Rough Seas and the Moral Compass: An Examination of the Florida Bar's Rules of Professional Conduct and the Ethical Obligations of Advocates and Mediators in Settlement Negotiations

by

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A 2008 Florida Bar Journal article detailing the ethical obligations of lawyers in mediation and those of lawyer-mediators, concludes that in a world of ever-evolving ethical standards and community conventions related to negotiations, all participants to mediation negotiations should keep in mind the adage "everyone may be lying and everyone should be aware." See Stephen A. Bailey & O. Russell Murray, *Ethics in Negotiation and Mediation for the Florida Attorney*, Fla. Bar Journal, Vol. 2 No. 5 (May 2008). What ethical rules are implicated in the bargaining process that takes place in mediation as the parties and mediator strive to achieve a mediated outcome acceptable to all sides? Often, zealous advocacy by counsel results in less-than-perfect disclosure of all facts and circumstances that might affect the outcome of the parties' dispute. Similarly, in an effort to encourage the parties in the dispute resolution process, a mediator may choose to highlight certain facts and downplay others at various points to change the parties' focus – again, a less-than-perfect disclosure of all known information in the case. To the extent that these negotiation tactics implicate the Rules of Professional Conduct for Florida Lawyers and the Rules for Certified and Court-Appointed Mediators, what are the ethical constraints and obligations mediators face deciding appropriate ways to discharge the mediator's role?

The Rules Regulating the Florida Bar (last updated May 2016) contain Chapter 4: Rules of Professional Conduct ("RPC"). The RPC begins with the Preamble, "A Lawyer's Responsibilities" (last amended in May 2015, with an effective date of October 2015). It states as follows:

> As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. ***As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.*** As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others. (emphasis added).

Honest dealings with others is important enough in the universe of Florida attorneys to merit its own Rule and Comment (last amended effective May 2006):

[1] The author was inspired to explore this topic after reviewing an article discussing the ABA Model Code of Professional Responsibility and the 1994 Model Standard of Conduct for Mediators and the ethical obligations triggered in mediation negotiations. See Robert Kaplan & Linda Lawson, *Ethical Considerations in Settlement Discussions and During Mediation,* For the Defense (March 2016).

RULE 4-4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

Comment

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see rule 4-8.4.

Statements of fact

This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or fraud by client

Under rule 4-1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Subdivision (b) states a specific application of the principle set forth in rule 4-1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under subdivision (b) the lawyer is required to do so, unless the disclosure is prohibited by rule 4-1.6.

Rule 4-4.1 and its Comment establish a duty on the part of the advocate to deal in truthful and accurate statements about matters of fact, but relieves the lawyer of any duty to focus an adversary's attention on relevant facts. More significantly for the purposes of a mediation context, the Comment draws a boundary around "statements of fact" and defines those fundamental elements in a way that gives an advocate substantial leeway in negotiations. First, the comment simply removes the kinds of statements that are often referred to in negotiations as puffing or bluffing from the category of "statements of fact." Second, if that tactic isn't sufficient to alleviate the advocate from the obligation

to toe the line of only utilizing statements of utmost accuracy and honesty, the Comment specifically excludes statements that are "generally accepted conventions in negotiation." The effect of this Comment could be potentially momentous, especially when viewed through the lens of cultural or geographic diversity. It is not difficult to imagine that a lawyer born and raised in the Haitian community in Fort Lauderdale might have a completely different set of "generally accepted" negotiating conventions than a lawyer who hails from Jacksonville or Tallahassee.

The RPC also contains a Rule barring misconduct by advocates:

RULE 4-8.4 MISCONDUCT

A lawyer shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule;

RULE 3-4.3 MISCONDUCT AND MINOR MISCONDUCT

The standards of professional conduct to be observed by members of the bar are not limited to the observance of rules and avoidance of prohibited acts, and the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof. The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.

Given this general discussion of some of the ethical rules that govern Florida lawyers, what should a mediator do when confronted with possible ethical misconduct? For illustration purposes, consider the fictionalized, hypothetical mediation fact pattern presented below.

FACT PATTERN – The Driver with the Hollow Leg

Plaintiff is suing defendant for personal injury arising from an auto accident, where plaintiff's vehicle is struck on the side by defendant's vehicle, and ends up jumping the curb and striking a light pole. Plaintiff's opening statement in mediation describes multiple injuries, including

recommendations for future surgery on the plaintiff's neck and back, as well as completed surgeries for a broken clavicle and femur fracture. Plaintiff has 18 weeks of lost wages from hospital stays and rehabilitation as well as a claim for a lost promotion at work. Plaintiff will lose another 12 weeks of wages if the recommended surgery is undertaken. Plaintiff was the sole wage-earner in his family at the time of the accident, but his spouse has had to return to the workplace and had to place the family's children in daycare, at a high financial and significant emotional cost. Plaintiff's young children have reacted negatively to him, indicating that his cervical collar and crutches are scary and they are unwilling to spend time alone with him.

Defendant's opening states that plaintiff's blood alcohol count ("BAC") following the accident exceeded Florida's legal limit, and that had plaintiff not been driving "buzzed", his injuries would have been mitigated because he would have avoided the secondary collision with the light pole. Plaintiff was not ticketed for driving under the influence. Defense counsel indicates that discovery in the lawsuit has shown that plaintiff admitted drinking three beers in the hour before he started driving.

Following Defense Counsel's opening, plaintiff counsel states in the joint session that his client is seeking $7 million to settle during the mediation proceedings today and that if the case fails to settle, he will not be willing to settle at this figure again. The parties move to caucus.

In caucus, the first thing defense counsel says to the Mediator is there is an applicable insurance policy that has limits of $5 million, and that the defense side isn't interested in having any discussion where the demand exceeds the policy limit. Unless the mediator can get the plaintiff's side to lower their demand to $5 million, defense sees no point in continuing settlement discussions. "We will not counter until the demand is $5 million or lower. Go tell the other side what our position is, please."

HAS DEFENSE COUNSEL COMMITTED AN ETHICAL BREACH UNDER FLORIDA'S RULES OF PROFESSIONAL CONDUCT? WHAT ACTION IS THE MEDIATOR REQUIRED TO TAKE UNDER THE MEDIATION RULES?

Under Rule 4-4.1, it would appear to be an ethical violation for the lawyer to represent that his client won't entertain negotiations without setting a ceiling on the demand or creating some other condition precedent for the negotiations --- unless the client's actual intention is to stand up and walk out of the mediation at that point. Nevertheless, this kind of posturing statement may be viewed as an effort by counsel to rein in rather than derail negotiations. The comment to Rule 4-4.1 states, in part, "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction **and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category . . ."** (emphasis added). The process of mediation and self-determination principles recognize that a party's concept of how to resolve a case in an acceptable manner evolves over the course of the proceeding. Thus, it is not surprising that settlement posturing occurs as the parties' positions change, and that this potential for change is recognized as a negotiation convention.

Rules for Certified and Court Appointed Mediators (last revised in 2000) govern certified mediators in Florida. Does the request by defense counsel to impose a ceiling on negotiations implicate any of those rules?

First, let's examine Rule 10.310 Self-Determination:

(a) Decision-making.
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.
(b) Coercion Prohibited.
A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation.
(c) Misrepresentation Prohibited.
A mediator shall not intentionally or knowingly misrepresent any material fact or circumstance in the course of conducting a mediation.
(d) Postponement or Cancellation.
If, for any reason, a party is unable to freely exercise self-determination, a mediator shall cancel or postpone a mediation.

If the mediator simply refuses to convey defense counsel's unilateral decision to revise the demand, the mediator might be in the position of improperly influencing or coercing the defense side, who is stating a condition to continued participation. And, the mediator might be cautioned to be sure not to overtake the decision-making process for defense side. On the other hand, the plaintiff might view the mediator's decision to even bring the other side's demand coercive, as it compels the plaintiff to "bid against himself" as a requirement of continuing.

Rule 10.230 Mediation Concepts

Mediation is based on concepts of communication, negotiation, facilitation and problem-solving that emphasize:

(a) self-determination;
(b) the needs and interests of the parties;
(c) fairness;
(d) procedural flexibility;
(e) confidentiality; and
(f) full disclosure.

Rule 10.330 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.

* * *

Committee Notes

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> During the mediation, a mediator shall maintain impartiality even while raising questions regarding the reality, fairness, equity, durability and feasibility of proposed options for settlement. In the event circumstances arise during a mediation that would reasonably be construed to impair or compromise a mediator's impartiality, the mediator is obligated to withdraw.

A mediator faced with this dilemma might also want to consider these two rules. It is important to remind the parties to the process that the mediator must remain impartial, and that while the parties have the ultimate right to determine what deal will work for them, the mediator's burden is to help the parties reach a point where they can find a deal, without simply upending the process. While there are many potential avenues that a mediator could take in response to defense counsel's request that the mediator convey a unilateral condition for continuing the mediation, any technique must take into account these rules. Utilizing the concept of reality-testing and exploring the consequences for feasibility and the impact on the outcome might be one technique that will allow the defense side to present its position without creating an impasse before any substantive bargaining begins.

In Florida, as in many jurisdictions, a distinction can be made between posturing, puffing and bluffing on the one hand and misrepresentations of material facts on the other. If facts are involved, then Rule 4-4.1 applies, and misrepresentations regarding those material facts are violations of the ethical rules. If material facts are involved, then the mediator's duty under Rule 10.310 will apply (a mediator shall not knowingly misrepresent any material fact or circumstance in the course of conducting a mediation) and the mediator would be compelled to withdraw from the mediation.

So what's a material fact? The RPC has created a boundary to exclude certain items from the category of "material fact," but that territory might seem limited when trying to assess all the potential areas that a mediation might encounter. The United States Supreme Court has provided some insight into this term. In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), the court stated that a material fact is "determined by the substantive law" and is one that affects the outcome of the dispute. Florida's Standard Jury Instructions for Civil Cases define a material fact as one that is so important that but for the fact, one party would not have acted as the party allegedly did. Colloquially, material facts are facts that matter. In a negligence slip-and-fall case, it may not matter if the candy bar wrapper that caused the fall is from a Hershey bar or a Mars Bar. In a trademark infringement claim, the wrapper identity will be a material fact.

Let's see where the parties are now in our mediation example.

Our model mediator has convinced defense counsel that the posturing position counsel wanted to begin with might not be productive as an opening gambit, and has proposed other ways to proceed. Defense counsel and clients discuss and determine that they want to send the same message about not considering demands in excess of the $5 million policy limit, but will include a counter-offer as well. The counter-offer is 100k. In caucus, defense reveals that two witnesses have been identified who plan to

testify that the plaintiff started drinking two hours before the accident and had three beers in the first hour, and three beers in the second hour. The witnesses are the bartender and server at the lounge where plaintiff was served. Defense counsel states that this information must be confidential and kept from plaintiff at this time.

IS DEFENSE COUNSEL'S REFUSAL TO PROVIDE THIS INFORMATION THE OMISSION OF A MATERIAL FACT THAT CREATES AN ETHICAL PROBLEM FOR COUNSEL AND/OR THE MEDIATOR?

Defense counsel's decision not to disclose all of the available evidence supporting the defense position probably does not rise to the level of a misrepresentation. There is no certainty that knowing what defense counsel knows will change the plaintiff's position for purposes of the mediation, or in other words, is a fact that matters. It may not be the case that the disclosure of these two witnesses will change the balance between the parties. This is particularly so because the information that is not being disclosed has not been subjected to the rigors of cross examination in trial or discovery. While on the surface the information seems significant and material, further exploration may affect that assessment.

Moreover, the Comment to Rule 4-4.1 makes it clear that an attorney does not have to provide all the information the lawyer possesses: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." This scenario assumes that there is no outstanding discovery obligation that is triggered by what defense counsel knows.

As to the mediator's duty of confidentiality, there is no such close question. Rule 10.360 compels the mediator to keep confidential any information that is provided in a caucus and designated "not to be shared" by the providing party:

Rule 10.360 Confidentiality

(a) Scope. A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties.
(b) Caucus. Information obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party.

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Florida Statute Chapter 44.401 et seq., known as the Mediation Confidentiality and Privilege Act, also applies, and unless disclosure is required or permitted under this statute then confidential information must be maintained as such by the mediator.

44.405 Confidentiality; privilege; exceptions.—

(1) Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. A violation of this section may be remedied as provided by s. 44.406. If the mediation is court ordered, a violation of this

section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees.

(2) A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.

(3) If, in a mediation involving more than two parties, a party gives written notice to the other parties that the party is terminating its participation in the mediation, the party giving notice shall have a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding only those mediation communications that occurred prior to the delivery of the written notice of termination of mediation to the other parties.

(4)(a) Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:

1. For which the confidentiality or privilege against disclosure has been waived by all parties;

2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;

3. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;

4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or

6. 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.

(b) A mediation communication disclosed under any provision of subparagraph (a)3., subparagraph (a)4., subparagraph (a)5., or subparagraph (a)6. remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this section.

(5) Information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation.

(6) A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation.

Several more rounds of negotiations take place. During a caucus with plaintiff's side, the plaintiff himself reveals that he knows he has a drinking problem, and was exploring alcohol

rehabilitation treatment prior to the accident. He states that his children indeed avoid him on occasion, but he believes it is related to his behavior when he drinks, and that is true whether or not he was wearing his cervical collar or using his crutches. Plaintiff's counsel interrupts to clarify, reminding plaintiff that they have discussed this previously and plaintiff may not "remember" accurately what they discussed, and that plaintiff is clearly getting fatigued by the mediation process. One third of the damages that plaintiff is requesting are based on the emotional distress and pain and suffering of plaintiff. Do we have a material fact now? Is plaintiff's counsel engaged in a woodshedding process that might have the appearance of manufacturing testimony? Does this create any ethical issues for counsel or the mediator?

Referring to the Comment to Rule 4-4.1, the comments of counsel do not appear to be a misrepresentation or fraudulent, which would require an intent to deceive by the lawyer. The lawyer may have a basis to make an argument that counsel does not have a duty to inform an opposing party of relevant facts (under the ethical rules – remember we are not considering the duties imposed via rules of discovery). Moreover, the lawyer does not know that all instances where the children avoided the plaintiff were because of the plaintiff's behavior after drinking, because no one has asked the children yet why they behaved as they did. So far, plaintiff has only stated his belief as to the cause of the avoidance.

The Mediator's perspective on this situation may be informed by reviewing two opinions from the Mediator's Ethics Advisory Committee ("MEAC"). In MEAC 2014-007, a mediator questioned whether being aware of a party's unquestionable misrepresentation to the Program Manager of a Residential Mortgage Foreclosure Mediation Program could be considered the commission of a crime, namely, subornation of perjury, sufficient to trigger the criminal acts exception to the Mediation Confidentiality and Privilege Act. In that circumstance, MEAC found it beyond the scope of its jurisdiction to make an assessment of the mediation party's conduct and was thus unable to address the application of the confidentiality exception. Under those circumstances, MEAC declined to take a position on whether confidentiality could be breached.

In a prior opinion, MEAC 2012-002, MEAC was asked to advise whether the mediator who learned after the mediation that the attorney appearing for one side was in fact disbarred at the time of the mediation should reveal that fact to the represented party – did the conduct allow confidentiality to be breached under the Confidentiality and Privilege Act's exceptions?

MEAC stated that the disclosure could be made in this case because the disbarred attorney was engaged in the unlicensed practice of law, a misdemeanor in the state of Florida:

> The unlicensed practice of law (UPL) can occur in a variety of circumstances and within a broad spectrum of activities. In Florida, UPL is a third degree felony and is determined by The Florida Bar with assistance from its Standing Committee on Unlicensed Practice of Law. Mediation communications undertaken while committing UPL are not confidential under the Mediation Confidentiality and Privilege Act, Section 44.405(4)(a)(2), Chapter 44, which states: "Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a

signed written agreement reached during mediation, unless the parties agree otherwise, or for any mediation communication: (2) That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence; ….” While mediation communications of a disbarred attorney representing himself as an attorney currently a member of The Florida Bar are not confidential, there is no requirement that the mediator or mediation participants report the actions of the disbarred attorney. The Mediation Confidentiality and Privilege Act allows for the permissive disclosure of these type of mediation communications but does not require a mandatory report to anyone, including law enforcement.

If the mediator in this scenario was also a member of the Florida Bar, would the disclosure be mandatory under the RPC? The answer is no:

RULE 4-8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) Reporting Misconduct of Other Lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

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(c) Confidences Preserved. This rule does not require disclosure of information;

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(2) gained by a lawyer while serving as a mediator or mediation participant if the information is privileged or confidential under applicable law . . .

Returning to our hypothetical mediation, the Mediator goes to defense side. Now defense counsel wants to reveal the two additional witnesses who saw plaintiff consume the extra drinks prior to the accident. However, counsel states that the witnesses may not be available to testify. The waitress is spending her semester abroad and is outside the subpoena bulge for the court. The bartender is in a rehab program himself and has indicated he needs funds to be able to testify for the defense. Counsel does not want the mediator to reveal that part of the discussion. Can the mediator maintain that confidence without triggering the mandatory requirement to adjourn or terminate? Put differently, is the mediator in danger of making a knowing misrepresentation or engaging in fraud?

Rule 10.420 (b) Adjournment or Termination. A mediator shall:

(4) terminate a mediation entailing fraud, duress, the absence of bargaining ability, or unconscionability . . .

MEAC Opinion 95-005 is instructive. In that opinion, MEAC determined that the Mediator was required to withdraw when one side revealed in caucus that this spouse had an undisclosed asset in a marriage dissolution that the spouse did not intend to disclose. To continue would be to countenance fraud, and would be a knowing misrepresentation by the mediator as well as an effort to bring the parties to a resolution that the mediator was aware would be subject to challenge on grounds of fraud. In the hypothetical as posed, there is no certainty that the witnesses will not be able to testify competently or provide admissible evidence. Under these circumstances, the confidentiality rules that pertain to caucus overcome the possibility of potential misrepresentation, and would allow the Mediator to proceed without having to terminate the mediation. Of course, the "full disclosure" and "fairness" concepts contained in Rule 10.230 will likely form the basis of a discussion between the Mediator and counsel about the wisdom and practical effect of keeping counsel's cards so close to the chest.

Understanding the Advocate's role and the ethical obligations placed on attorneys in the negotiation and settlement process may provide the mediator with additional avenues to facilitate dispute resolutions. At the same time, the mediator has to be exquisitely aware of the ethical constraints imposed on the mediation process as it exists under the Florida Rules. Maintenance of a robust and satisfactory process that fulfills the needs of all the parties who are participating in the mediation demands no less.