there is a public policy obligation for there also to be a mechanism to educate, reprimand or remove individuals from the list of qualified mediators if they have deviated from the standard expected of them. In this article, I will explore the public policy implications of mediator ethical breaches using the Florida state court-connected mediation experience as a prototype. Specifically, I will attempt to answer the following questions: What are appropriate goals for a grievance process from a public policy viewpoint? Should a grievance process include informal as well as formal means of reviewing grievances? How should a formal hearing process be designed to meet the public policy goals for establishing court-connected mediation programs as well as the interests of the litigants and the mediators? In Part I, I will briefly explore the underlying public policy goals for the development of court-connected mediation both nationally and Florida in particular.

In Part II, I explore the premise that a court is responsible for identifying “qualified neutrals” and for providing both a standard of conduct and grievance system if it is mandating or encouraging parties to use a mediation process as an alternative to trial. In Part III, I will use the Florida state court mediation program’s experience from April 2000 through December 2009 to examine the ethical breaches by mediators and their impact on the public policy goals underpinning the acceptance of court-connected mediation. In this section, I will also explore the concerns of complainants by examining the types of grievances filed and the outcomes sought in order to make the argument that a rehabilitative (rather than retributive) grievance process will best serve the public. Finally, I conclude with some recommendations to better meet the initial public policy goals for court-connected mediation and to better serve the public interest.

Keywords

Mediation, Dispute resolution, Arbitration, ADR, Professional ethics, Conflicts of interest

Disciplines

Dispute Resolution and Arbitration

MEDIATOR ETHICAL BREACHES: IMPLICATIONS FOR PUBLIC POLICY

By
Sharon Press*

INTRODUCTION

Court-connected mediation, which includes both court mandated and court encouraged mediation, has become a well-established part of the judicial system in the United States.¹ There are many public policy implications of this phenomenon. These include the underlying goals of the development of court-connection mediation and the responsibility to the public once a court-connected mediation program is established to ensure that the public has access to quality providers of mediation services. Once a court-connected mediation program has established qualifications and ethical standards for mediators, there is a public policy obligation for there also to be a mechanism to educate, reprimand or remove individuals from the list of qualified mediators if they have deviated from the standard expected of them. In this article, I will explore the public policy implications of mediator ethical breaches using the Florida state court-connected mediation experience as a prototype. Specifically, I will attempt to answer the following questions: What are appropriate goals for a grievance process from a public policy viewpoint? Should a grievance process include informal as well as formal means of reviewing grievances? How should a formal hearing process be designed to meet the public policy goals for establishing court-connected mediation programs as well as the interests of the litigants and the mediators?

In Part I, I will briefly explore the underlying public policy goals for the development of court-connected mediation both nationally and Florida in particular. In Part II, I explore the premise that a court is responsible for identifying “qualified neutrals” and for providing both a standard of conduct and grievance system if it is mandating or encouraging parties to use a mediation process as an alternative to trial. In Part III, I will use the Florida state court mediation program’s experience from April 2000 through December 2009 to examine the ethical breaches by mediators and their impact on the public policy goals underpinning the acceptance of court-connected

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¹ See, e.g., Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons From the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 405-408 (2004/2005). Court-connected is defined as “any program or service, including a service provided by an individual, to which a court refers cases on a voluntary or mandatory basis, including any program or service operated by the court.” See also Margaret Shaw et al., *National Standards for Court-Connected Mediation Programs*, 31 FAM. CT. REV. 156 (1993).

mediation. In this section, I will also explore the concerns of complainants by examining the types of grievances filed and the outcomes sought in order to make the argument that a rehabilitative (rather than retributive) grievance process will best serve the public. Finally, I conclude with some recommendations to better meet the initial public policy goals for court-connected mediation and to better serve the public interest.

I. COURT-CONNECTED MEDIATION

The rationale for developing court-connected mediation programs developed from two distinct streams: 1) the success of community mediators and mediation processes to productively handle a host of issues,² and 2) a growing dissatisfaction with the administration of justice as discussed at the Pound Conference of 1976.³ The philosophical underpinnings of each of these streams are also distinct. Underlying the development of community mediation are notions of participant involvement, community empowerment, and access to justice.⁴ At the core of community mediation are the assumptions that individuals are capable of resolving their own disputes⁵ and there is value in them doing so. On the other hand, the impetus for looking to mediation and other alternative processes at the Pound Conference was more related to efficiency and case management goals. There was an interest in identifying ways to decrease the courts' dockets, speeding the pace of cases to resolution, decreasing the cost of resolving conflict through the courts for both the litigants and the court system and decreasing the demand on judges. The 1992 CPR Publication, *Court ADR: Elements of Program Design*, summarized this in its observation that a "court's objective in sponsoring an ADR program can include reducing backlog, handling certain kinds of cases more effectively, freeing judicial resources, rationalizing the pretrial process, providing litigants with more dispute resolution options or better results, saving litigants time and money, or responding to political or legislative directives. To over simplify, ADR is often viewed

² See, e.g., Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, A Time of Change*, 95 MARQ. L. REV. 993, 993 (2012) (explaining that one major goal of court-connected ADR was to offer "processes that do not compromise, and perhaps even enhance, perceptions and experiences of fairness and justice.").

³ See, e.g., Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. DISP. RESOL. 545, 546 (2002); McAdoo & Welsh, *supra* note 2, at 401-403. The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (known as the Pound Conference) was a gathering of judges, legal scholars and leaders of the bar convened by US Supreme Court Chief Justice Warren Burger in St. Paul, Minnesota in 1976. In his keynote address, Justice Burger encouraged the increased exploration and use of informal dispute resolution processes. At the conference, Harvard Law Professor Frank E. A. Sander proposed that courts provide a variety of dispute resolution techniques to citizens. Sander is credited with encouraging the movement for a "multi-door" courthouse. See McAdoo & Welsh, *supra* note 2, at 402.

⁴ See, e.g., Cynthia M. Jurrius, *Building More Peaceful Communities Through Community Mediation*, 45 APR MD. B.J. 30, 32 (2012).

⁵ Bush and Folger identify three different "stories" of the mediation movement: the social justice story, aimed at reducing inequality; the satisfaction story, aimed at integrated problem-solving; and the transformative story, aimed at the conflict interaction itself. JOSEPH P. FOLGER ET AL., A BENCHMARKING STUDY OF FAMILY, CIVIL AND CITIZEN DISPUTE MEDIATION PROGRAMS IN FLORIDA 100 (2001).

mainly as a way to relieve court burden or as a means to offer litigants more efficient dispute resolution processes.”⁶

The two rationales for the development of court-connected mediation were evident in the creation of Florida’s program, which is one of the largest (and most heavily regulated) court-connected programs in the United States.⁷ By 2013, there were over 6,100 Florida Supreme Court certified mediators.⁸ The Florida Supreme Court certifies mediators in five categories: county (civil cases under \$15,000, including small claims), circuit (civil cases \$15,000 and over), family (dissolution of marriage cases, modifications, and cases involving parenting plans even if the parents were never married), dependency (abuse and neglect cases), and appellate.⁹ While it has become

⁶ Elizabeth Plapinger & Margaret Shaw, *Court ADR: Elements of Program Design*, CTR. FOR PUB. RESOURCES: CPR LEGAL PROGRAM 1-2 (1992). See also, Brazil, *Institutionalizing Court ADR Programs*, in *Emerging ADR Issues in State and Federal Courts* 52 Litigation Section of the ABA (1991); see also Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029 (1992-1993); Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989); ROBERT J. NIEMIC ET AL., *Institutionalizing Court ADR Program, Emerging ADR Issues in State and Federal Court*, in *GUIDE TO JUD. MGMT. CASES ADR* 52 (1991).

⁷ The Florida State Court mediation program will be examined in depth for several reasons. It remains one of the largest court-connected mediation programs in the U.S, it is arguably the most regulated, and it provides the most public access to its mediator grievance apparatus. In addition, the author served as primary staff to the program during the years 1988 – 2009. For a more thorough review of the roots of the current system, see Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN STATE L. REV. 43 (2003)

⁸ See *Alternative Dispute Resolution*, FLA. CTS., <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/> (last visited March 21, 2014).

⁹ In 2006, the Florida Supreme Court modified the qualification requirements for mediators to a “point system” in order to “remove the more formal mandatory education and profession-based requirements... and to allow applicants to obtain certification in a variety of different ways more directly related to the actual skills and experience the Committee has determined to be necessary for service as an effective mediator.” *In re* Petition of the Alternative Dispute Resolution Rules and Policy Comm. on Amendments to Fla. Rules for Certified and Court-Appointed Mediators 931 So. 2d 877, 880 (Fla. 2006). The 2006 Opinion retained the requirement of Florida Bar membership for circuit mediators pending further consideration by the Court. In 2007, the Florida Supreme Court revisited the Florida Bar requirement for circuit mediators and amended the rules to remove it as a requirement citing “the general consensus in the alternative dispute resolution field ... that possession of academic degrees, including law degrees, does not necessarily predict an individual’s ability to be a good mediator.” SC05-998. Page 5.

The current requirements are found in rules 10.100-10.105 of the Florida Rules For Certified and Court-Appointed Mediators, and require that individuals complete a Florida Supreme Court certified mediation training program of the type for which they are seeking certification, accrue a specified number of points in education/mediation experience, and complete a specified number of points in mentorship activities which could include both observing certified mediators conducting mediations of the type for which the applicant is seeking certification and/or conducting mediations under the observation and supervision of a certified mediator. The rules also require that mediators “be of good moral character” which is defined in rule 10.11 of the Florida Rules For Certified and Court-Appointed Mediators.

increasingly difficult to capture accurate statistics on the number of mediations conducted,¹⁰ conservative estimates place it at least 100,000 cases annually.¹¹

The Florida state court-connected ADR program is marked by a large infrastructure. At its core is a statutory framework¹² that includes definitions for arbitration¹³ and five types of mediation.¹⁴ Prior to the adoption in 1987 of this comprehensive legislation which authorized trial judges in civil cases to refer all or any part of a civil action to mediation or arbitration,¹⁵ the Florida courts already had a long history with mediation programs – both community and family.¹⁶ In 1975, the first community mediation (CDS)¹⁷ and juvenile arbitration/mediation programs became

¹⁰ The Office of the State Courts Administrator is able to record mediation statistics for mediations conducted pursuant to state court funding which means that there are reasonably accurate statistics for small claims and family cases where the parties are eligible for subsidized mediation through the court. There are moderately accurate statistics for other county civil cases and dependency cases. There is no reliable data for the number of circuit mediations because they are handled by private mediators who have no obligation to report their statistics to anyone.

¹¹ See *Uniform Data Reporting*, FLA. CTS., <http://www.flcourts.org/publications-reports-stats/statistics/uniform-data-reporting.shtml#ADR> (last visited June 21, 2014).

¹² See generally FLA. STAT. ANN. § 44 (West).

¹³ *Id.* at § 44.1011(1). The statutory sections, 44.103 and 44.104, dealing with arbitration will not be discussed in this article.

¹⁴ *Id.* at §§ 44.1011(2)(a)-(e).

¹⁵ *Id.* at § 44.102(2)(b). Sections 44.102(a), (c), and (d) provide authority on specific referrals. Section 44.102(2)(a) requires the court to refer to mediation certain filed civil actions for monetary damages upon request of any party and “provided the requesting party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties.” *Id.* at § 44.102(2)(a). Section 44.102(2)(c) requires the court to refer to mediation “all or part of custody, visitation, or other parental responsibility issues ...” upon a court finding a dispute. FLA. STAT. ANN. § 44.102(2)(c). There is an exception to this general provision if, upon motion or request of a party, the court finds “there has been a history a domestic violence that would compromise the mediation process.” *Id.* Section 44.102(2)(d) provides for permissive referral to mediation of dependency or in need of services cases. *Id.* at § 44.102(2)(d).

¹⁶ The use of mediation in dissolution of marriage disputes also predates the adoption of comprehensive civil legislation. Legislation for “family” mediation was first introduced in 1978 and ultimately was adopted in 1982. The first formal family mediation program began operating in Dade County in 1979. See FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM, FLA. DISP. RESOL. CTR. 4 (2009) [hereinafter “COMPENDIUM”]; see also FAMILIES AND CHILDREN IN THE COURT STEERING COMMITTEE, REPORT OF 2000-2002 (2001). The 2001 Report articulated the following goals for the family mediation program:

if the judicial system encourages alternatives to the adversarial process, empowers litigants to reach their own solutions, and assists in crafting solution that promote long-term stability in matters involving children and families, the likelihood of future court intervention in the family should be decreased – whether through minimizing post-judgment litigation or preventing the dependent child of today from becoming the delinquent child of tomorrow.

Id.

¹⁷ In Florida, the community mediation programs generally operated as “citizen dispute settlement” centers (CDS). COMPENDIUM, *supra* note 17, at 4.

operational.¹⁸ Unlike many other jurisdictions, community mediation has always had a close relationship with and received a great deal of financial and other types of support from the courts.¹⁹ The primary goals for the CDS centers, and for other community programs, were to increase participant involvement, community empowerment, and access to justice.²⁰

The experience with community and family mediation shaped the discussions and recommendations of the Florida Legislative Study Commission on ADR.²¹ The Commission's first recommendation called for the establishment of "comprehensive court-annexed mediation and arbitration services consolidated under court dispute resolution centers in each judicial circuit."²² The recommendation commentary included both efficiency and access to justice rationales.²³

Regardless of program rationale, if a judge has the authority to order or encourage the parties to utilize mediation (and a mediator) to settle their filed cases, there are public policy reasons why that judge should have some responsibility to ensure that there are qualified individuals to serve in that capacity. In the next section, the public policy issues related to identification of qualified mediators are explored from a national perspective with a continued focus on the Florida state court system's response.

¹⁸ *Id.*

¹⁹ For example, in 1977, the Florida Supreme Court received a federal grant to establish a state-level office responsible for providing technical assistance, research and training to courts relating to citizen dispute settlement and other dispute resolution alternatives and in 1979, the office of the state courts administrator published a CDS Guidelines Manual. *Id.*

²⁰ The training manual for the Florida Citizen Dispute Settlement Center mediators contained the following description of the purpose of the CDS Center:

CDS serves other purposes as well: ... by using trained citizen volunteers as mediators who can spend more time with each case than could a judge faced with crowded court calendars, the justice process becomes less alienated and threatening to the persons it is designed to serve; by using mediation to resolve these problems, the parties are forced to take responsibility for creating solutions; and compliance with the resolution that is designed and accepted by the parties is frequently higher than would be the case with a decision imposed on the parties, so the rate of recidivism or reappearance by the same parties on related programs is reduced.

JOSEPH B. STULBERG, *CITIZEN DISPUTE SETTLEMENT: A MEDIATOR'S MANUAL* 9 (1981).

²¹ H.R. 1223, 1984 Leg., Reg. Sess. (Fla. 1984).

²² STUDY COMMISSION ON ALTERNATIVE DISPUTE RESOLUTION: FINAL REPORT 5 (1985).

²³ "Not only will the expansion of such services be cost beneficial to the state in terms of lessening the need for judicial resources [efficiency rationale], the citizens of Florida will benefit by having access to a convenient, inexpensive and effective means of resolving their disputes ["better" justice rationale]." *Id.* at 6.

II. QUALIFIED MEDIATORS

A. Public Policy Rationale

In the late 1980's as courts increasingly ordered or recommended mediation to litigants, there was increasing concern regarding the qualifications of the individuals serving as mediators.²⁴ Some of the concerns stemmed from the desire to protect consumers while others were concerned about protecting the integrity of the process (both the mediation and litigation processes).²⁵ Unqualified individuals could harm the interests of parties by providing incompetent services and the public may become dissatisfied with the fledging field of mediation.²⁶ At the same time, neutrals (including those who had served as mediators for a significant period of time) were concerned that inappropriate barriers would be adopted and that the innovative quality of the profession would be hampered.²⁷ Some even questioned whether it was too soon to codify qualification standards because the field was not yet prepared to "define and measure competence."²⁸ In light of these concerns, the Society of Professionals in Dispute Resolution (SPIDR)²⁹ convened a Commission on Qualifications. Their 1989 report was a critical voice in articulating the balance needed between these competing sets of concerns. The principles adopted in their report included:

- A. No single entity (rather a variety of organizations) should establish qualifications for neutrals;
- B. The greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory should be the qualification requirements; and
- C. Qualification criteria should be based on performance rather than paper credentials.³⁰

²⁴ As of the end of 1988, the SPIDR Commission on Qualifications noted that "at least 35 states and the District of Columbia had adopted some type of statutory authority for mediation..." and ten states [including Florida] had "legislated, by statute or court rule, qualifications for practice as a neutral." See QUALIFYING NEUTRALS: THE BASIC PRINCIPLES, SPIDR COMM'N ON QUALIFICATIONS 4 n. 1 (1989) [hereinafter "SPIDR COMM'N"].

²⁵ *Id.* at 6

²⁶ *Id.*

²⁷ SPIDR COMM'N, *supra* note 25, at 6.

²⁸ *Id.*

²⁹ In 2000, the Society of Professionals in Dispute Resolution merged with the Academy of Family Mediators and the Conflict Resolution Education Network to become the Association for Conflict Resolution (ACR).

³⁰ SPIDR COMM'N, *supra* note 25, at 11. In 1999, the American Bar Association Section on Dispute Resolution adopted a resolution that provides that all individuals with appropriate training and qualifications should be permitted to serve as mediators and arbitrators, regardless of whether they are attorneys.

For court programs that were ordering or strongly recommending mediation these principles (even though created by a professional association to stem the tide of adoptions of restrictive qualifications) provided a public rationale for qualifications to be addressed. In 1992, the National Standards for Court-Connected Mediation Programs crystallized this responsibility in standard 2.1:

The degree of a court's responsibility for mediators or mediation programs depends on whether a mediator or program is employed or operated by the court, receives referrals from the court, or is chosen by the parties themselves

- a. The court is fully responsible for mediators it employs and programs it operates.
- b. The court has the same responsibility for monitoring the quality of mediators and/or mediation programs outside the court to which it refers cases as it has for its own programs.
- c. The court has no responsibility for the quality or operation of outside programs chosen by the parties without guidance from the court.³¹

Thus, there has been a consensus for some time that if courts were to recommend or order parties to use mediation, the courts had an obligation to ensure that the parties had access to qualified individuals to provide these services. On the other hand, there was no clear consensus as to what the specific qualifications necessary to serve should be. This was especially true in the early period of development of court-connected programs. The Florida state court experience is instructive as to how the court's thinking about the required qualifications for mediators has evolved.

B. Florida Response to Public Policy Requirement for Qualifications

In keeping with the general understanding that courts were responsible to establish qualifications for court-connected programs, the initial comprehensive legislation in Florida contained the authority for the Supreme Court to adopt rules of practice and procedure³² and the directive that the Court do so in terms of minimum

³¹ NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, CTR. FOR DISP. SETTLEMENT: INST. JUD. MGMT. 2.1 (1992), available at <http://courtdr.org/files/NationalStandardsADR.pdf> (last visited June 21, 2014). The Commentary to this standard, includes the following: "Although the court naturally has no direct responsibility for the operation or administration of outside programs or mediators to which it refers cases, it is responsible for monitoring the quality of those individuals or programs that receive its imprimatur. This is so regardless of whether the court's referrals occur through the suggestion of a particular mediator or program by a judge or by court staff or through maintenance of a list of mediators that is provided to parties." *Id.* at 2.1 cmt. The authors note that the approach is based on the same rationale adopted by the Conference of State Court Administrators (COSCA) Committee on Alternative Dispute Resolution that "[t]he more closely connected to the court an alternative dispute resolution program is, the higher the degree of control the court should exercise." *Id.*

³² FLA. STAT. ANN. § 44.102(1) (West).

standards and procedures for qualifications, certification professional conduct, discipline and training for mediators appointed pursuant to court order.³³ The statute now also includes provisions for mediator immunity from civil suits,³⁴ a funding scheme for court-ordered mediation,³⁵ and the Mediation Confidentiality and Privilege Act.³⁶

In addition to the statute, there are procedural rules which were adopted by the Florida Supreme Court.³⁷ Initially, the qualifications for mediators were adopted in the rules of civil procedure³⁸ and contrary to the principles adopted by the SPIDR Commission on Qualifications, they relied primarily on “paper credentials” for family and circuit mediators.³⁹ Specifically, in addition to completing a minimum of 40 hours of training certified by the Florida Supreme Court,⁴⁰ family mediators were required to

³³ “The Supreme Court *shall* establish minimum standards and procedures for qualifications, certification, professional conduct, discipline, and training for mediators and arbitrators who are appointed pursuant to this chapter.” *Id.* at § 44.106 (emphasis added).

³⁴ Section 44.107(1) provides mediators serving under court-order to have “judicial immunity in the same manner and to the same extent as a judge.” *Id.* at § 44.107(1). Mediators in mediations required by statute (other than 44.102) or agency rule or order and mediations conducted pursuant to the Mediation Confidentiality and Privilege Act have limited statutory immunity pursuant to section 44.107(2). In addition, Florida Supreme Court certified mediators are granted limited immunity for any mediations they conduct. The limited immunity for non-court ordered mediation requires that the mediator be acting within the scope of the mediation function and the immunity will no cover if the mediator acts “in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.” *Id.* at § 44.107(2).

³⁵ *Id.* § 44.108. Initially, the funding for the mediation programs was the responsibility of each county. As a result of a constitutional amendment, the state assumed responsibility for all “core functions” and requirements of the state courts system in 2003, including “mediation and arbitration.” Currently, a one dollar filing fee is levied on all proceedings in the circuit or county courts and deposited in the State Courts Revenue Trust Fund to fund mediation and arbitration services. FLA. STAT. ANN. § 44.108(1). In prior incarnations of the statute, the funds were deposited into a Mediation and Arbitration Trust Fund providing for a bit more stability for the programs. For a further discussion of the implications of this amendment, *see* Press, *supra* note 8.

³⁶ Mediation Confidentiality and Privilege Act, FLA. STAT. ANN. §§ 44.401-406 (West). The Mediation Confidentiality and Privilege Act was adopted in 2004.

³⁷ FLA. R. CIV. P. 1.700 – 1.750; FLA. R. JUV. P. 8.290; FLA. FAM. L.R.P. 12.740 – 12.741.

³⁸ FLA. R. CIV. P. 1.760 (1987), *amended by In re* Amendment to Fla. Rules of Civil Procedure 1.700-1.780 (Mediation), 563 So.2d 85 (Fla. 1990) (repealed 1992).

³⁹ *See In re* Proposed Rules for Implementation of Fl. Statutes Sections 44.301-306, 518 So. 2d 908 (Fla. 1987), *repealed by* Proposed Standards of Professional Conduct for Certified and Court-Appointed Mediators, 604 So.2d. 764 (Fla. 1992), *readopted as* FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.010. The qualifications for county mediators included completion of a 20 hour training program certified by the Florida Supreme Court and a “mentorship.” FL. R. CIV. P. 1.760(a), 1.770(c). There were no specific educational requirements for certification as a county mediator.

⁴⁰ FLA. R. CIV. P. 1.760(b)(3), *repealed by* Proposed Standards of Professional Conduct for Certified and Court-Appointed Mediators, 604 So.2d. 764, *readopted as* FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.010, FLA. R. CIV. P. 1.770(b).

(1) have a Masters Degree in social work, mental health, behavioral or social sciences; or be a physician certified to practice adult or child psychiatry; or be an attorney or a Certified Public Accountant licensed to practice in any United States jurisdiction; and (2) have at least four years practical experience in one of the above mentioned fields⁴¹

For circuit court matters other than family, individuals seeking certification were required to complete 40 hours of training⁴² and “[b]e a former judge of a trial court who was a member of the bar in the state in which the judge presided; or be a member in good standing of the Florida Bar with at least five years of Florida practice.”⁴³

The rule was a codification of practice at that time. Small claims cases (county court) were typically mediated by volunteer mediators who came from a variety of backgrounds; family mediations were mediated primarily by individuals with academic degrees in psychology, social work, and other social-sciences; and to the extent that large civil cases were mediated, courts were relying on attorneys and retired judges from other U.S. jurisdictions. The initial qualifications also reflected an attempt to gain acceptance from the legal community (judges and lawyers) for court-connected mediation.⁴⁴

In 1990 the qualifications were amended⁴⁵ to add a good moral character requirement for each of the areas of certification⁴⁶ and a mentorship requirement for circuit and family.⁴⁷ In addition, Rule 1.770 Standards for Mediation Training Programs was repealed in favor of the more complete training standards which were adopted via Administrative Order of the Chief Justice of the Florida Supreme Court effective September 1989.⁴⁸ For family mediation, an experiential option was added for experienced mediators who did not have the academic credentials required in the 1987

⁴¹ FLA. R. CIV. P. 1.760(b), *repealed by* Proposed Standards of Professional Conduct for Certified and Court-Appointed Mediators, 604 So.2d. 764, *readopted as* FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.010.

⁴² FLA. R. CIV. P. 1.760(c)(2), 1.770(a), *repealed by In re* Amendment to Fla. Rules of Civil Procedure 1.700-1.780 (Mediation), 563 So.2d 85.

⁴³ FLA. R. CIV. P. 1.760(c)(1).

⁴⁴ “When the [Qualifications] Standards were first proposed in 1987, the Special Rules Committee, composed exclusively of attorneys appointed by [the Florida Supreme] Court, was very concerned about gaining acceptance from the judiciary and The Florida Bar for this new experiment with court-ordered mediation. The qualifications then proposed represented the Committee’s best attempt to inspire confidence with the new program and encourage its use.” Petition of the Committee on Alternative Dispute Resolution Rules and Policy at 3, *In re* Amendments to the Fla. Rules for Certified and Court-Appointed Mediators (2005).

⁴⁵ *In re* Amendment to Fla. Rules of Civil Procedure 1.700-1.780 (Mediation), 563 So. 2d 85.

⁴⁶ FLA. R. CIV. P. 1.760(a)(3), 1.760(b)(4), 1.760(c)(4).

⁴⁷ FLA. R. CIV. P. 1.760(b)(3), 1.760(c)(3).

⁴⁸ COMPENDIUM, *supra* note 17, at 6.

rules.⁴⁹ For certification as a circuit mediator, the rule was amended to make clear that the preferred path for certification was to be a member in good standing of the Florida Bar with five years of Florida practice,⁵⁰ but retained the ability for the chief judge of a circuit to “certify as a circuit court mediator a retired judge who was a member of the bar in the state in which the judge presided.”⁵¹

In 1992 the qualifications were amended⁵² and later moved from the Florida Rules of Civil Procedure to the Florida Rules for Certified and Court-Appointed Mediators which also contain the Ethical Standards and the Grievance Procedure.⁵³ In 2005, the Supreme Court Committee on ADR Rules and Policy submitted a petition to replace the certification requirements, which had remained largely unchanged from those adopted in 1992,⁵⁴ to a “point system.”⁵⁵ The Committee’s stated reason for the proposed amendment was to “provide applicants with more flexibility in obtaining certification and to increase the diversity of the mediation profession in Florida.”⁵⁶

The current rule, adopted in 2007, establishes general certification requirements⁵⁷ as well as, specific requirements for county court,⁵⁸ family,⁵⁹ circuit,⁶⁰ dependency,⁶¹ and appellate⁶² mediators. In order to be certified, mediators must be “at least 21 years of age, be of good moral character, and have the required number of points for the type of

⁴⁹ Individuals with eight years of family mediation experience with a minimum of ten mediations per year were eligible to substitute that experience for the requirement of having an advanced degree (the 1990 rules also expanded the recognized degrees from masters to masters or doctorate) in social work, mental health, behavioral or social sciences, psychiatrists or licensed attorneys or CPAs. FLA. R. CIV. P. 1.760(b)(2).

⁵⁰ A requirement that the individual was an active member of the Florida Bar within one year of application for certification was also added. FLA. R. CIV. P. 1.760(c)(2).

⁵¹ FLA. R. CIV. P. 1.760(c)(2). In order to be certified, the retired judge had to submit a “written request setting for reasonable and sufficient grounds” and had to “have been a member in good standing of the bar of another state for at least five years immediately preceding the year certification [was] sought...” *Id.*

⁵² 604 So. 2d 764 (Supreme Court of Florida 1992)

⁵³ *See infra* Part II.D: Footnotes and accompanying text on Florida Ethical Standards.

⁵⁴ “The last significant amendments, resulting in the current rules, were submitted to the Court and adopted in 1999.” *Supra* note 45.

⁵⁵ *Id.*

⁵⁶ *Id.* at *1-2.

⁵⁷ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.100(a) (2007).

⁵⁸ *Id.* at 10.100(b).

⁵⁹ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.100(c).

⁶⁰ *Id.* at 10.100(d).

⁶¹ *Id.* at 10.100(e).

⁶² *Id.* at 10.100(f).

certification sought.”⁶³ For county, family, circuit and dependency mediators, 100 points are required.⁶⁴ For each type, mediation training specific to the area in which certification is sought must be completed and along with a “mentorship.”⁶⁵ The initial training requirements range from a minimum of twenty hours, for county court mediation, to forty hours each for family, circuit court and dependency mediation.⁶⁶ The points required for the “mentorship” can be accrued via observing mediations (of the type of certification sought) conducted by certified mediators (five points) or conducting mediations (of the type of certification sought) under the supervision of certified mediators (ten points).⁶⁷ The most significant change was in the area of required educational background. Rather than specify a minimum level of education, each area of certification includes a minimum point requirement which can be achieved via academic credentials or via mediation experience.⁶⁸

The Chief Justice also has adopted a number of administrative orders with state-wide implications for mediation. Administrative Order AOSC11-1, entitled Procedures Governing Certification of Mediators, details the process for initial mediator certification along with the continuing education requirements for certification renewal which is required every two years.⁶⁹ Administrative Order AOSC10-51, entitled Mediation Training Standards and Procedures, details the learning objectives and other course requirements for approval of mediation training programs and the procedure by which program providers may be disciplined.⁷⁰ The result of these rules and administrative orders is a very clear commitment by the Florida Supreme Court to provide lawyers and

⁶³ *Id.* at 10.100(a).

⁶⁴ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.100.

⁶⁵ *Id.*

⁶⁶ Mediation Training Standards and Procedures, AOSC10-51 (Sept. 17, 2010). The training requirement for appellate mediators is only a minimum of seven hours; however, in order to be certified as an appellate mediators, an applicant must already be a Florida Supreme Court certified circuit, family, or dependency mediator. *See* FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.100(f).

⁶⁷ FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.105(c).

⁶⁸ *Id.* at 10.100(c)(2), 10.100(d)(2), 10.100(e)(2). Appellate mediators can seek certification upon successful completion of a Florida Supreme Court certified appellate mediation training program if already certified as a circuit, family or dependency mediator. *Id.* at 10.100(f).

⁶⁹ The administrative requirements were revised in 2012 for members of The Florida Bar to allow them to obtain verification of their current membership and good standing in The Florida Bar instead of providing their law school transcripts. Procedures Governing Certification of Mediators, AOSC11-1 (Jan. 10, 2011)

⁷⁰ Additional administrative orders of the Chief Justice relating to mediation include: Mediation Training Standards and Procedures, AOSC10-51 (Sept. 17, 2010), which contains the mediation training standards and procedures for the certified training programs, and Committee on Alternative Dispute Resolution Rules and Policy, AOSC03-32 (Jul. 8, 2003), which created the Committee on Alternative Dispute Resolution Rules and Policy. The ADR Rules and Policy Committee is charged with, among other things, monitoring and recommending amendments to court rules governing alternative dispute resolution procedures and monitoring and recommending revisions to the continuing education, mentorship, and basic mediation training requirements. *Id.* at 2-3.

litigants with lists of individuals who are arguably qualified to mediate civil disputes filed in the state trial courts.

Having an established roster of qualified mediators is the first step in the court's public policy responsibilities. Next, certifying bodies must address how to discipline or remove a mediator from the roster if s/he fails to deliver a quality process or turns out not to be qualified. This step includes the adoption of a set of ethical standards to which the mediators on the roster will be bound and the establishment of a grievance procedure. Each of these will be examined in the next several sections – first from a national perspective and then as implemented in the Florida state court program.

C. Ethical Standards for Mediators

While some states and mediation provider organizations adopted individual ethical standards, the most widely used national set of ethical principles was adopted in 1994 when the American Arbitration Association, the American Bar Association Section on Dispute Resolution, and the Society of Professionals in Dispute Resolution⁷¹ jointly developed a set of model standards of conduct for mediators.⁷² The stated functions of these ethical standards were: “to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.”⁷³ Nine standards were included: self-determination; impartiality; conflicts of interest; competence; confidentiality; quality of process; advertising and solicitation; fees; and obligations to the mediation process.⁷⁴ The 1994 standards were explicitly created to “serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.”⁷⁵ As such, the standards did not include an enforcement mechanism.

In 2002, representatives⁷⁶ from the three original drafting organizations [hereinafter the Joint Committee] convened to initiate a review of the 1994 Standards to assess whether changes were warranted.⁷⁷ The Joint Committee adopted the following principles to govern their work:

⁷¹ The Society of Professionals in Dispute Resolution (SPIDR) merged with the Academy of Family Mediators (AFM) and the Conflict Resolution Education Network (CRENet) in 2000 to create the Association for Conflict Resolution (ACR).

⁷² MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994) [hereinafter “MODEL STANDARDS”].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ The representatives were: Eric Tuchman and John Wilkinson from the AAA; Wayne Thorpe and Susan Yates from the ABA Section of Dispute Resolution; and Sharon Press and Terrence Wheeler from ACR.

⁷⁷ MODEL STANDARDS OF CONDUCT FOR MEDIATORS reporter's notes (2005) [hereinafter “MODEL STANDARDS Reporter's Notes”], *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/mscm_reporternotes.authcheckdam.pdf (last visited June 21, 2014).

- A. The major functions of the 1994 Version – to serve as a guide to mediators; to inform the mediation parties; and to promote public confidence – should remain unchanged.
- B. The Standards should serve a “fundamental, basic ethical guidelines” for all practice contexts.
- C. The basic architecture of the 1994 Version should be retained.
- D. Each Standard should exclude references to desirable behaviors or “best practices.”
- E. The Joint Committee’s process for conducting the review should be transparent.
- F. Changes to the Standards will be adopted if supported by a consensus of all Joint Committee members.⁷⁸

The Joint Committee met a number of times during 2003-04 in executive session, conducted a series of public sessions at conferences or meetings of the sponsoring organizations, invited liaisons from more than 50 organizations in the dispute resolution field to review working drafts, and published drafts for public comment. The final document, incorporating comments, was submitted to the respective organizations for formal adoption on July 25, 2005.⁷⁹ Ultimately, the 2005 Model Standards contain the same nine standards included in 1994 with one minor revision. Standard IX was re-titled “Advancement of Mediation Practice” from “Obligations to the Mediation Process” and the scope was expanded. The organizational format of the Standards was revised to provide more clarity in a number of ways. Most significantly, rather than use standards and comments, the 2005 Model Standards adopt a convention of targeted use of the verbs, “shall” to designate those practices which the mediator must follow, and “should” to indicate those “highly desirable” practices which can be departed from for very strong reasons. In addition, the Standards were more intentionally aimed at mediator conduct rather than the conduct of other mediation participants. Unchanged was the recognition that the Standards were primarily educational and “unless and until adopted by a court or other regulatory authority [they] do not have the force of law.”⁸⁰ However, a note of caution was raised that given that the Standards have been widely adopted, they may “be viewed as establishing a standard of care.”⁸¹

In contrast to the Model Standards which were intended to be primarily educational, the Florida Ethical Standards were drafted and adopted with an expectation that they would be enforceable. In the next section, I will explore the impact of enforceability had on the development of the Florida ethical standards.

⁷⁸ MODEL STANDARDS Reporter’s Notes, *supra* note 78.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

D. Florida Ethical Standards

Florida was not the first state to adopt Standards of Conduct,⁸² but it was the first state court system to recognize the importance of including a disciplinary procedure for handling mediator misconduct along with standards of conduct. The 1987 legislation which authorized civil court judges to order the use of mediation also contained a provision directing the Florida Supreme Court to “establish minimum standards and procedures for qualifications, certification, professional conduct, discipline, and training for mediators and arbitrators who are appointed pursuant to this chapter.”⁸³ The procedural rules promulgated to implement the comprehensive court-connected legislation of 1987 included a rule entitled “Duties of the Mediator.”⁸⁴ The rule included two duties for the mediator, namely, “to define and describe the process of mediation and its costs during an orientation session before the mediation conference begins”⁸⁵ and “to be impartial, and to advise all parties of any circumstances bearing on possible bias.”⁸⁶

In 1989, the Supreme Court Committee on Mediation and Arbitration Rules submitted proposed ethical standards for mediators incorporating the rule 1.780 Duties of the Mediator and adding additional ethical standards. The Court only adopted the proposed revisions to the rules of civil procedure because the standards were not accompanied by a means of enforcement.⁸⁷ The Court recognized that absent a means of enforcement, the standards would be insufficient. In November 1991, the Supreme Court Committee on Mediation and Arbitration Rules submitted its report containing recommendations for both Standards of Conduct and Rules of Discipline.⁸⁸

⁸² See John D. Feerick, *Standards of Conduct for Mediators*, 79 JUDICATURE 314, 315 (1996) (explaining that the Supreme Court of Hawaii established ethical standards for mediators in 1986 while the Supreme Court of Florida established its mediator ethical standards as well as procedural and disciplinary rules in 1992).

⁸³ FLA. STAT. ANN. § 44.106 (West 2012) (formerly FLA. STAT. ANN. § 44.306).

⁸⁴ FLA. R. CIV. P. 1.780, *repealed by In re* Amendment to Fla. Rules of Civil Procedure, 563 So.2d. 85 (Fla. 1990).

⁸⁵ The rule also specified that the following items be included: “(1) the difference between mediation and other forms of conflict resolution, including therapy and counseling; (2) the circumstances under which the mediator may meet alone or with either of the parties or with any other person; (3) the confidentiality provision as provided by Florida law; (4) the duties and responsibilities of the mediator and of the parties; (5) the fact that any agreement reached will be reached by mutual consent of the parties; (6) the information necessary for defining the disputing issues. FLA. R. CIV. P. 1.780.

⁸⁶ FLA. R. CIV. P. 1.780(b), *repealed by In re* Amendment to Fla. Rules of Civil Procedure, 563 So.2d. 85.

⁸⁷ *In re* Amendment to Florida Rules of Civil Procedure, 563 So.2d. 85.

⁸⁸ FLORIDA SUPREME COURT STANDING COMMITTEE ON MEDIATION/ARBITRATION RULES 1991 REPORT 1-2 (November 1, 1991). The Florida Supreme Court adopted the ethical standards and the rules of discipline in 1992 thereby creating the Florida Rules for Certified and Court-Appointed Mediators. Proposed Standards of Professional Conduct for Certified and Court-Appointed Mediators, 604 So.2d. 764 (Fla. 1992). Rule 1.760 of the Florida Rules of Civil Procedure, containing the qualification requirements for mediators was repealed and readopted as Rule 10.010 of the Florida Rules for Certified and Court-Appointed Mediators.

The standards of conduct currently are divided into five categories:⁸⁹ general provisions,⁹⁰ a mediator's responsibility to the parties,⁹¹ a mediator's responsibility to the process,⁹² a mediator's responsibility to the court,⁹³ and a mediator's responsibility to the profession.⁹⁴ Similar to the Model Standards, the Florida standards include provisions related to party self-determination,⁹⁵ impartiality⁹⁶ and conflict of interest,⁹⁷ confidentiality,⁹⁸ advice and opinions by the mediator,⁹⁹ fees and expenses,¹⁰⁰ and advertising¹⁰¹ among many others. The standards were substantially reorganized in 2000 after "a year long study program to determine if Florida's ethical rules for mediators would benefit from review and revision."¹⁰² In particular, the Supreme Court Committee on Mediation and Arbitration Rules looked to other states and dispute resolution organizations, the experience of the Mediator Ethics Advisory Committee,¹⁰³ and data from actual grievances filed with against mediators with Florida's mediator qualifications

⁸⁹ The 1992 version contained 14 rules: Preamble, General Standards and Qualifications, Responsibility to the Courts, The Mediation Process, Self-Determination, Impartiality, Confidentiality Professional Advice, Fees and Expenses, Concluding Mediation, Training and Education, Advertising, Relationships with Other Professionals, and Advancement of Mediation. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.020-10.150 (1992). In 2000, the rules were reorganized. *In re* Amendments to Fla. Rules for Certified & Court-Appointed Mediators, 762 So.2d 441, 441 (2000) ("The proposed changes to the ethical rules amount to a complete rewrite of the existing rules. In addition to revising the text of the individual ethical rules, the Committee has reorganized the grouping and order of the rules, moved ethical concepts between rules, renumbered the rules, and created several new rules.").

⁹⁰ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.200-10.230 (2000).

⁹¹ *Id.* at 10.300 – 10.380.

⁹² *Id.* at 10.400 – 10.430.

⁹³ *Id.* at 10.500 – 10.530.

⁹⁴ *Id.* at 10.600 – 10.690.

⁹⁵ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.310.

⁹⁶ *Id.* at 10.330.

⁹⁷ *Id.* at 10.340.

⁹⁸ *Id.* at 10.360.

⁹⁹ *Id.* at 10.370.

¹⁰⁰ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.380.

¹⁰¹ *Id.* at 10.610.

¹⁰² *Id.* at 10.200 cmt.

¹⁰³ The ethics advisory committee had been known as the Mediator Qualifications Advisory Panel prior to the 2000 revisions. *In re* Amendments to Fla. Rules for Certified & Court-Appointed Mediators, 762 So.2d 441, 448 (Fla. 2000).

board. The stated intent of the reorganization was to make the rules easier to locate and to apply what had been learned.¹⁰⁴

The 2000 revision to the Standards of Professional Conduct contained three major revisions¹⁰⁵ and several minor revisions.¹⁰⁶ For purposes of this article, I will highlight those changes which were tied directly to providing an enforceable standard. There were two types of issues, both relating to the public policy interest in providing a mechanism for participants in mediation to raise issues of importance to them. The first was to ensure that there were ethical standards which address all situations in which mediators behave inappropriately. For example, an ethical rule on “demeanor” was added in 2000 to address allegations such as: the mediator “yelled, pointed his finger in [the complainant’s face] and threw papers during the session,”¹⁰⁷ and “the mediator addressed one of the complainants as ‘a spoiled brat’ and declared the complainants ‘poor slob’ who would never be recognized in court.”¹⁰⁸ In both of these cases, the allegations were considered as possible violations of the “general integrity” rule,¹⁰⁹ but it was not a good fit. The absence of such a rule was because the initial drafters of the rules presumed that an explicit rule on demeanor was unnecessary. Based on experience, the grievance body learned that absent a specific rule there was nothing to enforce. The 2000 rule, entitled Demeanor, states “A mediator shall be patient, dignified, and courteous during the

¹⁰⁴ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.200 cmt. In addition to the reorganization, three major areas were substantively revised.

¹⁰⁵ The first was to make the impartiality standard objective rather than subjective. FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.330(b). The second major substantive revision was to rule 10.370, Advice Opinions or Information. *Id.* at 10.3370. In subsection (c), the rule now continues an outright prohibition on “providing a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue.” *Id.* at 10.3370(c). The most significant revision however, was to subsection (a) which now requires a consideration of context in assessing a mediator’s conduct. *Id.* at 10.3370(c). “Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.” FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.3370(c). The third major area of revision was to the standard on conflicts of interest. The rule now starts with the premise that a mediator “shall not mediate a matter that presents a clear or undisclosed conflict of interest” and continues with an explanation that a conflict of interest arises when, “any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator’s impartiality.” *Id.* at 10.340.

¹⁰⁶ The standard on fees and expenses was revised to allow for the written explanation to be provided to the parties or their counsel (as opposed to just parties). *Id.* at 10.380(c).

¹⁰⁷ MQB 98-009, Resolution Report Volume 14 #4.

¹⁰⁸ MQB 95-002, Resolution Report Volume 10 #4.

¹⁰⁹ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.030(a) (1992) (“Mediators shall adhere to the highest standards of integrity, impartiality, and professional competence in rendering their professional services. (1) A mediator shall not accept any engagement, perform any service, or undertake any act which would compromise the mediator’s integrity.”). In 2000, rule 10.030(a)(1) was revised in minor ways and renumbered to rule 10.630 Integrity and Impartiality. FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.630 (2000). A mediator shall not accept any engagement, provide any service, or perform any act that would compromise the mediator’s integrity or impartiality. *Id.*

mediation process.”¹¹⁰ While there may be some debate as to what is “dignified” and how one demonstrates a lack of patience or discourteousness, a grievant could describe what happened during the mediation and the grievance board could make a determination as to whether the standard was violated.

From a public policy perspective, having no ethical standards on point sends the same message as having an ethical standard that is not enforceable. Participants may feel that their experience of being wronged was invalidated and mediators may (wrongly) conclude that there was nothing inappropriate about their conduct. Thus, the second type of revision was to amend the rules to provide a clearer means of enforcement. The best illustration of this principle was with regards to the ethical standard on impartiality. In the 1992 and 1995 versions of the Florida Rules for Certified and Court-Appointed Mediators a mediator was required to “withdraw from mediation if the mediator believes the mediator can no longer be impartial.”¹¹¹ The problem with enforcing this rule was that the standard for violation was based on what the mediator *believed*. Therefore, an absolute defense to a grievance alleging that a mediator violated the requirements of impartiality for a mediator was to state that s/he believed that s/he was still impartial despite any evidence to the contrary.¹¹² The current version, initially adopted in 2000, states that “[a] mediator shall withdraw from mediation if the mediator is no longer impartial.”¹¹³ This language allows the grievance body to find a violation of the requirements of impartiality even if the mediator believed at the time that s/he was still impartial.

Because of the strong public policy connection between ethical standards and the grievance procedure in place to enforce those standards, one needs to understand both the underlying philosophy which guided the initial creation of the disciplinary procedure as well as the specific procedures which were adopted. In the next section, these will be discussed along with the significant modifications which were made over the years to effectuate public policy interests.

¹¹⁰ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.350(a).

¹¹¹ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.070(a)(2) (1992).

¹¹² For example, the plaintiffs in a small claims case filed a grievance against the mediator for allegedly not maintaining impartiality and giving legal advice during the mediation by advising the defendant that his wife was “wrongfully named in the suit.” The plaintiffs alleged violations of rules 10.090(a) and (d) and 10.070(a), (a)(1), and (a)(2). The mediator was unwilling to accept sanctions because he believe that 1) as a businessman he knew the defendant’s wife had been wrongfully named as a party (thus he had not violated rule 10.090(a) “A mediator shall not provide information the mediator is not qualified by training or experience to provide”); and 2) he was still impartial and therefore had not violated the impartiality rules. Formal charges were filed on all of the alleged violations. The grievance went to a hearing and the mediator was found only to have violated rule 10.070(a) for failing to maintain impartiality. “The hearing panel was unable to find by clear and convincing evidence a violation of any of the other rules given a strict reading of the rules.” MQB #12, Resolution Report 10 #2.

¹¹³ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.320 (2000).

E. Florida's Mediator Grievance Process

The grievance process in Florida was set up to provide both due process and accessibility. To promote accessibility, the state was divided into three geographic divisions¹¹⁴ rather than a single centralized review board to review complaints so that complainants and mediators would be guaranteed not to have any great distance to travel in order to participate in the processing of the complaint.¹¹⁵ Each division included both mediators and consumers of mediation services. Specifically, the divisions included three certified county mediators, three certified family mediators (at least two of whom were non-attorneys), three certified circuit mediators, three judges (county or circuit), and three attorneys licensed to practice law in Florida who were neither certified mediators nor judicial officers during their term of service on the board.¹¹⁶ At least one of the attorneys had to have a “substantial divorce law practice.”¹¹⁷ While this makes the Mediator Qualifications Board (MQB) quite large in total numbers, the rules do not contemplate the Board ever sitting as a body of the whole. In practice, the MQB meets once a year to discuss the cases that have been resolved, any rule changes that will impact the Board’s future work, and any issues which have arisen during the year that require response or attention.

The rule envisioned a two stage process involving a three-person complaint committee which would be responsible for a probable cause determination¹¹⁸ and a five-person hearing panel responsible for conducting hearings and determining if a mediator should be sanctioned.¹¹⁹ As initially conceived, when a complaint was filed, staff would not provide any screening function. So long as a mediator governed by the grievance process¹²⁰ was the subject of the complaint, it would be forwarded to the mediator for a

¹¹⁴ The northern division encompassed the first, second, third, fourth, eighth, and fourteenth Judicial Circuits; the central division included the Fifth, Sixth, Seventh, Ninth, Twelfth, Thirteenth, and Eighteenth Judicial Circuits; and the southern division included the Eleventh, Fifteenth, Sixteenth, Seventeenth, Nineteenth, and Twentieth Judicial Circuits. FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.190(a) (1992). The divisions have remained as initially promulgated despite the numerous revisions over the years. See FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS Rule 10.730 (2000).

¹¹⁵ Another way that access was addressed in the rules is to allow a complaint to be filed with the state office (Dispute Resolution Center) in Tallahassee or “in the office of the court administrator in the circuit in which the case originated, or, if not case specific, in the circuit where the alleged misconduct occurred.” FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(b) (1992) (renumbered as 10.810(b) in 2000).

¹¹⁶ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.190(b) (1992). The rules currently require that each division have the membership cited above in addition to at least one and no more than three certified dependency mediators and at least one and no more than three certified appellate mediators. FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.730(b) (2000).

¹¹⁷ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.190(b)(5) (1992).

¹¹⁸ *Id.* at 10.220.

¹¹⁹ *Id.* at 10.230.

¹²⁰ “These rules apply to all proceedings before all panels and committees of the Mediator Qualifications Board involving the discipline or decertification of certified mediators or non-certified mediators appointed

response.¹²¹ Once the mediator's response was received, a complaint committee from the geographic division in which the complaint arose would be convened. The complaint committee, selected in a weighted random manner,¹²² would consist of a judge or attorney who would serve as the chair, a mediator certified "in the area to which the complaint refers," and one other certified mediator. The complaint committee membership was set up in order to ensure both familiarity with appropriate behavior in mediation (via two of the three committee members were mediators) and that due process requirements were followed (via a judge or lawyer serving as chair).

As initially drafted, the next phase of the procedure required the complaint committee to review the complaint and the response and determine probable cause. If there was "probable cause to believe that the alleged mediator misconduct would constitute a violation of the rules,"¹²³ the complaint committee could either forward formal charges on to a panel for a hearing¹²⁴ or attempt to resolve the complaint by meeting with "the complainant and the mediator in an effort to resolve the matter."¹²⁵ At this meeting, the mediator could agree to accept sanctions but the complaint committee could not impose any.¹²⁶ If there was probable cause but no resolution at the meeting, the complaint was referred to the center for a hearing.¹²⁷

There were many problems with this procedure:

to mediate a case pursuant to Florida Rules of Civil Procedure 1.700 – 1.750." FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.190(b)(5) (renumbered as 10.200 in 2000). Early on the Board set the precedence that the standards of conduct and grievance procedure covered all Florida Supreme Court certified mediators for whatever mediations they conducted, as well as, any mediator, certified or not, who served as the mediator for a court-ordered case under chapter 44, Florida Statutes. Thus, a certified mediator conducting a pre-filed community mediation was included MQB 95-001, Resolution Report Vol. 11 #1, as was a certified circuit mediator mediating a federal case MQB #6.

¹²¹ FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.220(e) (1992). In 1995, the rules were amended to add a facial sufficiency step and the rules provided that "[i]f the complaint is found to be facially sufficient, the committee shall prepare a list of rules which may have been violated and shall submit such to the center." FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(e) (1995).

¹²² FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(f) (1992); FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.220(d) (1995) (renumbered as 10.810(d) in 2000) (covers the assignment to the complaint committee). The manner of selection, not specified in the rules, was codified in the Internal Operating Procedures Manual. INTERNAL OPERATING PROCEDURES MANUAL 5 (2012).

¹²³ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(g) (1992).

¹²⁴ *Id.* at 10.220(j).

¹²⁵ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(h) (1992); FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(j) (1995) ("Notwithstanding any other provision ..., at any time while the committee has jurisdiction, it may meet with the complainant and the mediator... jointly or separately, in an effort to resolve the matter.") (renumbered as 10.810 in 2000).

¹²⁶ *Id.*

¹²⁷ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(h) (1992). In 1995, the meeting was separated from the probable cause determination to make clear that the meeting could happen at any time while the committee had jurisdiction.

- 1) There was no facial sufficiency review. As soon as the complaint was filed, it was forwarded to the mediator for a response.¹²⁸ The mediator had no way of knowing what, if anything, the complaint committee would find objectionable about the mediator's alleged behavior. Even if the mediator believed the complaint to be completely frivolous, the mediator had to prepare a complete response or risk having the allegations deemed admitted.¹²⁹ Because not all grievances were written clearly, often times it was difficult for a mediator to discern what might be objectionable to the complaint committee. From a public policy perspective, the procedure was flawed because it failed to provide appropriate due process for the mediators.
- 2) The complaint committee did not have authority to conduct an investigation prior to making a probable cause determination. The determination was made straight from the complaint and response.¹³⁰ Thus, the committee had no ability to assess credibility or to find out information from others with knowledge of the situation.¹³¹ Further exacerbating the situation was that confidentiality was tied to the filing of formal charges.¹³² Even if the investigation resulted in a finding that the complaint was unfounded, the mediator would be branded with a grievance history. As initially adopted, this

¹²⁸ *Id.* at 10.220(d).

¹²⁹ *Id.* at 10.220(e).

¹³⁰ *Id.* at 10.220(g).

¹³¹ The most glaring example of the problems with the system came to light in a grievance filed by a party and his wife. In the complaint, they alleged that the defendant in their circuit court case failed to appear at the mediation session but the mediator allowed the mediation to proceed. They also alleged that they were not provided any opportunity to eat during the course of the mediation which was particularly problematic as one of the complainants was hypoglycemic. Based on the paper filings, the complaint committee found probable cause, drafted formal charges and forwarded to a hearing panel. At that point, the complaint committee hired a prosecutor who, in preparation for the hearing, was able to interview the parties and collect evidence. In the course of his preparation, the prosecutor learned from the complainants that they had in fact been provided lunch, but it was "not a good lunch." He further determined that the complainants' attorney had waived the defendant's attendance. Despite determining that the complainants were not credible, there was no provision for the prosecutor to dismiss the charges, so the hearing went forward. The hearing panel found "no credible evidence to support the charges" and on the record, specifically found that "the mediator was sensitive to the complainants needs and concerns and that the process of reaching a settlement was fair and consistent with the rules of mediation." MQB #4, Resolution Report, #16 and #17.

¹³² FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.260(a) (1992) ("Upon filing of formal charges, such charges and all proceedings shall be public."). In 1995, the confidentiality provision was amended to "Until sanctions are imposed, whether by the panel or upon agreement of the mediator, all proceedings shall be confidential." FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.260(a) (1995).

rule also failed to meet the public policy goal of providing due process to mediators.

- 3) If the complaint committee wished to meet with the mediator and the complainant in an effort to resolve the matter, a finding of probable cause was required first. This requirement prevented creative resolutions in which a mediator might accept sanctions, thus providing the desired rehabilitative impact, prior to a finding of probable cause.¹³³

The 1995 revisions corrected these problems in the following ways. First, both a submission in “proper form”¹³⁴ and a facial sufficiency determination step¹³⁵ were added. Proper form means that the original copy of the complaint is filed and contains the following information: contact information for the complainant, “case number of the court case (if applicable and if possible), location of case, mediator name and number (if certified),” mediator contact information (if not certified), allegation of a violation, “the date of the mediation session or when the alleged misconduct occurred,” and type of case.¹³⁶ The complaint must also be signed and notarized for it to be considered to be in proper form.¹³⁷ Upon receipt of the complaint, the complaint committee convenes to determine “whether the allegation(s) if true, would constitute a violation of these rules.”¹³⁸ If not, the complaint is dismissed without prejudice and both the mediator and the complainant are so notified.¹³⁹ If the complaint is determined to be facially sufficient,

¹³³ After 1995, the MQB was able to meet the rehabilitative goals of the grievance process by entering into a sanctions agreement with the mediator prior to a finding of probable cause. Some examples of sanctions accepted by the mediators prior to a finding of probable cause include: a circuit mediator accepting: 1) send a letter of apology to the complainant with a copy to the trial judge in the underlying case; 2) forego collection of fees in the underlying case; 3) write an article clarifying the correct legal interpretation of a0 confidentiality in mediation, b) lack of a requirement for “good faith mediation,” c) report of agreement without comment or recommendation and d) mediator not acting as juror. MQB 99-004; a family mediator 1) forgiving all uncollected fees for the mediation underlying the grievance and returning any fees collected, other than the initial deposits, 2) attending a Family Law Section CLE program on Mediation Skills, and 3) observing three complete family mediations involving pro se litigants conducted by a certified mediator approved by the DRC director, and 4) refraining from conducting any pro se mediations during the remainder of the calendar year. MQB 99-005, Resolution Report Vol. 15 #4.

¹³⁴ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(d) (1995) (renumbered as 10.810(d) in 2000).

¹³⁵ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(e) (1995) (renumbered as 10.810(e) in 2000).

¹³⁶ INTERNAL OPERATING PROCEDURES MANUAL 2-3 (2012).

¹³⁷ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(a) (1995) (renumbered as 10.810(a) in 2000).

¹³⁸ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(a) (1995) (renumbered as 10.810(e) in 2000).

¹³⁹ *Id.*

the committee prepares a list of the rules which may have been violated so that the mediator can better target his/her response.¹⁴⁰

Secondly, the rules were amended to provide the complaint committee with the option of conducting an investigation at any point after the committee has found facial sufficiency and reviewed the response of the mediator.¹⁴¹ The rule allows the committee to conduct an investigation either collectively or by a single member (which may include a meeting with the mediator and complainant) or to appoint an investigator.¹⁴² Finally, the timing of a meeting with the mediator and complainant was revised to allow it to take place “at any time while the committee has jurisdiction.”¹⁴³ Because probable cause need not be found prior to this meeting, the committee has more options available to it in its efforts to attempt to resolve the issue. The rule governing confidentiality of the grievance process was also amended. Pursuant to the new rule, all proceedings are confidential “[u]ntil sanctions are imposed, whether by the panel or upon agreement of the mediator”¹⁴⁴ thus maintaining “the integrity of the disciplinary system... while still maintaining the integrity of the mediation process.”¹⁴⁵

After a finding of probable cause not resolved through a meeting with the mediator and the complainant, the complaint committee drafts formal charges¹⁴⁶ and the

¹⁴⁰ *Id.*

¹⁴¹ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(i) (1995) (renumbered as 10.810(i) in 2000).

¹⁴² *Id.*

¹⁴³ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.220(j) (1995) (renumbered as 10.810(j) in 2000).

¹⁴⁴ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS Rule 10.260(a) (1995) (renumbered as 10.850(a) in 2000). The Committee Notes to the rule make clear that the revision was necessary “in deference to the 1993 amendment to FLA STAT. ANN. § 44.102, that engrafted an exception to the general confidentiality requirement for all mediation sessions for the purpose of investigating complaints filed against mediators.” FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.260(a) cmt. (1995). The statute specifically provided that “the disclosure of an otherwise privileged communication shall be used only for the internal use of the body conducting the investigation” and that “[Prior] to the release of any disciplinary files to the public, all references to otherwise privileged communications shall be deleted from the record.” *Id.* The Note continued to point out that the new statutory provision created “substantial” problems when read in conjunction with the 1992 rule on confidentiality. *Id.* “In addition to the ... burden of redacting the files for public release, these was the potentially greater problem of conducting panel hearings in such a manner as to preclude the possibility that confidential communications would be revealed during testimony, specifically the possibility that any public observers would have to be removed prior to the elicitation of any such communication only to be allowed to return until the next potentially confidential revelation.” *Id.*

¹⁴⁵ FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.260 cmt. (1995).

¹⁴⁶ FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.220(j) (1992) (renumbered as 10.220(n) in 1995 and 10.810(n) in 2000). Starting in 1995, this section also includes a provision for the committee to “appoint a member of The Florida Bar to investigate and prosecute the complaint.” Rule 10.220(n) (1995) (renumbered as 10.810(n) in 2000). The 1992 rules only contained a provision for the center to “appoint counsel to prosecute the complaint.” FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.230(b) (1992).

complaint is forwarded to a hearing panel from the same division.¹⁴⁷ In order to keep the investigatory function separate from the adjudicatory function, no member who serves on the complaint committee for a grievance could also serve on the hearing panel for that grievance.¹⁴⁸ The five person hearing panel is drawn from the division in which the complaint arose and is composed of a judge, who serves as chair, an attorney, and three mediators, at least one of whom was certified in the area to which the complaint referred.¹⁴⁹ The majority of the hearing panel members are mediators who presumably understand mediation practice (and thus presumably can better assess appropriate mediator behavior) and the panel also always includes one judge and at least one additional attorney.¹⁵⁰ The judge has the experience and expertise to rule on procedural issues and both the judge and the attorney presumably ensure compliance with due process protections.

The rules allow for the appointment of counsel to prosecute the case.¹⁵¹ Even though it is permissive for the MQB to hire a prosecutor, the internal operating procedures call for a prosecutor to be retained in every case that proceeds to hearing.¹⁵² Unlike the initial phase which contains no time frame for a complaint committee once the complaint has been assigned to the committee, a hearing must be scheduled “not more than 90 days nor less than 30 days from the date of notice of assignment of the matter to the panel.”¹⁵³

The hearing phase is much more formal than the complaint committee phase. While the rules state that “[t]he hearing may be conducted informally but with decorum,”¹⁵⁴ the rules of evidence applicable to trial of civil actions apply.¹⁵⁵ A mediator

¹⁴⁷ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.230(a) (1992/1995) (renumbered as 10.820(a) in 2000).

¹⁴⁸ *Id.*

¹⁴⁹ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.190(d) (1992) (renumbered as 10.190(e) in 1995 and 10.730(f) in 2000).

¹⁵⁰ One or more of the certified mediators may also be licensed attorneys which mean in practice, hearing panels often include several individuals with legal training and experience.

¹⁵¹ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.230(b) (1992) and expanded to include an investigatory function in FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.220(n) (1995) (renumbered as 10.810(n) in 2000).

¹⁵² In the second case filed with the MQB, a prosecutor was not retained and the complainant attempted to present his case at the panel hearing. The complainant was not an attorney and was unsure how to appropriately present evidence to the hearing panel. As a result, the hearing took more than a day to complete and resulted in a dismissal on jurisdictional grounds. The complaint alleged that the parties reached an agreement on May 2, 1992. The agreement was not reduced to writing until October 1992, “at which time the defendants attempted to renegotiate several points of the agreement. Because the ethical requirement relating to drafting the agreement was not adopted until May 28, 1992, the hearing panel dismissed the grievance.” MQB #2, Resolution Report #16.

¹⁵³ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.230(c) (1992) (renumbered as 10.820(b) in 2000).

¹⁵⁴ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.820(d)(2) (2000).

has a right to defend, a right to be represented by an attorney, to examine and cross-examine witnesses, and to compel the attendance of witnesses and the production of documents.¹⁵⁶ Both the mediator and the prosecutor are entitled to discovery regarding *Id.* the witnesses to be called.¹⁵⁷ After taking testimony, the hearing panel may dismiss the complaint¹⁵⁸ or may impose sanctions on the mediator.¹⁵⁹ The standard of review for certified mediators in “clear and convincing evidence to support a violation of the rules,”¹⁶⁰ while the standard of review for a denial of certification is “preponderance of the evidence that an applicant should not be certified.”¹⁶¹

The rules provide a list of possible sanctions which the hearing panel can impose ranging from an oral admonishment or written reprimand up to and including a decertification or bar from service as a mediator under the Rules of Civil Procedure, if the mediator was not certified.¹⁶² Notably, the rules allow for the hearing panel to impose “[s]uch other sanctions as are agreed to by the mediator and the panel.”¹⁶³ Because one of the stated goals of the MQB is rehabilitation, the members have consistently attempted to craft sanctions which are appropriate and would be meaningful in achieving this goal.¹⁶⁴

¹⁵⁵ *Id.* at 10.820(d)(3).

¹⁵⁶ FLA. R. FOR CERTIFIED & CT.-APPOINTED 10.820(e).

¹⁵⁷ *Id.* at 10.820(f)-(g).

¹⁵⁸ *Id.* at 10.820(l).

¹⁵⁹ *Id.* at 10.820(m).

¹⁶⁰ *Id.* at 10.820(m).

¹⁶¹ FLA. R. FOR CERTIFIED & CT.-APPOINTED 10.820(n). In 2000, the rules were amended to create a parallel process for review of “good moral character” issues. *See* FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.110. These issues could arise in the course of initial certification, at the time of certification renewal, or at any point while the mediator was certified. A special qualifications complaint committee, including one member from each division, is appointed each year to review the issues relating to good moral character which arise. *Id.* at 10.730(e). The process is similar to the regular grievance process with the exception of the standard of review.

¹⁶² *Id.* at 10.830(a).

¹⁶³ *Id.* at 10.830(a)(8).

¹⁶⁴ Examples of sanctions crafted specifically for the individual circumstances include, a mediator accepted a restriction from mediating via teleconferencing after a grievance was filed alleging that the mediator continued with a mediation even though the parties were unable to communicate with each other due to either user error or equipment failure and the complainant repeatedly requested that the mediation be discontinued. MQB #8, Resolution Report #18; a circuit certified mediator who was regularly mediating family cases upon agreement of the parties accepted a restriction on his ability to conduct family mediations until such time as he completed a family mediation training program and was certified as a family mediator by the Florida Supreme Court after a grievance was filed by the paternal grandparents in a grandparent visitation cases. The complainants alleged, among other things, that an agreement was reached at the mediation providing telephone privileges to the complainants, but the mediator did not include it in

In order to fully understand the policy implications of the Florida rules, it is helpful to analyze filed grievances and their resolutions in order to determine whether the public policy goals were implemented in practice. After providing statistics on the total number of filed grievances, the next section will focus specifically on the grievances filed from April 1, 2000¹⁶⁵ and December 31, 2009.

III. THE GRIEVANCE PROCESS IN PRACTICE

A. Statistics

A total of 199 grievances have been filed with the MQB since it was created in 1992 and it has considered an additional 469 “good moral character” (GMC) reviews.¹⁶⁶ In this article, I limit my analysis to the grievances that have been filed by individuals involved in mediations rather than including the GMC cases. The reason for doing so is that the vast majority of the GMC cases arise via the routine examination of an applicant’s criminal record either at the time of initial certification or renewal. While the public and the courts should legitimately be concerned about mediators’ general character in relation to having trust and confidence in their ability to serve as a neutral, the more interesting questions involve behaviors of a mediator during a mediation which parties to mediation find objectionable enough to file a complaint.

Nearly 50%¹⁶⁷ of all of the filed complaints were from the central division.¹⁶⁸ Thirty nine percent were from the southern division¹⁶⁹ and only 16% were from the northern division.¹⁷⁰ This breakdown can be explained to some degree by the amount of cases mediated and number of mediators¹⁷¹ but also may reflect regional differences.

Regardless of which division they come from, complaints overwhelmingly are filed by parties.¹⁷² Approximately a third¹⁷³ of the complaints were filed against

the written agreement “because the mediator felt it was unnecessary since everyone agreed.” MQB #11, Resolution Report 10 #1.

¹⁶⁵ A substantial revision of the Standards of Conduct was adopted effective April 1, 2000. *In re* Amendments to the Fla. Rules for Certified and Court-Appointed Mediators, 762 So.2d 441 (Fla. 2000).

¹⁶⁶ Grievances Filed with the MQB Chart (prepared by the Dispute Resolution Center Office of the State Courts Administrator – March 17, 2014 *includes all grievances filed through MQB 2014-004 and QCC 2014-023*).

¹⁶⁷ The actual number is 46%. *Supra* note 167.

¹⁶⁸ Includes the fifth, sixth, seventh, ninth, tenth, twelfth, thirteenth, and eighteenth judicial circuits. FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.730(a)(1).

¹⁶⁹ Includes the eleventh, fifteenth, sixteenth, seventeenth, nineteenth, and twentieth judicial circuits. *Id.* at 10.730(a)(2).

¹⁷⁰ Includes the first, second, third, fourth, eighth, and fourteenth judicial circuits. *Id.* at 10.730 (a)(3).

¹⁷¹ *Supra* note 167.

mediators conducting circuit mediations, a third¹⁷⁴ were filed against mediators in family cases and only 16.6%¹⁷⁵ were filed against mediators in county cases.¹⁷⁶ To date, no grievances have been filed against mediators in dependency cases or appellate cases.¹⁷⁷ Not all of the filed grievances have been against Florida Supreme Court certified mediators because the standards of conduct and the grievance process apply to non-certified mediators who mediate pursuant to court order.¹⁷⁸ The rules also apply to certified mediators for work they have done which is not court-ordered. As a result, approximately 7% involved other, non-state court, types of mediations, for example, home owner association,¹⁷⁹ community,¹⁸⁰ mobile home disputes,¹⁸¹ workers' compensation¹⁸² and federal court mediations. The final 14.5% were unrelated to a specific mediation or even to mediation in general. These include grievances alleging violations of advertising rules, as well as activities other than mediation, including serving as a parenting coordinator¹⁸³ or an arbitrator.¹⁸⁴

Between April 2000 and December 31, 2009, 77 grievances were filed.¹⁸⁵ Not surprisingly, the rules most often cited in grievances¹⁸⁶ filed after 2000 are those that

¹⁷² Nearly 71% (141 of 199) of all grievances filed were filed by parties to the mediation. Attorneys filed 21 grievances and an additional 37 were filed by "other." *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ The relatively small number of grievances filed against mediators conducting county court cases is likely to reflect the fact that county mediators tend to offer services as volunteers in a court program. This means that there is an individual who serves in the role of "director" of the program and would be able seen as someone to whom issues could be raised and dealt within on the local level without the need to file the grievance with the state office.

¹⁷⁷ Dependency mediation was added to the definitions found in Chapter 44, Mediation Alternatives to Judicial Action, in 1994. Appellate mediation is defined as "mediation that occurs during the pendency of an appeal of a civil case. FLA. STAT. ANN § 44.1011(2)(a).

¹⁷⁸ Rule 1.720(f) allows the parties to select a mediator by agreement within the first 10 days of referral by the court. FLA. R. CIV. P. 1.720(f). During this initial period, the parties may select a certified mediator or a mediator who is not certified. *Id.* Approximately 5% of the filed grievances have been against noncertified mediators. *Supra* note 167.

¹⁷⁹ FLA. STAT. ANN. §720.311 (West).

¹⁸⁰ FLA. STAT. ANN. §44.201 (West).

¹⁸¹ FLA. STAT. ANN. §723.038 (West).

¹⁸² FLA. STAT. ANN. §440.25 (West).

¹⁸³ FLA. STAT. ANN. §61.125 (West).

¹⁸⁴ FLA. STAT. ANN. §44.103 (West).

govern the mediator's responsibility to the parties, rules 10.300 – 10.380, and of those, the most common are rule 10.330, Impartiality and rule 10.310, Self-Determination.¹⁸⁷ It is fair to deduce that parties to mediation care the most about the ethical standards which impact them directly and therefore, in order to serve the public, the grievance process should be designed in such a manner that it effectively addresses ethical breaches of these rules.

Of the 77 grievances filed since 2000, only four¹⁸⁸ reached the hearing panel stage.¹⁸⁹ From a public policy perspective, it is important to explore if there are “good” reasons why so few grievances go to hearing and, for those that do proceed through the hearing process, are the outcomes appropriate and justifiable?

In response to the first inquiry, there are several reasons why only five percent of the grievances filed ended with a hearing. First and foremost, the design of the MQB process is built on the premise that resolving grievances at the lowest level is most beneficial to complainants, mediators, and the system. There is no question that it is more efficient both in terms of time and money to resolve a complaint short of hearing. The costs for the state associated with a hearing include payment to a prosecutor, travel

¹⁸⁵ Grievances filed before 2000 were not considered for this article due to the significant substantive revisions to the ethical standards that took place in 2000.

¹⁸⁶ The rules were tallied based on facial sufficiency determinations by the Mediator Qualifications Board. Because grievances are generally filed by parties, they range in sophistication and ability to identify what rules may have been violated. As a result, the complaint committee often adds rules for the mediator's response at the facial sufficiency stage, even if not identified by the complainant. In addition, even if filed, if the complaint does not pass a facial sufficiency determination, it is not included.

¹⁸⁷ Compare Paula Young, *Take it or Leave it, Lump it or Grieve it: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721 (2006).

¹⁸⁸ During this period, an additional five hearings were held stemming from four “good moral character” cases. Three of those involved initial applicants for Florida Supreme Court certification. Two of the three were certified after the hearing panel concluded that there was insufficient evidence to support a conclusion that the applicant lacked good moral character based on a preponderance of the evidence standard. In the third case, the applicant was denied certification. The final two hearings involved a certified mediator who, as a result of issues with alcoholism, reported on his renewal application that he had been convicted of two first degree misdemeanors since his last renewal. The panel found by clear and convincing evidence that the mediator violated the good moral character rule and sanctioned the mediator to a one year probation which included a suspension from mediation activity for a period of 9 months; a ban on consumption of alcohol or any controlled substance; a prohibition against committing any new violations of law or violations of probation; completion of 100 community service hours; completion of all continuing mediator education hours; completion of another set of mentorship activities and compliance with his Florida Lawyer Assistance Contract which was already in effect. A decertification hearing was held when the mediator did not complete the sanctions. The mediator was decertified. A little over two years later, he applied for reinstatement and was successful. QCC 15a, Resolution Report Volume 17, Number 1 and Volume 21 Number 4.

¹⁸⁹ While it is an interesting to consider why so few grievances are filed, it is the subject of a different article and will not be covered here. Possible reasons include lack of knowledge of the grievance process, lack of knowledge about what is ethical in a mediation, fatigue with the dispute, recognition that ultimate decision making rests with the parties not the mediator, many grievances are handled on the local level, among others.

for the panel members and staff, as well as witness fees, and other discovery and court reporter costs. For mediators, appearing at a hearing will take them away from income producing activities and most will hire attorneys, even though not required. For the complainant, there may be costs associated with travel and taking time off to appear at the hearing. In terms of non-economic costs, a formal hearing process does not provide an opportunity for reconciliation or for a mediator to understand why something s/he did caused the complainant discomfort.¹⁹⁰ As a result, the rules allow the complaint committee to meet with the mediator and the complainant “at any time the committee has jurisdiction... in an effort to resolve the matter.”¹⁹¹ These provisions satisfy the public policy goal of accessibility to complainants and provide an opportunity to resolve disputes in a meaningful fashion.

In keeping with the other public policy goal of providing due process to the mediator, the rules provide for a dismissal at a very early stage in the proceedings if the complaint is facially insufficient. Just over twelve percent (ten grievances) were dismissed at the facial sufficiency stage in the proceeding. Although the complaint committee considers facial sufficiency a very low threshold, there were some complaints which did not meet the minimal requirements. For example, grievances filed against Florida Supreme Court certified mediators for actions taken while acting in a role other than a mediator rarely survive¹⁹² unless the complaint raises questions about the mediator’s “general integrity.”¹⁹³

Of the 66 grievances that survived the facial sufficiency stage, 46 were dismissed, one complaint was withdrawn,¹⁹⁴ the mediator resigned voluntarily in one complaint,¹⁹⁵

¹⁹⁰ From my experience as staff to the MQB from 1992 – 2009, I know that parties who file grievances often are more interested in making sure that the mediator knows that s/he did something wrong and will not do the same thing to someone else than they are in punishing their mediator. Many parties would specifically tell me some version of “I don’t want the mediator to lose his/her ability to serve as a mediator. I just want him/her to understand what s/he did.”

¹⁹¹ FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.810(j) (2000).

¹⁹² The following grievances did not survive a facial sufficiency determination: a Florida Supreme Court certified family mediator serving as a parenting coordinator pursuant to court order, MQB 2008-01, Resolution Report Volume 23, #1; a Florida Supreme Court certified family mediator acting in the role as counselor, MQB 2001-006, Resolution Report Volume 17, #1; a Florida Supreme Court certified mediator who was a party to the dispute, not the mediator, MQB 2007-007, Resolution Report Volume 23, #1 and MQB 2006-003, Resolution Report 21, #4.

¹⁹³ Rule 10.620 requires a mediator not to “accept any engagement, provide any service, or perform any act that would compromise the mediator’s integrity and impartiality.” FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.620.

¹⁹⁴ The complaint was withdrawn after the mediator’s response was received and the complaint committee requested additional information from the complainant to support the complaint. MQB 2003-001, Resolution Report Volume 18, Number 2,

¹⁹⁵ The grievance had been filed by the author of an article alleging that the subject of the grievance (a certified county and circuit mediator) had published an article under the mediator’s byline in a Florida Bar Section Newsletter. The article actually was a composite of three articles written by other people, none of who were acknowledged not given any credit. After two rounds of interviews and other investigation, the committee advised the mediator that it was prepared to find probable cause that the mediator had violated

and sanctions were accepted by the mediator at the complaint committee stage or imposed by a hearing panel in 18 grievances. Of the complaints that were dismissed, 36 had a finding of no probable cause and ten were dismissed after a finding of probable cause.¹⁹⁶

Another way to analyze these cases is to review how many were dismissed after a meeting with the mediator and the complainant¹⁹⁷ given that these meetings so successfully satisfy the public policy goals of efficiency, reconciliation, rehabilitation, and due process. Nineteen of these types of meetings took place in grievances filed during the years 2000 - 2009. Sanctions were involved in 11 of the grievances, of which eight were agreed to prior to a finding of probable cause. Of the five grievances which were dismissed after the complaint committee meeting with the mediator and complainant, two were after a finding of probable cause.¹⁹⁸ If one accepts rehabilitation as a valid rationale for a grievance process, then the acceptance of sanctions which ranged from a written reprimand,¹⁹⁹ refunding (and if appropriate forgiveness) of fees associated with the mediation,²⁰⁰ agreement to adhere in the future to the specific rule which had been violated,²⁰¹ completion of additional ethics continuing education hours,²⁰² a letter of apology to the complainant,²⁰³ and researching and writing an article

rules 10.520, Compliance with Authority; 10.600, Mediator's Responsibility to the Mediation Profession; 10.610, Advertising; and 10.620, Integrity and Impartiality. The mediator accepted the committee's offer to resign as a mediator. MQB 2007-11.

¹⁹⁶ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.810. Examples of grievances dismissed after a finding of probable cause include: MQB 2000-004, Resolution Report Volume 16, #1, in which a Florida Supreme Court certified circuit mediator conducted a non-court ordered cases pursuant to rules adopted by the Department of Business and Professional Regulation (DBPR) for mobile home mediations pursuant to §723.038, Florida Statutes. The complaint committee found probable cause that the mediator violated rule 10.380(c) by failing to fully inform the parties of the costs that would be incurred beyond their initial filing fee, but dismissed the complaint because the mediator had provided the parties with a document prepared by DBPR which detailed the requirements in relation to the filing fee and thus may have been "lulled into complacency;" MQB 2002-003, Resolution Report Volume 17, Number 3, in which a Florida Supreme Court certified circuit mediator admitted to failing to appear at a duly noticed mediation conference ordered by the court which resulted in the cancellation of the mediation even though all of the parties and their counsel were in attendance. The complaint committee found probable cause that the mediator violated rule 10.430, Scheduling Mediation but dismissed the grievance based on the presentation by the mediator of unrefuted medical evidence that the mediator's medical condition contributed to or caused the mediator to miss the scheduled mediation; the mediator was "genuinely apologetic" for his failure to appear and offered to perform the mediation in the future at no charge to the parties; and a referral of the matter to a panel would be "overly harsh" given the mediator's extensive professional experience and lack of prior history of violations.

¹⁹⁷ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.810(j).

¹⁹⁸ MQB 2005-005, Resolution Report Volume 21 #4; and MQB 2008-004.

¹⁹⁹ MQB 2004-002 and MQB 2005-005, Resolution Report Volume 21 #4.

²⁰⁰ MQB 2002-001, Resolution Report Volume 17, #3; MQB 2007-005, Resolution Report, Volume 23 #1; and MQB 2007-009, Resolution Report, Volume 24, #1.

²⁰¹ MQB 2002-001, *supra* note 201.

clarifying the procedural and ethical issues related to the alleged violation²⁰⁴ would appear to be appropriate outcomes regardless of whether probable cause was officially found.²⁰⁵ For mediators, acceptance of sanctions prior to a finding of probable cause is beneficial even though confidentiality of the grievance is maintained only until sanctions are imposed “whether by the panel or upon agreement of the mediator.”²⁰⁶ The acceptance of sanctions prior to a finding of probable cause could be likened to a plea of nolo contendere in a criminal case by which a defendant does not contest the charges and accepts a fine or sentence. In these circumstances, the defendant preserves the right to say that the charges were never proven while still engaging in the rehabilitative sanctions.

In the same way that court-connected mediation takes place in the “shadow of the law,”²⁰⁷ informal resolution takes place in the shadow of the formal grievance procedure. Thus, even if one accepts the premise that the resolution of grievances short of hearing preferable, it is important to analyze what happens at the hearing stage. If grievance hearings never result in mediator sanctions, it will be less likely that a mediator would accept a sanction at the complainant committee stage.²⁰⁸ While having only four grievances to analyze raises some questions regarding reliability, the disparate outcomes of these grievances raise some issues worthy of consideration. Before exploring how the grievances were resolved and assessing whether the resolutions met the public policy goals of access, due process, and rehabilitation, I will briefly describe the circumstances which led to the filing of each of the complaints.

²⁰² MQB 2002-004, Resolution Report Volume 18, #1; MQB 2005-001, Resolution Report Volume 21 # 2; MQB 2006-009, Resolution Report Volume 22, #2; and MQB 2007-010, Resolution Report, Volume 23 #1.

²⁰³ MQB 2002-004, *supra* note 203; MQB 2006-009, *supra* note 203; MQB 2007-005, *supra* note 201; MQB 2007-009, *supra* note 201; and MQB 2007-010, *supra* note 203.

²⁰⁴ MQB 2005-001, *supra* note 203; and MQB 2006-002, Resolution Report, Volume 21, #4.

²⁰⁵ One of the reasons for allowing the mediator to agree to sanctions prior to a finding of probable cause is that once sanctions are involved, the grievance is no longer confidential. FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.850 (2000). Some mediators are more comfortable accepting the sanctions if they can do so without a finding of probable cause. Given the expense and other challenges associated with proceeding to a hearing, the complaint committee often sees this as an acceptable compromise.

²⁰⁶ *Id.*

²⁰⁷ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

²⁰⁸ A second more practical reason for looking closely at the grievances which resulted in sanctions at the hearing stage is that “all documentation including and subsequent to the filing of formal charges shall be public.” While “[i]f a consensual agreement is reached between a mediator and a complaint committee, only the basis of the complaint and the agreement shall be released to the public.” FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.850.

B. Grievances Referred to Hearing Panels

1. MQB 2003-003

MQB 2003-003 was the first grievance that went to hearing under the 2000 rules. This grievance was filed by a party against a Florida Supreme Court certified circuit mediator. Although it was initially unclear if the mediation was “court-ordered” or took place prior to a required arbitration, the MQB asserted jurisdiction because the mediator was certified by the Florida Supreme Court. The complainant alleged that the content of the mediator’s opening statement was meant to “intimidate” the complainant;²⁰⁹ the mediator did not act with impartiality;²¹⁰ the mediator did not provide accurate or timely information regarding the fees for mediation and the fees charged did not correspond with the time that the complainant had indicated the mediation had concluded;²¹¹ the mediator exhibited a “lack of professionalism” by misrepresenting the outcome of the mediation;²¹² and the relationship between the mediator and the complainant’s attorney created a conflict of interest.²¹³

The complaint committee found the complaint to be facially sufficient and requested a response from the mediator regarding the following possible rule violations: 10.310(a) and (b), Self-Determination;²¹⁴ 10.330(a), (b), and (c), Impartiality;²¹⁵

²⁰⁹ The complainant’s statement provides some insight into how parties view mediator’s opening statements. The complainant stated that the mediator asked her if she had ever been to a mediation before “with the intent to intimidate her in front of the opposition.” Mediator Grievance Report, 2003-03. The mediator did not make a similar inquiry of the other party and when asked why he had not, according to the complainant, the mediator responded, “I’m sure they have. All contractors have been at one time or another.” *Id.* The complainant observed that the plaintiffs were “young contractors” and believed it was possible that they had not been to mediation before. *Id.* Therefore, the complainant concluded this was done as “a means of trying to intimidate [her].” *Id.*

²¹⁰ The complainant alleged that during her presentation of what had happened, the mediator “interrupted [her] and stated, ‘You’re lucky your house was not sitting on a sink hole!’” *Id.*

²¹¹ The complainant alleged that she had previously been told that the mediation firm charged \$250.00/hour and at no time did her attorney or the mediator communicate to her that the fees were \$300.00/hour and that there were fees for lunch. *Id.* In addition, the complainant alleged that not only was she required to pay the hourly rate for mediation while the mediator ate lunch, the bill contained a \$44.24 charge for the mediator’s lunch. *Id.* The complainant stated that because she is a vegetarian, she did not eat any of the meats that were ordered. *Id.* Finally, the complainant alleged that she told the mediator that the mediation “was over and [her] clock had stopped regarding this mediation” after just over 3 hours. *Id.* The bill reflected 4.2 hours of mediation. *Id.*

²¹² The complainant alleged that at the conclusion of the mediation in which no agreement had been reached in “a pre-arbitration” mediation, the mediator faxed a mediator’s report to the court indicated that an agreement had been reached. *Id.* The complainant alleged that this was in appropriate not only because it was inaccurate, but also because the case had been mediated prior to court order and therefore, no report should have been sent to the judge. In a fax sent after the mediation, the complainant’s attorney reminded the mediator, “this was not a court mediation but a pre-arbitration mediation. *Id.* We did not want to waive our demand for arbitration by voluntarily consenting to participation in state court proceedings.” *Id.*

²¹³ The complainant alleged that she heard her attorney telling the mediator that “he’s going to send more business his way” as an apparent conflict of interest. *Id.*

10.340(a), (b), (c), and (d), Conflict of Interest;²¹⁶ 10.380(b) and (c), Fees and Expenses;²¹⁷ 10.410, Balanced Process;²¹⁸ 10.420, Conduct of Mediation;²¹⁹ and 10.630, Professional Competence.²²⁰

²¹⁴ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.310(a) (2000) (“Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self determination.”); *id.* at 10.310 (b) (“A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation.”).

²¹⁵ *Id.* at 10.330(a) (“A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties as opposed to any one individual.”); *id.* at 10.330(b) (“A mediator shall withdraw from mediation if the mediator is no longer impartial.”); *id.* at 10.330(c) (“A mediator shall neither give nor accept a gift, favor, loan, or other item of value in any mediation process. During the mediation process, a mediator shall not solicit or otherwise attempt to procure future professional services.”).

²¹⁶ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.340(a) (“A mediator shall not mediate a matter that represents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator’s impartiality.”); *id.* at 10.340(b) (“The burden of disclosure of any potential conflict of interest rests on the mediator. Disclosure shall be made as soon as practical after the mediator becomes aware of the interest or relationship giving rise to the potential conflict of interest.”); *id.* at 10.340(c) (“After appropriate disclosure, the mediator may serve if all parties agree. However, if a conflict of interest clearly impairs a mediator’s impartiality, the mediator shall withdraw regardless of the express agreement of the parties.”); *id.* at 10.340(d) (“A mediator shall not create a conflict of interest during the mediation. During a mediation, a mediator shall not provide any services that are not directly related to the mediation process.”).

²¹⁷ *Id.* at 10.380(b) (“A mediator shall be guided by the following general principles in determining fees: (1) Any charges for mediation services based on time shall not exceed actual time spent or allocated. (2) Charges for costs shall be for those actually incurred. (3) All fees and costs shall be for those actually incurred. (4) When time or expenses involve two or more mediations on the same day or trip, the time and expense charges shall be prorated appropriately.”); FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.380(c) (“A mediator shall give the parties or their counsel a written explanation of any fees and costs prior to mediation. The explanation shall include: (1) the basis for and amount of any charges for services to be rendered, including minimum fees and travel time; (2) the amount charged for the postponement or cancellation of mediation sessions and the circumstances under which such charges will be assessed or waived; (3) the basis and amount of charges for any other items; and (4) the parties’ pro rata share of mediation fees and costs if previously determined by the court or agreed to by the parties.”).

²¹⁸ *Id.* at 10.410 (“A mediator shall conduct mediation sessions in an even-handed, balanced manner. A mediator shall promote mutual respect among the mediation participants throughout the mediation process and encourage the participants to conduct themselves in a collaborative, non-coercive, and non-adversarial manner.”).

²¹⁹ *Id.* at 10.420(a) (“Upon commencement of the mediation session, a mediator shall describe the mediation process and the role of the mediator, and shall inform the mediation participants that: (1) mediation is a consensual process; (2) the mediator is an impartial facilitator without the authority to impose a resolution or adjudicate any aspect of the dispute; and (3) communications made during the process are confidential, except where disclosure is required or permitted by law.”); *id.* at 10.420(b) (“A mediator shall: (1) adjourn the mediation upon agreement of the parties; (2) adjourn or terminate any mediation which, if continued, would result in unreasonable emotional or monetary costs to the parties; (3) adjourn or terminate the mediation if the mediator believes the case is unsuitable for mediation or any party is unable or unwilling to participate meaningfully in the process; (4) terminate a mediation entailing fraud,

2. MQB 2005-002

The second grievance during this period which was referred to a hearing panel was filed in 2005 about a mediation which took place in 1999. In keeping with the public policy goal of accessibility for complainants, there is no statute of limitation for the filing of a grievance.²²¹ The litigants in the underlying case had been in court for many years after the mediation because the former wife had alleged, at the trial and appellate court levels, mediator misconduct as a reason for the mediation agreement to be set aside.²²² Given that the complaint committee had access to sworn testimony²²³ and the mediator had full knowledge of these appeals and therefore, was still very familiar with all aspects of the mediation, the complaint committee was not concerned by the significant passage of time between the alleged misconduct and the filing of the complaint.

The underlying case involved a dissolution of marriage. The mediation was conducted by family mediator who was certified by the Florida Supreme Court at the time of the mediation but had since allowed his certification to lapse. The appellate court included the following summary of the facts which led to the appeal and ultimately to the mediator grievance.

Procedural background

By August of 1999, [the complainant and her spouse's] divorce proceedings to end their near twelve-year marriage had been going on for one and a half to two years. On August 17, 1999, the couple attended court-ordered mediation to attempt to resolve their dispute. At the mediation, both parties were represented by counsel. The mediation lasted seven to eight hours and resulted in a twenty-three page marital settlement agreement. The agreement was comprehensive and dealt with alimony, bank accounts, both parties' IRAs, and the husband's federal customs, postal, and

duress, the absence of bargaining ability, or unconscionability; and (5) terminate any mediation if the physical safety of any person is endangered by the continuation of mediation.”); *id.* at 10.420(c) (“The mediator shall cause the terms of any agreement reached to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement.”).

²²⁰ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.630 (“A mediator shall acquire and maintain professional competence in mediation. A mediator shall regularly participate in educational activities promoting professional growth.”).

²²¹ Given that the length of time between the alleged misconduct may be considered by the MQB in its review of the complaint and assessment of probable cause, to date, the MQB has determined that an arbitrary limitation should not be imposed. *Id.* at 10.810.

²²² See *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, 1096-97 (Fla. Dist. Ct. App. 2001). In 2008, the appellate court upheld the court’s granting of the husband’s motion to enforce the provision of the marital settlement agreement requiring the wife to turn over to him the couple’s frozen embryos. See *Vitakis-Valchine v. Valchine*, 987 So. 2d 171, 171 (Fla. Dist. Ct. App. 2008).

²²³ The complainant included transcripts and orders from hearings conducted in the cases, as well as the reported appellate decision in the underlying case in which the complainant raised mediator misconduct as grounds for setting aside the mediation agreement. *Valchine*, 793 So.2d 1094.

military pensions. The agreement also addressed the disposition of embryos that the couple had frozen during *in vitro* fertilization attempts prior to the divorce. The agreement provided in this regard that “[t]he Wife has expressed her desire to have the frozen embryos, but has reluctantly agreed to provide them to the husband to dispose of.”

The former wife's claims

The wife testified that the eight-hour mediation, with ... the mediator, began at approximately 10:45 a.m., that both her attorney and her brother attended, and that her husband was there with his counsel. Everyone initially gathered together, the mediator explained the process, and then the wife, her attorney and her brother were left in one room while the husband and his attorney went to another. The mediator then went back and forth between the two rooms during the course of the negotiations in what the mediator described as “Kissinger-style shuttle diplomacy.”

With respect to the frozen embryos, which were in the custody of the Fertility Institute of Boca Raton, the wife explained that there were lengthy discussions concerning what was to become of them. The wife was concerned about destroying the embryos and wanted to retain them herself. The wife testified that the mediator told her that the embryos were not “lives in being” and that the court would not require the husband to pay child support if she were impregnated with the embryos after the divorce. According to the wife, the mediator told her that the judge would *never* give her custody of the embryos, but would order them destroyed. The wife said that at one point during the discussion of the frozen embryo issue, the mediator came in, threw the papers on the table, and declared “that's it, I give up.” Then, according to the wife, the mediator told her that if no agreement was reached, he (the mediator) would report to the trial judge that the settlement failed because of her. Additionally, the wife testified that the mediator told her that if she signed the agreement at the mediation, she could still protest any provisions she didn't agree with at the final hearing—including her objection to the husband “disposing” of the frozen embryos.

With respect to the distribution of assets, the wife alleges that the mediator told her that she was not entitled to any of the husband's federal pensions. She further testified that the mediator told her that the husband's pensions were only worth about \$200 per month and that she would spend at least \$70,000 in court litigating entitlement to this relatively modest sum. The wife states that the mediation was conducted with neither her nor the mediator knowing the present value of the husband's pensions or the marital

estate itself. The wife testified that she and her new attorney had since constructed a list of assets and liabilities, and that she was shortchanged by approximately \$34,000—not including the husband's pensions. When asked what she would have done if Mr. London had told her that the attorney's fees could have amounted to as little as \$15,000, the wife stated, “I would have took [sic] it to trial.”

Finally, the wife testified that she signed the agreement in part due to “time pressure” being placed on her by the mediator. She testified that while the final draft was being typed up, the mediator got a call and she heard him say “have a bottle of wine and a glass of drink, and a strong drink ready for me.” The wife explained that the mediator had repeatedly stated that his daughter was leaving for law school, and finally said that “you guys have five minutes to hurry up and get out of here because that family is more important to me.” The wife testified that she ultimately signed the agreement because [I] felt pressured. I felt that I had no other alternative but to accept the Agreement from the things that I was told by [the mediator]. I believed everything that he said.²²⁴

The complaint committee found the complaint to be facially sufficient and requested a response from the mediator regarding the following possible rule violations:²²⁵ rule 10.050(b), Appropriateness of Mediation;²²⁶ rule 10.060(a) and (b), Self-Determination;²²⁷ rule 10.070(a)(1) Impartiality;²²⁸ rule 10.090, Professional Advice;²²⁹ and rule 10.110, Concluding Mediation.²³⁰

²²⁴ *Valchine*, 793 So.2d at 1096-97.

²²⁵ Because the mediation took place in 1999, the mediator was asked to respond to the ethical standards which were in place at that time.

²²⁶ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.050(b) (2010) (“The mediation shall assist the parties in evaluating the benefits, risks, and costs of mediation and alternative methods of problem solving available to them. A mediator shall not unnecessarily or inappropriately prolong a mediation session if it becomes apparent that the case is unsuitable for mediation or if one or more of the parties is unwilling or unable to participate in the mediation process in a meaningful manner.”).

²²⁷ *Id.* at 10.060(a) (“A mediator shall assist the parties in reaching an informed and voluntary settlement. Decisions are to be made voluntarily by the parties themselves.”); *id.* at 10.060(b) (“A mediator shall not coerce or unfairly influence a party into a settlement agreement and shall not make substantive decisions for any party to a mediation process.”).

²²⁸ *Id.* at 10.060(a) (“A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.”).

²²⁹ *Id.* at 10.090(a) (“A mediator shall not provide information the mediator is not qualified by training or experience to provide.”); FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.090(b) (“When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel.”); *id.* at

3. MQB 2005-004

The third grievance that was referred to a hearing panel during this period was filed by a party to a mediation conducted by a Florida Supreme Court certified circuit mediator. The complainant alleged: 1) the mediator was rude to the complainant and his female attorney who both were from “out-of-town” by “dismissing what counsel had to say” and walking out of the room during the attorney’s opening presentation;²³¹ 2) the complainant and his attorney were subjected to “ethnic profiling and stereotyping;”²³² 3) the mediator behaved “more like ... an attorney for the plaintiff than a mediator;”²³³ and 4) the mediator exhibited a lack of impartiality by telling the complainant that “if you go to court, you need to be on medication and heavy drugs.”²³⁴

10.090(c) (“If one of the parties is unable to participate in a mediation process for psychological or physical reasons, a mediator should postpone or cancel mediation until such time as all parties are able and willing to resume. Mediators may refer the parties to appropriate resources if necessary.”); *id.* at 10.090(d) (“While a mediator may point out possible outcomes of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.”).

²³⁰ *Id.* at 10.110(a)(1) (“The mediator shall cause the terms of any agreement reached to be memorialized appropriately and discuss with the participants the process for formalization and implementation of the agreement.”); *id.* at 10.110(a)(2) (“When the participants reach a partial agreement, the mediator shall discuss the procedures available to resolve the remaining issues.”); FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.110(a)(3) (“The mediator shall not knowingly assist the parties in reaching an agreement which for reasons such as fraud, duress, overreaching, the absence of bargaining ability, or unconscionability would be unenforceable.”); *id.* at 10.110(b)(1) (“The mediator shall not require a participant’s further presence at a mediation conference when it is clear the participant desires to withdraw.”); *id.* at 10.110(b)(2) (“If the mediator believes that the participants are unable or unwilling to participate meaningfully in the process or that an agreement is unlikely, the mediator shall suspend or terminate the mediation. The mediator should not prolong unproductive discussions that would result in emotional and monetary costs to the participants. The mediator shall not continue to provide mediation services where there is a complete absence of bargaining ability.”).

²³¹ Specifically, the complaint stated “During my attorney’s presentation, [the mediator] simply got up and left the room without so much as excusing himself upon leaving or apologizing upon his return. On several occasions, [the complainant] witnessed him totally dismiss what [complainant’s] counsel had to say. Frankly, it appeared that [the mediator] was more interested in what he had to say. It also appeared that my counsel was summarily dismissed and treated differently because she was a woman.” Complainant’s letter filed as part of his complaint. MQB 2005-004.

²³² Specifically, the complainant alleged that he had to “suffer through ethnic profiling and ethnic stereotyping with comments like ‘I just love you people’ and ‘I eat at all of your restaurants... [and] ‘I am an Italian-phile.’” *Id.* The complainant also stated that he was told to speak more softly because “the other party doesn’t understand us and [the complainant] was essentially told not to speak with [his] hands or show any emotion.” *Id.*

²³³ To support this allegation, the complainant stated that “[w]ithin the first three minutes of our individual meeting with him, [the mediator] asked [the complainant’s] attorney twice and [the complainant] once to divulge specific details of a previous settlement with a related party, when he was specifically told the first time he asked that [the complainant and his attorney] could not discuss it because of a confidentiality agreement which had been signed.” *Id.*

The complaint committee found the complaint to be facially sufficient and requested a response from the mediator regarding possible violations of rules 10.330(a) and (b), Impartiality;²³⁵ 10.350, Demeanor;²³⁶ and 10.410, Balanced Process.²³⁷

4. MQB 2009-006

The final grievance that was forwarded to a hearing panel during this period involved a certified family mediator. The complaint alleged that the mediator

charged a flat fee of \$3,995.00 regardless of the amount of time or effort required by the case and refused to refund any portion of the fee despite the absence of any discernible benefit to the parties... the mediator did not assist the parties in reaching a verbal agreement, the draft of a written agreement, or a final agreement... the mediator never met with the complainant's husband, did not schedule subsequent meetings with the complainant, and did not schedule any joint mediation sessions.... The fee charged by the Mediator included fees to be paid to a third party to draft an agreement, which fees were returned to the Mediator because no agreement was reached, but were not refunded to the complainant, as the party paying the fees.... The Mediator failed to contact the complainant's husband for a period of four to six weeks after the Mediator was retained in order to discuss the mediation process and the husband's interests... The mediator failed to schedule any mediation sessions with the parties after work hours or on weekends to enable them to effectively participate in the mediation process, despite knowing the difficulty each party had in attending sessions during work hours... The Mediator failed to inform the complainant's husband that mediation was a voluntary process and that the complainant's husband could choose not to mediate the parties' divorce... The Mediator failed to inform the complainant's husband that if he chose to mediate, he was not obligated to engage the services of this mediator.²³⁸

²³⁴ The complainant described the mediator's comment that "if you go to court, you need to be on medication and heavy drugs" as "the final blow." *Id.* The complainant alleged that the mediator declared an impasse after the complainant's counsel "chastised" the mediator for "his outrageous comment." *Id.*

²³⁵ Rule 10.330(a) and (b), *supra* note 216.

²³⁶ FLA. R. CERTIFICATION & CT.-APPOINTED MEDIATORS 10.350 (2000) ("A mediator shall be patient, dignified, and courteous during the mediation process.").

²³⁷ *Supra* note 219.

The complaint committee found the complaint to be facially sufficient and requested a response from the mediator regarding possible rule violations of rules 10.380(a),²³⁹ (c)²⁴⁰ and (d),²⁴¹ Fees and Expenses; 10.430, Scheduling Mediation,²⁴² and 10.620, Integrity and Impartiality²⁴³

C. Critique: Examination of Grievances as they Relate to Identified Public Policy Goals

In this section, I will use the grievances which went to the hearing panel stage to examine how well the grievance process stages achieve the goals of accessibility for complainants, due process for mediators, and education and rehabilitation rather than retribution for mediator ethical lapses.

1. Initiating a Grievance.

While it is difficult to assess the ease of entry for complainants since there is no way to access data on alleged grievances which were not filed, it appears that those who found the state grievance process were able to initiate a grievance (regardless of whether they were assisted by a lawyer)²⁴⁴ and have that grievance considered. It is significant to note that the Florida Mediation Confidentiality and Privilege Act²⁴⁵ contains an explicit exception for communications “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.”²⁴⁶ This exception advances the public policy goals of holding mediators accountable while still protecting mediation

²³⁸ Formal Charges at 1-4, Fla. Mediator Qualifications Bd., Op.2009-006 (N. Div. 2009).

²³⁹ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.380(a) (“A mediator holds a position of trust. Fees charged for mediation services shall be reasonable and consistent with the nature of the case.”).

²⁴⁰ *Supra* note 218.

²⁴¹ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.380(d) (“A mediation shall maintain records necessary to support charges for services and expenses and upon request shall make an accounting to the parties, their counsel, or the court.”).

²⁴² *Id.* at 10.430 (“A mediator shall schedule a mediation in a manner that provides adequate time for the parties to fully exercise their right of self-determination. A mediator shall perform mediation services in a timely fashion, avoiding delays whenever possible.”).

²⁴³ *Id.* at 10.620 (“A mediator shall not accept any engagement, provide any service, or perform any act that would compromise the mediator’s integrity or impartiality.”).

²⁴⁴ Of the four grievances that went to the hearing panel stage, only the complainant in MQB 2005-004 was represented by an attorney.

²⁴⁵ FLA. STAT. ANN. §§ 44.401-44.406 (West).

²⁴⁶ *Id.* at § 44,405(4)(a)(6).

communications. The filing of a complaint does not open up all of the mediation communications, nor do the communications become accessible outside of the grievance board unless sanctions are imposed, and even then, the rules require that “those matters which are otherwise confidential under law or rule of the supreme court” remain confidential.²⁴⁷

Once filed, complaints are reviewed by a complaint committee so long as the complaint is notarized and names someone who is covered by the grievance process at the time of the alleged misconduct.²⁴⁸ The process does not require the complainant to state the claim in any particular manner nor to appropriately identify which rule or rules may have been violated. At the facial sufficiency stage, the complaint committee convenes and determines “whether the allegation(s), if true, would constitute a violation of these rules.”²⁴⁹ If facially sufficient, the committee prepares the list of rules which may have been violated.²⁵⁰ Thus, even if a grievant does not completely understand the mediation process and what was appropriate for the mediator to do during the mediation, the complaint committee can add additional rules for the mediator’s response.²⁵¹ At this stage, the goal for ease of access for complainants appears to have been met. The complaint committee also has benefitted from this rule because mediator responses are clearer and more responsive to the actual concerns of the complaint committee. What about the goal of providing due process to the mediator?

As stated above, while all properly filed complaints are reviewed by a complaint committee, only those that are facially sufficient are forwarded to a mediator for a response.²⁵² In addition to the complaint, the mediator receives “a list of any rule or rules which may have been violated”²⁵³ thus fulfilling due process notice requirements. The rule also provides that “[i]f the committee finds a complaint against a certified mediator to be facially insufficient, the complaint shall be dismissed without prejudice.”²⁵⁴ Thus, if the complaint is not facially sufficient, the mediator receives notification that a complaint was filed at the same time the mediator receives the dismissal of the complaint. Many mediators report appreciating that they did not even know a complaint had been filed until they received notice of its dismissal thus, preventing them from having the anxiety of waiting to see if the complaint would be dismissed. The current rules seem to

²⁴⁷ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.850(a).

²⁴⁸ The allegations in 2005-002 were considered on the merits by the MQB even though the complaint was filed six years after the mediation took place. See *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, 1096 (Fla. Dist. Ct. App. 2001).

²⁴⁹ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.810(e).

²⁵⁰ *Id.*

²⁵¹ The complaint committee may include rules other than those identified by the complainant if the complaint committee.

²⁵² FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.810(e).

²⁵³ *Id.*

²⁵⁴ *Id.*

strike an appropriate balance of meeting due process goals of putting mediators on notice as to the rules of concern to the complaint committee while not unnecessarily worrying mediators who are subject to frivolous complaints. The rules also serve an educative goal because even if a facially sufficient complaint is later dismissed because the complaint committee determines that the allegations are not credible; the mediator still is on notice that the behavior raised by the complainant would be a violation if true.

2. Complaint Committee Stage

Since 2000, the procedures for the complaint committee phase of the grievance process have been structured to strike a balance between grievant accessibility and mediator protection from frivolous allegations. Specifically, the procedural rules include a “preliminary review” phase²⁵⁵ which takes place after the mediator submits a response to the filed grievance and the rules identified by the complaint committee.²⁵⁶ At the preliminary review phase, the complaint committee can dismiss the complaint if, after reading the mediator’s response, it is satisfied that no violation has occurred.²⁵⁷

If the complaint committee is not prepared to dismiss,²⁵⁸ it can immediately find probable cause and draft formal charges,²⁵⁹ investigate the matter itself or via an investigator²⁶⁰ or “meet with the complainant and the mediator ... in an effort to resolve the matter.”²⁶¹ The unwritten policy of the MQB is not to make a finding of probable

²⁵⁵ *Id.* at 10810(h).

²⁵⁶ *Id.* at 10.810(e).

²⁵⁷ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.810(h).

²⁵⁸ The rules allow the complaint committee to find probable cause but “decide not to pursue the case by filing a short and plain statement of the reason(s) for non-referral.” *Id.* at 10.810(m). Reasons for non-referral include: in a grievance filed by an attorney alleging that the mediator violated the ethical standards governing confidentiality (10.360) and Advice, Opinions, or Information (10.370) by “willingly testifying in court over the attorney’s objection and participating as “an advocate for the defense in court rather than as a neutral.” The mediator responded that he testified in court only after the court ordered the mediator to do so and further, he was not serving in the role of mediator, rather the parties hired him “to engage an appraiser and oversee the appraisal process.” The complaint committee met with the mediator as part of its investigation, and learned that the mediator discussed with the parties that he would be serving a “decision-making” role but continued to refer to himself as mediator in the written documents he exchanged with the parties. After the meeting, the mediator sent a letter to the committee confirming his understanding of the problem with failing to make clear the implications of his change in role and expressed his intention “if faced with a similar circumstance,” to make clear to the parties that his role would change, the implications of such change and to obtain their consent before proceeding with the new role. “In light of the mediator’s acknowledgments and the fact that both parties acknowledged that they requested the mediator to serve in the new capacity, the complaint committee found probable cause but dismissed the grievance.” MQB 2008-04 Summary.

²⁵⁹ FLA. R. FOR CERTIFIED & COURT-APPOINTED 10.810(m).

²⁶⁰ *Id.* at 10.810(i).

²⁶¹ *Id.* at 10.810(j).

cause without first conducting an investigation or meeting with the complainant and the mediator.²⁶² The rule 10.810(j) complaint committee meeting with the complainant and the mediator has been particularly useful in meeting the “education” and “rehabilitation” goals for the grievance process. At this meeting, the mediator has the opportunity to hear directly from the complainant why s/he filed the grievance and the specific behaviors with which the complainant was concerned. The mediator also has the ability, at this meeting, to offer an apology and to provide the complainant with the recognition s/he may be seeking.²⁶³ In addition, the mediator may accept sanctions at this stage foregoing the need for a formal hearing.²⁶⁴ Since the complaint committee does not have jurisdiction to impose sanctions, it can work with the mediator to fashion sanctions which make sense to the specific circumstances – again, serving the education/rehabilitation goals.²⁶⁵

To understand how this process works in practice, I will compare what examine what happened in MQB 2003-003 and MQB 2005-005 after the mediator received the complaint committee’s identification of rules.

*a. MQB 2003-003 – Mediator Response, Investigation, and
Complaint Committee Meeting*

The mediator submitted a response denying responsibility for having committed any violations of the rules. Specifically, in response to the allegations regarding his opening statement, the mediator stated that he always explains his background to the parties, including that he has over 20 years experience as a construction lawyer when he

²⁶² This policy serves both mediators and complainants – complainants have a forum to share what happened from their perspective and thus, feel that their concerns have been taken seriously and mediators are protected from having complaints progress to the more formal hearing process phase without a determination of the credibility of the complainant and the allegations.

²⁶³ See generally ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); Nancy A. Welsh, *Disputant’s Decision Control in Court-Connected Mediation: A hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179. My experience serving as staff to the MQB was that many complainants expressed to me that they did not wish the mediator to lose the ability to mediate, what they really wanted was for the mediator to understand what they had done wrong and not to do the same thing to someone else.

²⁶⁴ FLA. R. FOR CERTIFIED & COURT-APPOINTED 10.810(j).

²⁶⁵ Examples of sanctions agreed to at this stage include: in a grievance involving a fee dispute, the mediator agreed to refund the fees associated with the mediation (punitive) and agreed to modify his engagement letter to include his cancellation policy which had not previously been included and to provide the modified letter to the DRC for review (rehabilitative) [MQB 2002-001], Resolution Report Volume 17 #3; in a grievance involving a couple who met with an attorney-mediator and the purpose of the meeting was in dispute, the mediator agreed to attend and successfully complete eight hours of continuing mediator ethics education (educative), send a letter of apology to the complainant (rehabilitative), and waive her rights to attorneys fees from the complainant (punitive) [MQB 2002-004], Resolution Report Volume 18 #1; in a grievance involving a dispute about the “appearance” requirements in a Homeowners’ Association Mediation (which has different rules and procedures than a court-ordered mediation), the mediator agreed to research and write an article which discussed the interaction of court rules, statute, and regulations relating to the mediation procedure, using the “appearance requirements” for Homeowner Association mediation as the focal point (educative) [MQB 2006-002], Resolution Report Volume 21, # 4.

is handling a construction dispute such as this one. Further, he responded that he always asks the parties if they have been to mediation before as a way to tailor his opening since he is “charging by the hour.” The mediator alleged that the complainant was the only one who responded to his question (with a comment that it “was none of [his] business.”) Regarding possible bias, the mediator explained that his comment regarding the sinkhole was to “get her to be a little more optimistic about her situation, as there was no real damage to her house (the underlying cause of action was for the foundation work, which was all the contractor did before she fired them), and this was just a dispute over money.” In terms of the billing information, the mediator supplied a copy of his confirmation letter which included an hourly rate of \$300 per hour divided equally between the parties to the mediation. The letter also included a provision that the total fee charged would include “.5 hour as an administrative fee, in addition to billing for all time spent in preparation and travel, the mediation conference, and any subsequent meetings or negotiations, including telephone conferences with attorneys or their clients.”²⁶⁶ The mediator indicated that the scheduling of the mediation was set by the attorneys, not the mediator. The mediator denied that the complainant paid for the mediator’s lunch, rather the customary practice was that if a mediation extended over the lunch hour, lunch was ordered for everyone and the charges were split between the parties and added to the mediation bill.²⁶⁷ He explained that the final bill included .9 hours for preparation time.²⁶⁸

In terms of the disposition report, the mediator responded that because he does not mediate differently based on whether the case is court-ordered or voluntary, he typically does not “get involved in why the parties are mediating.”²⁶⁹ In this case, there already was a suit filed when the case was mediated, but it had been referred to arbitration. While the mediator denied recalling any discussion about this, when asked to revise his report to the court, he did so. The mediator also stated that indicating the case settled at mediation was his error and it too was corrected “without charge, of course.”²⁷⁰ Finally,

²⁶⁶ The letter was sent to the complainant’s attorney. Rule 10.380, Fees and Expenses, specifically states that a mediator “shall give the parties *or their counsel* a written explanation of any fees and costs prior to mediation.” FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.380 (emphasis added). It is the only standard which includes counsel and was done so for the very practical reason that oftentimes, mediators only have access to counsel who select and retain the mediator. Like many grievances, delving into what happened reveals problems between the complainant and his/her attorney. In this case, the complainant also felt abandoned by her attorney who the complainant alleged “was less than prepared to represent [her] at this mediation.” She went on to say that her attorney “was misquoting dates, times and event and [she] had to interrupt [him] to present true and accurate information about [her] case.” Mediator Grievance Report, 2003-03. The specific ethical responsibilities of counsel in a mediation while critical, are beyond the scope of this article.

²⁶⁷ The mediator added that there were “sufficient non meat items for a vegetarian to eat,” they would have ordered something special for her if requested, and that the charge was removed from the bill when she called to complaint. According to the mediator, the entire mediation bill remained unpaid at the time of his response. Mediator’s response, dated March 2, 2004, pages 2-3.

²⁶⁸ Interestingly, in his response, the mediator refers to it as preparation time he spent “prior to the deposition.” *Id.* at 2.

²⁶⁹ *Id.* at 2

in terms of the conflict of interest allegations, the mediator acknowledged that both he and the complainant's attorney were construction litigators and had been involved in several cases together in the late 1970's and early 1980's but had not seen each other "probably in 20 years." The mediator acknowledged that when the complainant's attorney left the mediation, he said "he was glad to know [the mediator] was mediating and would keep [him] in mind for future meetings."²⁷¹

After reviewing the response, the complaint committee authorized the retention of an investigator²⁷² to interview the mediator, the complainant, the attorneys for the parties, the mediator's office assistant, and "anyone else deemed necessary" in relation to possible violations of each of the rules it had previously identified. Based on the investigation, the complaint committee found no probable cause that the mediator violated rules 10.310 (self-determination), 10.330 (impartiality), 10.340 (conflicts of interest), 10.410 (balanced process), and 10.420 (conduct of mediation). The complaint committee continued to have concerns regarding possible violations of rules 10.380(c) related to the fees and expenses and specifically what was communicated to the party in advance of the mediation, as well as, rule 10.630, professional competence, because of the inaccurate report the mediator filed with the court and requested a meeting with the mediator and the complainant. As a result of that meeting, the complaint committee drafted a letter of reprimand referencing the violations of the rules regarding fees and professional competence. The mediator refused to accept the letter of reprimand so the complaint committee drafted formal charges.²⁷³

*b. MQB 2005-004 Mediator Response, Investigation and
Complaint Committee Meeting*

The mediator responded via counsel²⁷⁴ that "the allegations against him [were] a sham."²⁷⁵ The response went on to suggest that the grievance had been filed by the complainant in an effort to circumvent a motion for contempt for failure to engage in

²⁷⁰ *Id.* at 3.

²⁷¹ *Id.* at 3. The mediator noted this as proof that the attorney was pleased with his handling of the mediation. He did acknowledge that he had not been retained by the attorney for a future case.

²⁷² FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.810(i) (2000).

²⁷³ The complaint committee meeting with the mediator the complainant "may include sanctions if agreed to by the mediator..." *Id.* at 10.810(j).

²⁷⁴ The rules require that a mediator send a "written, sworn response to the center" within 20 days of the receipt of the list of violations prepared by the committee. *Id.* at 10.810(g). While the rules do not specify that the response be filed by the mediator and not counsel, most mediators do not retain counsel at this point in the process and thus, nearly all responses are filed by the mediator.

²⁷⁵ Mediator's response dated December 6, 2005 page two; however, on page 7 of the mediator's response, he acknowledged that the complainant's attorney "exploded" after the mediator suggested that the complainant might want to consider taking medication if he were to proceed to trial. The mediator stated that the attorney "literally started shrieking" that she was deeply offended by the remark.

good faith mediation which had been filed by the opposing party in the underlying litigation and “as a continuation of their overly aggressive litigation strategy.”²⁷⁶

In response to the first allegation, the mediator explained that the fire alarm system was to be tested in his building and he was concerned that he needed to provide that information to the participants in the mediation in advance of the alarm sounding. In order to find out the specific times for the alarm sounding, the mediator stated that he “momentarily left the conference room,”²⁷⁷ but he denied leaving “during the orientation process.”²⁷⁸ Further, the mediator indicated that it was not he who was rude, but rather it was the complainant’s attorney who arrived late and interrupted opposing counsel during his opening remarks in a “very aggressive manner.”²⁷⁹

In response to the allegation regarding ethnic stereotyping, the mediator acknowledged talking with the complainant about his Italian background and describing himself to the complainant as an “Italianophile.”²⁸⁰ He denied any violations of the rules though and asserted that the complainant was not offended by these discussions at the time.²⁸¹

The mediator contended that his inquiry into the confidential settlement was not as the complainant had suggested and was consistent with his role as mediator. Having learned from the plaintiffs in the underlying case that the complainant (defendant in the underlying case) had settled similar claims with other investors, the mediator sought to learn more about the settlement in “an effort to resolve the current litigation.”²⁸² The complainant’s counsel informed the mediator that it was a confidential settlement and the discussion continued about other items. Later in the caucus, the mediator explained, either the complainant or his attorney mentioned paying some other defendants to which the mediator inquired about the amount of the payment not realizing that the payment was the one that they had already indicated was confidential.²⁸³

Finally, in response to the allegation that the mediator lacked impartiality by suggesting that the complainant would need to be on heavy medication if he were to

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 5

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ In the mediator’s response to the grievance, he explained that in separate caucus with the complainant and his attorney, the mediator “described his upbringing among first and second generation Italian Americans and his fondness for all things Italian.” The mediator alleged that they two went on to discuss “Italian food, movies and culture.” *Id.* at 6

²⁸¹ According to the mediator, both the complainant and his attorney “were smiling broadly” when the mediator left them to caucus with the other party. *Id.*

²⁸² *Id.* at 7.

²⁸³ While the complainant and the mediator have different recollections about these discussions, both acknowledge that this was a flash point. The mediator states in his response that the complainant became very angry “because of [the mediator’s] inquiry into the prior settlements” and he realized the prior settlement was a “hot button” issue. *Id.*

proceed to court, the mediator acknowledged telling the complainant that if he went to trial in the matter, “he might want to consider taking some medication.”²⁸⁴ From the mediator’s point of view, he felt he had bonded with the complainant²⁸⁵ and thus, felt comfortable suggesting he tone down his demeanor.²⁸⁶

While the complainant alleged that the mediator declared the impasse, the mediator alleged that he did not call an impasse – it was the complainant and his attorney who unilaterally left the office. According to the mediator, after the complainant’s counsel yelled at the mediator for his remark that the complainant should consider taking medication, he left the room to give the complainant and his attorney an opportunity “to calm down.”²⁸⁷ In contrast, the complainant’s attorney alleged that the mediator declared impasse prior to leaving the caucus.²⁸⁸ In support of the mediator’s claim, he included a letter he wrote to the complainant’s attorney the afternoon of the mediation in which he stated that “everyone was taken aback by your abrupt departure from the mediation conference this morning.”²⁸⁹ His letter indicated that he would delay making a report to the judge (who had ordered the case to mediation) in the hopes that the parties consider continuing mediation at a later date. Finally, the mediator acknowledged that there may be some negative feelings towards the mediator, and offered to share his notes with another mediator if everyone agreed.²⁹⁰

In the mediator’s response, he included a paragraph where he described his efforts to make the complainant and his attorney feel comfortable. For caucus, the complainant and his attorney were asked to use the mediator’s office “where he has a refrigerator stocked with soft drinks and a comfortable couch.” In addition to inviting the parties to use the couch rather than the “less comfortable chairs” he also typically tells “his guests

²⁸⁴ In defense of his statement, the mediator responded that he was referring to the use of Beta Blockers which are used by many public speakers as “an aid to making clear and even presentations.” *Id.*

²⁸⁵ The mediator made a point in his response to include ways that he intentionally sought to bond with the complainant and his attorney as he does with everyone with whom he mediates. He stated that it is his practice to have a “nexus or a connection of some kind with the parties and their attorneys. If he knows they are gators or Seminoles, he will talk about football. If they enjoy the arts, food, wine, NASCAR, etc., he will engage in such conversation either before or during the mediation conference in order to establish a personal connection.” In this case, the mediator acknowledged that he “googled” the complainant’s attorney and learned that she had graduated from Princeton. He used that information to try to bond with the attorney “by telling her that his father-in-law had worked at Princeton for over thirty years; that [he and his wife] had been married in the Princeton chapel; and that he visits Princeton occasionally.” *Id.* at 3 – 4.

²⁸⁶ According to the mediator’s sworn response, he stated in the mediation “. . . I know and love Italian people and I understand your expressiveness. Other people don’t. You might just try to tone it down because some people are put off by strong expressions of emotions.” *Id.* at 6.

²⁸⁷ *Id.* at 7.

²⁸⁸ Letter dated August 6, 2005.

²⁸⁹ Letter dated August 5, 2005. The complainant’s attorney alleged that the letter was written to create a record that was not accurate.

²⁹⁰ *Id.*

that he would not be offended if, during the course of a long mediation, they want to relax and lay down on the couch.”²⁹¹

The complaint committee conducted its own investigation by speaking with the mediator and his attorney and then held a rule 10.810(j) meeting with the mediator and the complainant. At the conclusion of the call, the committee found probable cause that the mediator had violated rules 10.330(a) and (b), impartiality; 10.350, demeanor; and 10.410, balanced process. The mediator was offered the opportunity to accept sanctions including a letter of reprimand and forgiveness of any mediation fees paid by the complainant for the mediation in question along with reimbursement to the complainant for his legal fees associated with the mediation.²⁹² The mediator requested an opportunity to review the reprimand letter prior to agreeing to accept the sanctions. This request was denied by the complaint committee and formal charges were filed.

*c. Mediator Response, Investigation, and Meeting with the
Mediator and Complainant – Critique*

In these sample grievances, the mediator appeared to have sufficient information from the complaint and the list of rules which may have been violated to form a response to the allegations thus satisfying threshold due process protections. While all of the rules initially implicated remained of concern to the complaint committee in MQB 2005-004, in MQB 2003-003, the mediator’s response and complaint committee’s subsequent investigation were sufficient to result in the dismissal of violations of five rules.²⁹³ Thus, the process provided an efficient means of reviewing complaints and responses in order to determine which allegations had merit. The process also satisfied due process because the complaint committee had an effective means to determine credibility and likelihood that the complaint, as written, actually happened.

From the complainants’ perspective, the complaint committee process also met their goals of acknowledgment. The complainants received a copy of the referral of the grievance to the mediator and also a copy of the mediator’s response so they knew the complaint had been taken seriously.²⁹⁴ In both of these cases, the grievance was not resolved via the mediator’s response, the initial investigation, or the complaint committee meeting with the mediator and the complainant.

In MQB 2003-003, the biggest obstacle to a resolution was that while the mediator did not dispute the facts, he did not agree that he had violated any of the ethical standards. Specifically, he did not believe that he bore ultimate responsibility for billing, which was handled by an office assistant, and he was offended by the allegation that he was “incompetent.” While his misfiling of the paperwork was a mistake (and might even

²⁹¹ *Supra* note 276, at 6. While not raised by the complainant initially in his grievance, this practice and the language used by the mediator became an issue by the time the case got to the hearing stage.

²⁹² Grievances Filed with the Florida Mediator Qualifications Board Summary (2009) at 4.

²⁹³ Rules 10.310 (Self-Determination), 10.330 (Impartiality), 10.340 (Conflicts of Interest), 10.410 (Balanced Process) and 10.420 (Conduct of Mediation). FLA. R. FOR CERTIFIED & CT-APPOINTED MEDIATORS 10.310, 10.330, 10.340, 10.410, 10.420 (2000).

²⁹⁴ Internal Operating Procedures Manual (2012) §6.1 at 7-8.

have been negligent), it did not mean he was “incompetent.” As a result, he refused to accept the sanctions. Presumably, the fact that “the basis of the complaint and the agreement” would be released to the public²⁹⁵ also factored into the mediator’s consideration.²⁹⁶ Accepting a sanction for “incompetence,” would be difficult to explain from a public relations standpoint.

At the complaint committee meeting with the mediator and the complainant in MQB 2005-004, the mediator joined the call²⁹⁷ with his attorney. In this case, the differences of opinion about whether there had been a violation of the rule seemed to hinge more on interpretation than on the actual facts. Specifically, the mediator did not deny discussing the complainant’s Italian background or suggesting he needed to tone down his behavior. The mediator also acknowledged suggesting to the complainant that he consider taking medication. The complainant contended that both he and his attorney were offended by the remarks. According to the mediator, however, no one was offended and the offense taken was made-up after the fact to gain a tactical advantage. The complaint committee hoped that if the mediator could hear directly from the complainant how he felt, the mediator might develop a better understanding of the problem with his comments. Once recognized, presumably, the mediator would not make the same error again and the complaint may have ended there with an apology perhaps and some assurance of “rehabilitation.” However, rather than using the meeting as an opportunity for the mediator to hear from the complainant and acknowledge the complainant’s perceptions, the mediator and his attorney treated the call as an adversarial opportunity to argue with the complainant about his view of the situation. Throughout these early stages in the process, the mediator was unwilling to offer any type of apology to the complainant and repeatedly made the point that he believed that the grievance was filed as part of the complainant’s litigation strategy.²⁹⁸ The mediator’s framing of the issue is best summarized by the following excerpt from a letter to the DRC from the mediator’s attorney after the meeting with the mediator and the complainant

. . . [The mediator] remains willing to consider a reprimand in which he acknowledges that in an effort to assist [the complainant] to communicate his version of the underlying lawsuit, he engaged in a conversation which was later characterized as offensive... [and the mediator’s] comment to the effect that [the complainant] consider using medication if he were to find himself in a

²⁹⁵ FLA. R. FOR CERTIFIED & CT-APPOINTED MEDIATORS 10.850(a).

²⁹⁶ This fits within the heuristic known as the Framing Effect within Prospect Theory. It states that when one perceives an outcome as a loss, she or he prefers risky alternatives; when one perceives an outcome as a gain, she or he prefers certain alternatives. *See* RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 81 (2009).

²⁹⁷ The rules do not specify that the complaint committee meeting with the mediator and complainant take place in person. Both for financial reasons and ease of scheduling, these meetings are often held via conference call. *Internal Operating Procedures Manual* (2012) at 9.

²⁹⁸ The complainant’s real reason for filing the grievance was “he thought the mediation was too early, it had been imposed on him, he was not happy to be [at the mediation], and, he thought [the mediator] was too friendly with plaintiff’s counsel.” Letter dated December 6, 2005 at pages 2-3.

courtroom situation was fraught with peril; was susceptible of being misinterpreted as offensive; and should not have been made under the circumstances.²⁹⁹

The letter continued, that no other aspect of the mediator's interactions with the complainant "could reasonably be characterized as offensive or in violation of any applicable rule."³⁰⁰ The other major obstacle to a resolution at this stage was the complaint committee's refusal to share the letter of reprimand with the mediator in advance of his agreeing to accept such a letter. The mediator, through his attorney, expressed concern with the specific wording of the reprimand which the mediator expected the complainant "will most certainly publish widely."³⁰¹

In order for the complaint committee meeting with the mediator and the complainant to successfully fulfill the public policy goals of accessibility, due process, and rehabilitation/education, the following components should be implemented:³⁰²

1. The meeting should be held in person, rather than via conference call unless there is a compelling reason not to do so.
2. Attorney advocates should be prohibited from attending complaint committee meetings between the complainant and the mediator. In the same way that mediation (and settlement) communications are confidential, if such a rule was in place, the complaint committee should be prohibited from using this meeting as part of its investigation so as not to disadvantage mediators.³⁰³
3. Mediators should have a right to review the specific wording of any sanction agreement, including reprimand language, prior to accepting the sanctions.
4. All ethical standards should be reviewed and revised to ensure that they are clear, unambiguous and enforceable.

²⁹⁹ Letter dated June 9, 2006.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² From a mediator's perspective, extending confidentiality to include sanctions voluntarily accepted would be desirable. However, it would not serve public policy goals for consumers who should have access to information about mediators who have acknowledged misconduct.

³⁰³ The complaint committee meeting with the mediator and complainant is not a "real" mediation because the complaint committee has an investigatory role. Some have suggested that a "real" mediation option should be added to the grievance process not just a non-adjudicative step in the process. Such a process would use a neutral mediator, not a member of the grievance board and presumably would promise confidentiality. Other professions have implemented a mediation option in the grievance process. *See e.g., The Florida Bar Grievance Mediation Program. Under the Florida Bar program, alleged instances of incompetence, refusal to timely return client files, failure to adequately communicate with a client, and neglect that "does not cause substantial harm" are some of the types of disputes which may be mediated. Grievance Mediation Pamphlet, FLA. BAR, <http://www.floridabar.org/tfb/TFBConsum.nsf/840090c16eedaf0085256b61000928dc/f213ff9530af36db85256f72005ad534?OpenDocument> (last visited June 21, 2014).*

With these provisions in place, the efficacy of the complaint committee meetings would improve; however, there still will be circumstances in which grievances progress to a formal hearing. The final stage before the hearing is the drafting of formal charges stage which will be examined next.

3. Formal Charges

If the complaint committee has concerns about the mediator's behavior and is unable to resolve those concerns at the complaint committee phase, it will draft formal charges and forward the complaint to a hearing panel.³⁰⁴ The MQB learned with experience that because the formal charges serve as the equivalent of the "charging document" it is important they are written with the eventual prosecution at the hearing in mind. The rules allow for the complaint committee to hire "a member of the Florida Bar to investigate and prosecute the complaint"³⁰⁵ and it is permissible to use the person who served as the investigator for the complaint committee "if such person is otherwise qualified."³⁰⁶ As a practical matter, if the complaint committee is leaning towards drafting formal charges, it will direct the center to hire "an investigator" who can later serve as the prosecutor to help the committee draft the formal charges. This process protects the mediator as well because it is less likely that the complaint committee will draft formal charges for allegations which cannot be sustained if the individual helping draft the charges knows that s/he will have to be able to prove, by clear and convincing evidence, that the allegations are true.

The rules allow for a dismissal of a complaint "[u]pon the filing of a stipulation of dismissal signed by the complainant and the mediator with the concurrence of the complaint committee."³⁰⁷ This provision protects the complainant from undue influence from the mediator because the complaint committee can decide to continue to pursue the complaint even if the complainant indicates that s/he no longer wishes to do so.

The formal charge document follows a formula consisting of statements which each start with "The mediator violated rule ____." This is followed by a clause which summarizes the rule and a "to wit" clause which includes the facts from the grievance which will form the basis of issue. Examples from the grievances we have been examining follow.

a. MQB 2003-003 Formal Charges

The mediator violated rule 10.380(c), which requires a mediator to give the parties or their counsel a written explanation of any fees

³⁰⁴ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.810(m) (2000).

³⁰⁵ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.810(n).

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 10.810(o). A similar provision exists at the hearing panel stage whereby the panel must concur with a stipulation of dismissal signed by the complainant and the mediator prior to the complaint be dismissed. *See id.* at 10.820(c).

and costs prior to mediation, to wit, the mediator failed to provide fee information concerned charges for lunch.

The mediator violated rule 10.630, which provides that a mediator will acquire and maintain professional competence in mediation, to wit, the mediator failed to demonstrate the required competence by filing with the court an agreement reached in a voluntary pre-trial mediation and by incorrectly indicating on the agreement that the case had been settled.³⁰⁸

b. MQB 2005-004 Formal Charges

The mediator violated rule 10.330(a) and (b), Florida Rules for Certified and Court-Appointed Mediators, which requires a mediator to maintain impartiality throughout the mediation process and to withdraw from a mediation if the mediator is no longer impartial, to wit, the mediator demonstrated bias by relating to the complainant in a manner which was stereotypical and offensive and further exhibited bias when he suggested to the complainant that he should be medicated if he were to appear in court.

The mediator violated rule 10.350, Florida Rules for Certified and Court-Appointed Mediators, which requires that a mediator be patient, dignified, and courteous during the mediation process, to wit, in caucus, the mediator made the undignified statement that the complainant and his attorney could relax and lay down on the couch.

The mediator violated rule 10.410, Florida Rules for Certified and Court-Appointed Mediators, which requires that a mediator conduct mediation session in an even-handed, balanced manner, to wit, the mediator during the morning joint session, unnecessarily left the room during the opening statement made by the complainant's attorney to check on a fire alarm test which was not scheduled to occur until that afternoon.³⁰⁹

c. MQB 2009-006

Unlike the other grievances which were referred to a hearing panel, in this case, the mediator entered an admission to allegations and stipulation of sanctions including a relinquishment of certification. No hearing was held as a result of the stipulated agreement.³¹⁰

³⁰⁸ Formal Charges MQB 2003-003

³⁰⁹ Formal Charges MQB 2005-004 signed June 15, 2006.

4. Hearing Panel Phase

Once the grievance gets to the hearing panel phase, as with other adjudicative processes, the grievant often obtains less personal satisfaction from a resolution in this formal process.³¹¹ In addition, once one enters an adjudicatory process, the public policy goals switch from primarily education and rehabilitation to accessibility³¹² and due process.³¹³

To meet due process goals, the following protections are in place:

- (1) No hearing shall be conducted without [all] 5 panel members being present. . . .
- (3) The rules of evidence applicable to trial of civil actions apply
...³¹⁴

The rules also specifically provide that a mediator has the “right to defend against all charges and ... the right to be represented by an attorney, to examine and cross-examine witnesses, to compel the attendance of witnesses to testify, and to compel the production of documents and other evidentiary matter through the subpoena power of the panel.”³¹⁵ Upon written demand of a mediator or counsel of record, the center “shall promptly furnish... the names and addresses of all witnesses whose testimony is expected to be offered at the hearing, together with copies of all written statements and transcripts of the testimony ...”³¹⁶ Finally, the rules require that the imposition of sanctions only occur by a majority of the panel finding there is “clear and convincing evidence to support a violation of the rules.”³¹⁷ This final point, the standard of review, requires further exploration. While it clearly meets the goal of due process for the mediator, it does so at

³¹⁰ Admission to Charges, and Stipulations to Sanctions and Relinquishment of Certification (February 2010) <http://www.flcourts.org/core/fileparse.php/263/urlt/BlumSanctions.pdf>.

³¹¹ See, e.g., Donna Shestowsky, *Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 552-63 (2008).

³¹² Accessibility is addressed through the three standing divisions. FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.730(a) (2000).

³¹³ The hearing panel may impose “additional training, which may include the observation of mediations” as one of the enumerated possible sanctions in rule 10.830(a). Presumably, this sanction meets an education and rehabilitation goal as opposed to the more punitive sanctions such as: imposition of costs, restriction on types of cases which can be mediated in the future, suspension from the practice of mediation or decertification. FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.830(a)(1), 10.830(a)(5), 10.830(a)(6), 10.830(a)(7).

³¹⁴ FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.820(d).

³¹⁵ *Id.* at 10.820(e).

³¹⁶ *Id.* at 10.820(f).

³¹⁷ *Id.* at 10.820(m).

the expense of the education goal and ultimately, undermines the broader public policy goals for the establishment of mediation in the courts. A closer examination of the hearings in the cases we have been analyzing is instructive.

a. MQB 2003-003

Because the facts were not in dispute, the prosecutor and the mediator in MQB 2003-003 signed a stipulated statement of facts prior to the hearing.³¹⁸ This allowed for the hearing to be expedited which served the interests of the mediator, the hearing panel and the complainant.

At the hearing, the prosecutor opted not to rigorously pursue the charge relating to professional competence, citing the difficulty in drawing a line between incompetence and mere human error or even negligence. As a result, the violation of rule 10.630 was dismissed with a finding of no probable cause. The panel found that there was clear and convincing evidence that the mediator violated rule 10.380(c), which requires a mediator to give the parties or their counsel a written explanation of any fees and costs prior to mediation, finding that “a mediator is personally responsible for compliance with the Rules,” and the mediator failed to provide fee information concerning charges for lunch. The sanctions imposed included: the imposition of costs of the proceeding (retributive), a written and oral reprimand (educative), and completion of six additional hours of

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At the request of the parties, the September 25, 2003 mediation began at 11:00 am. During the mediation, [the mediator] stated lunch would be brought to the mediation to allow the parties to continue mediating. [The mediator] did not advise the parties they would be responsible for payment. [The mediator’s] engagement letter did not state anything with respect to said costs. All the parties and their attorneys believed the lunch fee was to be part of [the mediator’s] \$300 an hour fee. All parties were surprised when the mediation bill of \$1,454.24 included \$44.24 for lunch. The plaintiff although miffed nevertheless, paid the lunch bill. The defendant, upon receiving the statement from her counsel called... to complain. She spoke to . . . [the mediator’s] assistant advising she would not pay the lunch bill. The lunch fee was subsequently waived.

The mediation resulted in an impasse. Although this was a voluntary mediation, [the mediator] filed a mediation report with the Circuit Court. [The mediator] advised he filed it with the court because the filed mediation notice was styled as a Circuit Court action and his engagement letter advised the parties’ counsel that mediation [would] be conducted in accordance with Chapter 44 to the Florida Statutes and Rules 1.700 – 1.760 of the Florida Rules of Civil Procedure.

The initial mediation report filed with the court entitled ‘Mediation Disposition Report,’ erroneously stated, “This voluntary mediation was completely settled.” Defense counsel... contacted [the mediator’s firm] requesting [the mediator] file a new disposition report entitled Amended Pre-Arbitration Mediation Disposition Report which would accurately state, ‘the parties reached an impasse as to all issues at the voluntary pre-arbitration mediation.’ This request was honored by [the mediator].

While [the mediator] acknowledges his engagement letter fails to conform with Rule 10.380(c), he maintains that responsibility rests with [the firm] and not with him personally.

Stipulated Statement of Facts MQB 2003-003.

continuing mediator education in mediator ethics beyond the required four hours (educative/rehabilitative).³¹⁹

b. MQB 2005-002

At the conclusion of the hearing, the hearing panel issued a written reprimand [educative] to the mediator for violating rule 10.090(d) for providing a personal and professional legal opinion regarding the frozen embryos and the judge in the case would rule. While the panel “expressed its concern regarding the length of the mediation session that took place ‘without adequate breaks’ considering the nature of the issues and emotions involved, no other rules violations were found. The hearing panel suggested to the mediator, who was no longer certified at the time of the hearing,³²⁰ that if he were to continue to mediate, he should complete additional training on ethical standards.

c. MQB 2005-004

At the conclusion of the hearing, the Hearing Panel found that there was clear and convincing evidence to support a violation of rule 10.330(a) and (b)³²¹ based on the mediator’s testimony that “he suggested to the complainant that he should consider taking medication if the complainant were to appear in court in order to calm his demeanor while testifying.”³²² The committee also found that there was clear and convincing evidence to support a violation of rule 10.350³²³ based on the mediator’s “suggestive statement that the male complainant and his female attorney could “get horizontal” on his couch.”³²⁴ The hearing panel found there was not clear and convincing evidence to support a violation of rule 10.410.³²⁵

As a result of the violations, the hearing panel imposed the following sanctions:

³¹⁹ Sanction Orders MQB 2003-003.

³²⁰ The mediator reported that he had given up his certification due to the negative publicity around this case which had been made public via the various appeals to set aside the mediation agreement. Mediator Grievance Report, 2003-03.

³²¹ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.330(a) (“A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual.”); *Id.* at 10.330(b) (“A mediator shall withdrawn from mediation if the mediator is no longer impartial.”).

³²² Findings and Conclusions of the Panel, MQB 2005-004.

³²³ FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS 10.350 (“A mediator shall be patient, dignified, and courteous during the mediation process.”).

³²⁴ *Supra* note 323.

³²⁵ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.410 (“A mediator shall conduct mediation sessions in an even-handed, balanced manner. A mediator shall promote mutual respect among the mediation participants throughout the mediation process and encourage the participants to conduct themselves in a collaborative, non-coercive, and non-adversarial manner.”).

1. Imposition of costs of the proceeding, which includes the cost of the prosecution and panel and staff members travel expenses. [retributive]
2. In addition to the continuing education requirements for renewal as a certified mediator, completion of four additional hours of continuing mediator education on cultural and diversity awareness, which should include, but not be limited to, such topics as gender and cultural difference, appropriate use of language, and managing difficult conversations³²⁶ [educative/rehabilitative]

On November 17, 2006 the mediator filed a notice of request for review of the Findings and Conclusions of the Mediator Qualifications Board with the Chief Justice of the Florida Supreme Court.³²⁷ The same day the mediator also filed a request for a stay of the enforcement of the imposed sanctions with the chair of the MQB Hearing Panel which was granted “until the mediator has received directions from the Chief Justice on the procedure to be taken in this matter.”³²⁸

In the mediator’s initial brief filed with the Chief Justice, he argued that the complainants “failed to present competent, much less ‘clear and convincing,’ evidence to support their allegations that [the mediator] ‘suggested’ they both engage in sex together in his office during a mediation caucus with the opposing party just a few steps down the hall and the mediator’s wife in the next room, instead, the judgment is based only on innuendo.” He also argued that “no party introduced or argued at hearing any evidence

³²⁶ *Supra* note 323.

³²⁷ There were some procedural glitches with the mediator’s request for review. The filing was appropriately made with the Chief Justice; however, it was forwarded to the Clerk who assigned it a Supreme Court case number, SC06-2369, http://jweb.flcourts.org/pls/docket/ds_docket. The procedures initially adopted in 1992 called for review “to be under the jurisdiction of the Florida Supreme Court” and file with the clerk of the Florida Supreme Court. FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.290 (1992). In 1995, the rule was revised to clarify that only a mediator found to have committed a violation of the rules had a right to review (and not a complainant). FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.290 (1995). Effective August 1, 2006, the rules were amended to change the review from the full Supreme Court to review by the Chief Justice. This amendment was necessitated due to jurisdictional concern. Specifically, the Supreme Court’s jurisdiction is established in the Florida Constitution (and does not include a review of mediator grievances in its enumerated responsibilities) and cannot be expanded via court rule. In the Court’s opinion adopting the rule amendment, the Court recognized that review by the Chief Justice is consistent with the Chief Justice’s review of decisions relating to mediator qualifications. The Opinion also suggested that the procedures for filing an appeal would be adopted via administrative order. *In re* Petition of the Alternative Dispute Resolution Rules and Policy Comm. on Amendments to Fla. Rules for Certified and Court-Appointed Mediators, No. SC05-998 (Fla. May 11, 2006), available at <http://www.floridasupremecourt.org/decisions/2006/sc05-998.pdf> (last visited June 21, 2014). At the time of the mediator sought this review, the procedures had not yet been adopted. Eventually, SC06-2369, http://jweb.flcourts.org/pls/docket/ds_docket was dismissed and the Chief Justice heard the appeal.

³²⁸ Order Staying Enforcement of Sanctions Pending Appellate Review, Case Number: 2005-004, December 22, 2006. On file with author.

of any nature whatsoever to support the accusation that [the mediator] should have withdrawn as the mediator prior to the point when mediation ended.”³²⁹

The Chief Justice held oral argument on August 27, 2007 and issued his decision disapproving the imposition of sanctions via Administrative Order on September 7, 2007.³³⁰ In that Order, the Chief Justice specified that his review of the panel’s decision would utilize the same standard applicable to The Florida Bar’s disciplinary proceedings of attorneys, namely, the competent, substantial evidence standard of review³³¹. Using that standard, the Chief Justice found the panel’s factual findings to be “insufficient to support the conclusions that [the mediator] violated rules 10.350 and 10.330(a) and (b) based on clear and convincing evidence.”³³²

Specifically, the Chief Justice found that “while the phrase ‘get horizontal’ may be used, in the vernacular, to refer to sexual activities,³³³ which is the interpretation the complainant and his attorney testified they placed on these words, these identical words may also be utilized, in the vernacular, to refer to reclining for a rest or nap.” Given the context in which the words were stated, the mediator attempting to make the complainant and his attorney “comfortable and relaxed,” the Chief Justice found the words alone did not provide “competent, substantial evidence for a finding that a violation occurred based upon clear and convincing evidence.”³³⁴

With regards to the sanction relating to violations of rule 10.330(a) and (b), the Chief Justice found that because the mediator made the statement that the complainant “should consider taking medication if the complainant were to appear in court in order to calm his demeanor” in caucus and the complainant and his attorney left the mediation immediately after the statement was made, the mediator had no opportunity to withdraw from the mediation. As a result, “the record does not contain competent, substantial evidence to establish that [the mediator] violated rules 10.330(a) and (b) based upon clear and convincing evidence.”³³⁵

e. Hearing Critique

My critique of the hearing stage of the grievance process will be done in two parts: 1) the outcomes of the hearing and 2) the sanctions which were imposed.

³²⁹ Petitioner’s Initial Brief, MQB 2005-004, on file with author.

³³⁰ Ford v. Mediator Qualifications Bd., No. AOSC07-50, at 1-8 (Fla. Sept. 7, 2007), *available at* <http://www.floridasupremecourt.org/clerk/adminorders/2007/sc07-50.pdf> (last visited June 21, 2014).

³³¹ *Id.* at 2.

³³² *Id.* at 3.

³³³ The Chief Justice acknowledged that the panel did not specifically find that the mediator intended the words as a sexual innuendo, rather characterized the statement as “suggestive.”

³³⁴ *Edwin L. Ford*, AOSC07-50, at 5.

³³⁵ *Id.* at 6 – 7.

1. Disposition

In these four cases, the violations of the following rules were alleged:

- Rule 10.050(b): Appropriateness of Mediation. . . . A mediator shall not unnecessarily or inappropriately prolong a mediation session if it becomes apparent that the case is unsuitable for mediation or if one or more of the parties is unwilling or unable to participate in the mediation process in a meaningful way.³³⁶
- Rule 10.060(a): Parties Right to Decide. A mediator shall assist the parties in reaching an informed and voluntary settlement. Decisions are to be made voluntarily by the parties themselves.³³⁷
- Rule 10.060(b): Prohibition of Mediator Coercion. A mediator shall not coerce or unfairly influence a party into a settlement agreement and shall not make substantive decisions for any party to a mediation process.³³⁸
- Rule 10.090(d) Personal Opinion. While a mediator may point out possible outcomes or the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.³³⁹

³³⁶ “. . . to wit, the mediator continued the mediation after it became clear that the issue of the disposition of the frozen embryos was non-negotiable for both strongly held practical and moral reasons.” MQB 2005-002. In 2000, this rule was amended and renumbered as rule 10.420(b). FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.420(b) (2000) (“Adjournment or Termination. A mediator shall: . . . (3) adjourn or terminate the mediation if the mediator believes the case is unsuitable for mediation or any party is unable or unwilling to participated meaningfully in the process.”).

³³⁷ “. . . to wit, the mediator used forceful tactics and placed undue pressure on the complainant to sign the agreement as evidenced by the statement in the written agreement that the complainant has reluctantly agreed to the frozen embryo issue.” MQB 2005-002. In 2000, this rule was amended and renumbered as rule 10.310(a). FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.310(a) (“Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decision for any party. A mediator is responsible for assisting the parties in reached informed and voluntary decisions while protecting their right of self-determination.”).

³³⁸ “. . . to wit, the mediator exhibited physical and verbal behavior having the effect of pressuring the complainant into a settlement.” MQB 2005-002. In 2000, this rule was amended and renumbered as rule 10.310(b). FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.310(b) (“A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation.”).

³³⁹ “. . . to wit, the mediator stated his opinion of the law applicable to disposal of the frozen embryos and how the judge to whom the case was assigned would decide the issue if it went to trial.” MBQ 2005-002. In 2000, this rule was amended and renumbered as rule 10.370(c). FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.370(c) (“mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.”).

- Rule 10.110(b)(2): Termination by Mediator. . . . The mediator should not prolong unproductive discussions that would result in emotional and monetary costs to the participants³⁴⁰
- Rule 10.120(a): Address Change. Whenever any certified mediator changes residence or mailing address, that person must within 30 days thereafter notify the center of such change.³⁴¹
- Rule 10.330(a) and (b): Impartiality. (a) Generally. A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties as opposed to any one individual. (b) Withdrawal for Partiality. A mediator shall withdraw from mediation if the mediator is no longer impartial.³⁴²
- Rule 10.350 Demeanor. A mediator shall be patient, dignified, and courteous during the mediation process.³⁴³
- Rule 10.380(c): Written Explanation of Fees. A mediator shall give the parties or their counsel a written explanation of any fees and costs prior to mediation. The explanation should include:

³⁴⁰ “. . . to wit, the mediator continued discussion of the embryo issue without discussing the possibility of leaving that issue for the court to decide and allowing the parties to resolve the other issues in a partial settlement, despite the fact that the embryo issue was non-negotiable on both sides and was a matter of significant moral importance to the complainant, thereby resulting in the continuance of the mediation for hours beyond the time an impasse should have been declared or partial settlement reached.” MBQ 2005-002. In 2000, this rule was amended and renumbered as rule 10.420. FLA. R. FOR CERTIFIED & CT.-APPOINTED 10.420 (“A mediator shall: . . . (2) adjourn or terminate any mediation which, if continued, would result in unreasonable emotional or monetary costs to the parties.”).

³⁴¹ “. . . The Mediator moved to Los Angeles, California, but the Mediator failed to notify the Florida Dispute Resolution Center of the change of address.” MBQ 2005-002. Admission to Charges and Stipulation to Sanctions and Relinquishment of Certification. MQB 2009-006 (2010).

³⁴² “. . . to wit, the mediator demonstrated bias by relating to the complainant in a manner which was stereotypical and offensive and further exhibited bias when he suggested to the complainant that he should be medicated if he were to appear in court.” MQB 2005-004. In MQB 2005-002, formal charges were filed on the predecessor impartiality rule. FLA. R. FOR CERTIFIED & CT.-APPOINTED 10.070(a) (1995) (“A mediator shall be impartial. . . . Impartiality means freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to an individual party, in moving toward an agreement. . . .”). The mediator was alleged to have violated the rule “. . . to wit, the mediator asserted that the complainant’s position on the frozen embryos was contrary to settled law in an effort to force a concession on the issue and that if he were the other party’s attorney he would not concede on the frozen embryo issue.” *Id.*

³⁴³ “. . . to wit, in caucus, the mediator made the undignified statement that the complainant and his attorney could relax and lay down on the couch.” *Supra* note 343 MQB 2005-004.

- (1) the basis for an amount of any charges for services to be rendered, including minimum fees and travel time;
 - (2) the amount charged for the postponement of cancellation of mediation sessions and the circumstances under which such charges will be assessed or waived;
 - (3) the basis and amount of charges for any other items; and
 - (4) the parties' pro rata share of mediation fees and costs if previously determined by the court or agreed to by the parties.³⁴⁴
- Rule 10.380(d): Maintenance of Records. A mediator shall maintain records necessary to support charges for services and expenses and upon request shall make an accounting to the parties, their counsel, or the court.³⁴⁵
 - Rule 10.410: Balanced Process. A mediator shall conduct mediation sessions in an even-handed, balanced manner . . .³⁴⁶
 - Rule 10.430: Scheduling Mediation. A mediator shall schedule a mediation in a manner that provides adequate time for the parties to fully exercise their right of self-determination. A mediator shall perform mediation services in a timely fashion, avoiding delays whenever possible.³⁴⁷
 - Rule 10.630: Professional Competence. A mediator shall acquire and maintain professional competence in mediation. A mediator shall regularly participate in educational activities promoting professional growth.³⁴⁸

³⁴⁴ “. . . to wit, the mediator, who is personally responsible for compliance with the Rules, failed to provide fee information concerning charges for lunch.” MQB 2003-003 *supra* note 349. This rule was also referenced in MQB 2009-006. “. . . 1. The fee charged by the Mediator included fees to be paid to a third party to draft an agreement, which fees were returned to the Mediator because no agreement was reached, but were not refunded to the complainant, as the party paying the fees. 2. The Mediator did not sign the “Client Engagement Agreement,” date the “Client Engagement Agreement,” or complete the agreement by stating on the face of the agreement the names of all parties to the “Client Engagement Agreement.” *supra* note 311, Admission to Charges and Stipulation to Sanctions and Relinquishment of Certification. MQB 2009-006.

³⁴⁵ “. . . The mediator failed to maintain a file containing all notes of conversations with the parties, all correspondence from and to the parties, and other records of services provided by him.” MQB 2009-006 *supra* note 311.

³⁴⁶ “. . . to wit, the mediator, during the morning joint session, unnecessarily left the room during the opening statement made by the complainant's attorney to check on a fire alarm test which was not scheduled to occur that afternoon.” MQB 2005-004, *supra* note 343.

³⁴⁷ “. . . The mediator failed to schedule any mediation sessions with the parties after work hours or on weekends to enable them to effectively participate in the mediation process, despite knowing the difficulty each party had in attending sessions during work hours.” MQB 2009-006, *supra* note 311.

The rules can be categorized as those that can be determined with objective criteria and those that can be determined only with subjective criteria.

Objective:

- Rule 10.090(d) Personal Opinion requires a determination that a mediator offered an opinion as to how the court in which the case was filed would resolve the dispute.
- Rule 10.120(a) Address change requires a determination that a mediator changed addresses and did not notify the DRC within 30 days of such change.
- Rule 10.380(c) Fees and Expenses requires a determination that the mediator gave the parties or their counsel a written explanation of the fees and costs prior to the mediation.
- Rule 10.380(d) Maintenance of Records requires a determination that the mediator maintained records to support charges for services and expenses.

Subjective (emphasis added to highlight the subjective parts of the rule):

- Rule 10.050(b) Appropriateness of Mediation requires a determination that the mediator **unnecessarily** and **inappropriately** prolonged a mediation.
- Rule 10.060(a) Parties' Right to Decide requires a determination that the mediator assisted the parties in reaching an **informed** and **voluntary** settlement.
- Rule 10.060(b) Prohibition of Mediator Coercion requires a determination of whether a mediator **unfairly** influenced a party or **coerced** a party and no definition of coercion is provided.
- Rule 10.330/10.070 Impartiality requires a determination that the mediator was free from favoritism and bias in word, action and appearance.
- Rule 10.110(b) Termination by Mediator requires a determination that the mediator **prolonged unproductive** discussions that would result in emotional and monetary costs to the participants.
- Rule 10.350 Demeanor requires a determination that a mediator was **patient, dignified**, and courteous during the mediation process.
- Rule 10.410 Balanced Process requires a determination that the mediator conducted the mediation in an **even-handed**,

³⁴⁸ “. . . to wit, the mediator failed to demonstrate the required competence by filing with the court an agreement reached in a voluntary pre-trial mediation and by incorrectly indicating on the agreement that the case had been settled.” Formal Charges MQB 2003-003 (2005).

balanced manner and **promoted mutual respect** among the participants.

- Rule 10.430 Scheduling Mediation requires a determination that the mediator performed mediation services in a timely fashion and scheduled the mediation to provide **adequate** time for the parties to **fully exercise** their right of **self-determination**.
- Rule 10.630 Professional Competence requires a determination that the mediator acquired and maintained **professional competence**.

If you compare this list with the experience in the four grievances which were before a hearing panel, the rules for which the clear and convincing burden of proof were sustained were 10.380 Fees and Expenses³⁴⁹ and Rule 10.090(d) Personal Opinion.³⁵⁰ In addition, the mediator admitted the allegations and stipulated to sanctions for violations of Rules 10.380(c) and (d) Fees and Expenses and 10.120 Change of Address.³⁵¹ All of these rules can be proven using objective criteria. In addition, none of these rules (except perhaps Personal Opinion) go to the foundational values of mediation – self determination of the parties, neutrality of the mediator, and confidentiality of the process. From a public policy perspective, this disconnect is troubling.

Perhaps not surprisingly, the formal charges involving the subjective rules: appropriateness of mediation,³⁵² self-determination, impartiality, competence, demeanor, and balanced process, were unable to be proven by clear and convincing evidence.³⁵³ As opposed to the rules listed above, these do go to the core value of mediation and from a public policy perspective, are the ones about which the courts and the profession should be most concerned.

A secondary difficulty in proving breeches of these rules is that the legal settlement frame is lower than what one should expect and demand in a mediation setting. “Self-determination,”³⁵⁴ “coercion,”³⁵⁵ and even conflict of interest are defined

³⁴⁹ MQB 2003-003, *supra* note 320.

³⁵⁰ MQB 2005-002, *supra* note 343.

³⁵¹ MQB 2009-006, *supra* note 311. The mediator also stipulated to a violation of the objective portion of rule 10.430 Scheduling Mediation.

³⁵² “The Hearing Panel [in MQB 2005-002] ... expressed ... concern regarding the length of the mediation session that took place “without adequate breaks” considering the nature of the issues and emotions involved” but did not find a violation of the rule. *Supra* note 343.

³⁵³ This includes the Chief Justice’s Administrative Order disapproving of the sanction recommendation after finding that the record did not provide competent, substantial evidence to support the violations. MQB 2005-004, *supra* note 331.

³⁵⁴ “[F]ree choice of one’s own acts or states without external compulsion.” *Self-Determination Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/self-determination> (last visited June 21, 2014). Interestingly, *Black’s Law Dictionary*, an authority on legal definitions, does not have a corresponding definition for “self-determination” apart from the specific “self-determination contract”

differently in the legal context than they are in the mediation context. If one compares what happens during judicial settlement conferences versus mediations, it is not uncommon for a judge to “beat-up” on the lawyers in an effort to settle the case. While this behavior is expected and deemed acceptable in the context of a settlement conference, most would agree that it would be inappropriate for a mediator to behave in a similar fashion in terms of demeanor, self-determination, and neutrality.

The combination of these difficulties is exacerbated by the “clear and convincing” standard of proof required in order to sanction a mediator. This standard is more difficult to meet than the preponderance of the evidence standard required if an applicant will be denied certification.³⁵⁶ The difference in the standards relate to the greater property right an individual has once s/he is certified as a mediator as opposed to just seeking certification. In order to determine if the higher standard is justified, one needs to examine the sanctions imposed at the hearing stage.

2. Sanction Imposed

In each of the grievances resolved as a result of hearings held between April 1, 2000 – December 31, 2009, the sanctions which were imposed³⁵⁷ were a combination of rehabilitative³⁵⁸ and retributive (primarily in the form of recouping from the mediator the expenses for the proceeding). These sanctions are consistent with the MQB’s underlying philosophy of rehabilitation. Given that both in philosophic underpinnings and in practice rehabilitation is the norm and not decertification, requiring a clear and convincing standard of proof is not justified. In fact, such a high burden of proof, leads to an outcome which undermines the public policy justifications for court-connected mediation programs.

The goals for establishing court-connected mediation programs were both efficiency related and quality of the resolution.³⁵⁹ From a quality perspective, it is

relating to agreements under the Indian Self-Determination and Education Assistance Act. *See* BLACK’S LAW DICTIONARY 1482, 372 (2009).

³⁵⁵ “Compulsion by physical force or threat of physical force; Conduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it.” BLACK’S LAW DICTIONARY 294 (2009). According to Merriam-Webster, “coercion” is “the act, process, or power of coercing.” *Coercion Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/coercion> (last visited June 21, 2014). To “coerce” is “to make (someone) do something by using force or threats.” *Coerce Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/coerce> (last visited June 21, 2014). This difference in definitions illustrates the issue.

³⁵⁶ FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.820(n) (2000).

³⁵⁷ The only grievance in which the mediator lost his certification was the one which ended via a stipulated agreement prior to the hearing in which the mediator agreed to “relinquish” his certification. MQB 2009-006. *supra* note 311.

³⁵⁸ MQB 2003-003: oral and written reprimand and continuing education, *supra* note 320; MQB 2005-002: written reprimand, *supra* note 343; MQB 2005-004: additional training.

³⁵⁹ *See supra* Part I: Footnotes and accompanying text for Court-Connected Mediation.

important that the values underlying mediation which were promised are upheld. Those values specifically include self-determination of the parties (including being free from coercive behavior by the mediator), impartiality of the mediator and confidentiality of the process – the very same subjective standards which are so difficult to prove. Further, there should be great interest in ensuring that mediators who are not delivering quality processes and upholding these values are made aware of their lapses and receive the requisite re-education to provide quality services. From this perspective, the hearing process fails to deliver. Because of the difficulty in meeting the burden of proof, complaints which raise important issues around self-determination, demeanor, coercion, and appropriateness of mediation, end up being dismissed and only those “objective” complaints survive. Unfortunately, the lesson mediators draw from this is that they have not done anything wrong. Rather than being rehabilitative, the process leads to a reinforcement of the “bad” behavior.

IV. CONCLUSION AND RECOMMENDATIONS

Like with most disagreements, complaints against mediators often revolve around difference in perception – for example, the mediator in MQB 2003-003 did not deny making the “sink hole comment.” From the complainant’s perspective, this comment was an example of mediator bias against her. The mediator countered that his comment was to “get her to be a little more optimistic about her situation, as there was no real damage to her house (she was complainant about the foundation work, which was all the contractor did before she fired them), and this was just a dispute over money.” The mediator in MQB 2005-005 did not deny having suggested the complainant take medication but provided a rationale and justification for the comment that differed substantially from how it was perceived by the complainant. In both circumstances, the mediators believe they acted appropriately. From the complainants’ perspectives, however, both described the comments as offensive and violative of the standards of conduct which govern mediators. Herein lies the problem. The perception of the party should be of the utmost concern; however, the clear and convincing standard makes it difficult for the prosecutor to prove a violation and, therefore, the hearing panel is forced to dismiss the complaint.

In order to meet the public policy goals for court-connected mediation, the following programmatic components should be in place:

1. Ethical standards governing mediation and mediator behavior which are consistent with the core values of mediation should be adopted.
2. Qualified mediators should be readily identifiable by litigants. These qualifications should be related to the practice of mediation (rather than other educational or experiential criteria). Mediators identified as “qualified” must agree to abide by the ethical standards.
3. The ethical standards should be accompanied by a grievance process by which to remove “unethical” mediators from the “qualified” list. The philosophy of the grievance process should be

rehabilitative whenever possible. There should be a limited exception to the general mediation communication confidentiality provisions for complainants to file grievances against their mediators.

4. The grievance process should be both accessible to litigants and provide due process to mediators.

5. Grievances should be resolved at the lowest level possible and where possible, include opportunities for mediators and complainants to meet in attempt to understand why the grievance was filed and how a mediator might modify his/her behavior in the future.³⁶⁰

6. In the event that a grievance must be referred to a hearing panel, there should be a bifurcated standard of proof required. The formal charges should include a statement as to whether decertification should be pursued. If the hearing panel is not going to pursue decertification, but rather some other sanction (either rehabilitative or retributive), the standard should be preponderance of the evidence. If decertification is sought, the burden should be clear and convincing.

If these procedures were implemented, the public policy goals for court-connected mediation would be effectuated.

³⁶⁰ See specific recommendations re: complaint committee meeting with the mediator and complainant. *Supra* Section III.C.2.c.