



Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

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State Court Administrator
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Public Sanction of David D. Musselman, Mediator Entered: August 27, 2012

On behalf of the Judicial Council's ad hoc Committee on Alternative Dispute Resolution, based on the report and recommendation of the Committee's Ethics Panel convened June 21, 2012, in accordance with the Policy for Investigating Complaints Against ADR Providers, Judge Royal Hansen, Chair, enters a public sanction as follows:

David D. Musselman will receive a written reprimand documenting the Ethics Panel's concerns and determination (below).

Mr. Musselman will submit to additional ADR Training before any determination be made by the Director that he is capable of rejoining the ADR Roster.

That additional training is to be a minimum of 10 hours of training/refresher training from a Primary Trainer as defined in Rule 4-510.01 or training from the Utah Council on Conflict Resolution or the Dispute Resolution Section of the Utah State Bar, which training/refresher training is to include a minimum of 3 hours ethics training, within 6 months of the issuance of the written reprimand documenting this recommendation.

Mr. Musselman will retake the Utah State Courts' Online Ethics Exam for ADR Providers documenting his acquired understanding once the training (above) has concluded.

Reprimand of David D. Musselman, Mediator August 27, 2012

The following reprimand of David Musselman is for violation of the Code of Ethics for ADR Providers, Utah Rules of Court-Annexed ADR (URCADR) Rule 104

Background:

In accordance with the Policy for Investigating Complaints against ADR Providers, the Chair of the Judicial Council's Ad hoc Committee on Alternative Dispute Resolution (Committee) appointed three members of the Committee to an Ethics Panels to review a complaint against David Musselman, a mediator formerly on the ADR Roster for the Utah State Courts Court-Annexed ADR Programs.

**The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.**

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Background *continued*:

The question before the Ethics Panel was whether Mr. Musselman's conduct during a 2006 mediation constituted a violation of the ADR Code of Ethics included in the Utah Rules of Court-Annexed ADR (URCADR), specifically Rule 104. The review of the six year old complaint was prompted by a 2012 application from Mr. Musselman to rejoin the ADR Roster as a Master Mediator after removing his name from the roster pending investigation of the same complaint in 2006. The Ethics Panel was convened in June 2012.

Relevant Facts:

In Spring 2006, Mr. Musselman was engaged to mediate for JM and WM (Complainants) The potential sale of their residence was in dispute. Knowing this, Mr. Musselman is alleged to have engaged a realtor, to work with the Complainants, possibly yielding a financial exchange that could benefit Mr. Musselman for the referral. The Complainants held mediation sessions with a mediator in Mr. Musselman's firm, while Mr. Musselman handled intake issues. Nonetheless, the Complainants perceived that Mr. Musselman was their mediator as well, prompting their complaint about an unethical relationship between their mediator and the realtor.

Ethics Panel Determination:

The first issue before the review panel was what constitutes an "ADR provider", as governed by URCADR and Utah Code of Judicial Administration (UCJA) Rule 4-510. An underlying question in this issue is when does one become an ADR provider, or, more specifically, at what point in the mediation process are the responsibilities as listed in URCADR and UCJA Rule 4-510 assumed by a mediator. A definition for "ADR provider" is written in the Policy for Investigating Complaints against ADR Providers, in Section 4 of the Definitions:

(4) "ADR provider" or "provider" means a neutral person who conducts ADR proceedings, who has met the qualifications to be included on the Utah State Court Roster of ADR providers, and was listed on that roster at the time the complaint was made.

Based on this definition, the Ethics Panel determined that Mr. Musselman was an ADR provider in 2006 at the time that the complaint process was initiated by the Complainants' contact with the Administrative Office of the Courts, ADR Department. It is notable that Mr. Musselman voluntarily removed his name from the Roster during the initial processing of the complaint, though this voluntary removal does not alter the fact that Mr. Musselman would have been required to follow the URCADR Code of Ethics during his mediation practice as part of the Roster, while working on the Complainants' dispute in the Spring of 2006.

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As for the underlying question of when the obligations of a provider are triggered, this question is more complex. There is not a specific point in time or a specific event that opens every mediation session, as they can arise under different circumstances and begin in a multitude of ways. That flexible, creative process being true, it is clear that the ethical obligations of a mediator/ADR provider can begin prior to the formal mediation process or convening of facilitated negotiation sessions. URCADR Rule 104 provides guidance in this underlying question:

Rule 104 Canon I (g) The ethical objectives of providers begin prior to acceptance of the appointment to a particular case and continue throughout all stages of the proceedings. In addition, wherever specifically set forth in this Code, certain ethical obligations continue even after the award in the case has been made or after the case has been successfully resolved.

In this instance, the Ethics Panel determined that Mr. Musselman's ethical obligations to his clients, the Complainants, had been undertaken, even if they had not yet held a mediation session together.

Having found Mr. Musselman to be an ADR provider governed by the ADR Rules in place during the Complainants 2006 mediation process, and noting that Mr. Musselman's ethical obligations had been fully engaged despite his belief that he and the parties were only involved in initial intake or administrative conversations prior to a formal mediation, the Ethics Panel reviewed whether or not Musselman's conduct constituted a violation of URCADR Rule 104, the Code of Ethics for ADR Providers.

Rule 104 Canon I governs this situation, requiring that "ADR Providers Should Uphold The Integrity and Fairness Of The ADR Program." Although Mr. Musselman contended in 2006 and reiterated at the opening of the 2012 panel meeting, that he was merely serving in an administrative capacity with the Complainants, handling payment and scheduling conversations, it was clear from Complainant JM's communication with the ADR Department in writing in 2006 and in person with the review panel in 2012, that JM believed the conversations to constitute the opening of the mediation process, thus requiring Mr. Musselman to be fair to both JM and his wife during the mediation process.

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The question of fairness relates to Mr. Musselman's choice to engage a realtor for the Complainants as part of their mediation communications. It is alleged that Mr. Musselman created a business relationship with a realtor, for which he may have received financial benefit for the referral of the Complainants as real estate sales clients to the realtor. Canon I (c) governs this allegation:

(c) After accepting appointment to and while serving as provider for a particular case, an ADR provider should avoid entering into any financial, business, professional, family, or social relationship, or acquiring any financial or personal interest which (1) is likely to affect their impartiality or (2) might reasonably create the appearance of partiality or bias.

According to Complainant JM, he certainly felt "taken advantage of" and "that this was not what [he] expected from a mediator," to have a potential business gain from the Complainants' sale of their home or agreement during mediation to a real estate deal.

This perception of partiality constituted both a breach of the ethical obligation that Mr. Musselman owed to the Complainants, and his obligation of ethical service to the ADR Roster. As a ten year veteran of ADR practice, Mr. Musselman should have known that a mediator's obligations begin even during initial discussions, and that the party's perceptions are what truly dictate whether the duty of care has been met.

The Ethics Panel appreciated that Mr. Musselman acknowledged that he had an ethical obligation to avoid any financial or business relationship with the realtor during his work with the Complainants. Nonetheless, it was clear to the panel that Mr. Musselman did not fully understand that intake and initial communications also constitute confidential, ethically encumbered mediation communications and ethical obligations begin very early in any mediation process, not just in formal settlement negotiation sessions.

Due to this lack of complete understanding, the Ethics Panel agreed that a consequence is warranted for Mr. Musselman based on his conduct during the 2006 proceedings with the Complainants. Despite the passage of time from the initial complaint, the degree of acknowledgement from Mr. Musselman, however limited in capacity, and even the generous comment from Complainant JM that someone's ability to have employment during lean economic times should be valued, a reasonable consequence is warranted according to the range of options contained in the Policy for Investigating Complaints against ADR Providers.

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Ethics Panel Recommendation:

The Ethics Panel therefore respectfully and unanimously recommended that Mr. Musselman receive the following public sanction: a written reprimand documenting the concerns contained herein, and that Mr. Musselman submit to additional ADR training before any determination be made by the Director that he is capable of rejoining the ADR Roster. That additional training is to be a minimum of 10 hours of training/refresher training from a Primary Trainer as defined in Rule 4-510 or training from the Utah Council on Conflict Resolution or the Dispute Resolution Section of the Utah Bar, which training/refresher training is to include a minimum of 3 hours of ethics training, within 6 months of the issuance of the written reprimand documenting this recommendation, and that Mr. Musselman retake the Utah State Courts' Online Ethics Exam for ADR Providers documenting his acquired understanding once the training has concluded.

In accordance with the Ethics Panel's recommendation, Mr. Musselman is hereby reprimanded and the other recommendations are hereby adopted. This reprimand will be made available to the public upon request.



Judge Royal I. Hansen