**DRC 2022 Conference, Ethics Confidentiality Scenarios**

In small groups, individually read each scenario and then discuss whether sections 44.401 – 44.406, Florida Statutes (SEE HANDOUT), apply to each of the scenarios and if so which provisions apply. Answer the questions for a scenario and then the instructor discuss it.

**Scenario One:** For several years, Motor Club, the servicer, and Roadsidemasters, the marketer, participated in a business relationship which they internally described as "AAA for trucks." The servicer provided roadside assistance services to truckers, and the marketer sold those services as memberships to trucking companies.

The parties' relationship was governed by an agency agreement. Under the agreement, the marketer would collect gross membership fees from the trucking companies, and then would transfer such fees, minus the marketer's commissions, to the servicer. The agreement further provided, "In case of any dispute arising from, or in connection with the subject matter of this Agreement, including the interpretation or enforcement of this Agreement ... any such dispute shall be submitted for mandatory mediation."

Some years into the parties' relationship, the servicer sent a mediation demand to the marketer. The servicer alleged the marketer had breached the agency agreement by retaining $765,189.70 in fees which the marketer should have transferred to the servicer.

After mediation, the parties executed a mediation agreement. The mediation agreement centered around the disposition of membership fees being paid by a substantial client, Arrow Truck Sales, Inc. ("Arrow"). The mediation agreement's primary provision reads, in pertinent part:

1. [The marketer] shall pay to [the servicer], and [the servicer] shall accept from [the marketer], the Settlement Sum, which shall be in full and complete payment and settlement of any and all claims by and among the parties. The Settlement Sum shall be paid as follows: a) [the servicer] is entitled to receive a total of $350,000 that would otherwise be owed, as commissions, to [the marketer] pursuant to the parties contract with Arrow ([the servicer] estimates that it is holding $260,000 of that amount); b) [the marketer] hereby assigns its right to receive all funds owed to it under the parties contract with Arrow until the Settlement Sum and the amount referenced in paragraph 1a above is paid in full; c) once the Settlement Sum is paid in full, [the marketer's] assignment of its right to payment under the parties contract with Arrow shall terminate and [the marketer] shall then start receiving its contractual right to monies under the parties' contract with Arrow; and d) in the event that the parties' relationship with Arrow terminates before the Settlement Sum is paid in full, [the marketer] shall pay [the servicer] $20,000 per month until the Settlement Sum is paid in full.

At the time of the mediation agreement, the exact dollar amount which the servicer was holding from Arrow was $257,725, thus fairly close to the $260,000 estimated in section 1a.

Sometime later, the servicer sent a settlement accounting to the marketer. The servicer's settlement accounting indicated the marketer originally owed $765,189.70 to the servicer, but the servicer agreed in the settlement to write off $139,563.15, leaving a balance of $625,626.55. From that balance, the servicer's settlement accounting further deducted the $257,725 in the marketer's commissions from Arrow which the servicer already had received, thus leaving a "Total Due" of $367,901.55.

The marketer objected to the servicer's settlement accounting as not accurately reflecting the settlement. Sometime later, the marketer filed a one-count breach of contract complaint against the servicer. The marketer alleged the "Settlement Sum" under the mediation agreement was $350,000, and the servicer breached the mediation agreement by receiving more funds than the marketer owed under the mediation agreement.

The servicer filed an answer and affirmative defenses denying the marketer's allegations. One of the servicer's affirmative defenses alleged no meeting of the minds existed in forming the mediation agreement.

At the non-jury trial, the marketer's opening statement indicated the evidence would show the "Settlement Sum" under the mediation agreement was $350,000. The servicer's opening statement indicated the "Settlement Sum" was the approximate $625,000 amount shown in its settlement accounting after deducting the servicer's $139,563.15 write-off from the $765,189.70 which the marketer owed to the servicer.

The marketer began its case-in-chief by calling the servicer's representative as an adverse witness. The servicer's representative acknowledged that the dollar amount "$625,000" did not appear anywhere in the mediation agreement.

The marketer then had its representative testify on direct examination that the "Settlement Sum" under the mediation agreement was $350,000.

On cross-examination, the marketer's representative was shown the servicer's settlement accounting, and acknowledged $765,189.70 was the amount which the servicer asserted was owed before the mediation; $139,563.15 was the amount which the servicer had agreed to write off as part of the settlement; $257,725.00 was the amount of Arrow commissions which the marketer had agreed to waive as part of the settlement; and the line showing "Total Due" indicated "367,901.55."

However, the marketer's representative insisted the servicer's settlement accounting indicated the marketer only had to pay the servicer an additional $92,275 to satisfy the mediation agreement, as the difference between the marketer's understanding of the $350,000 "Settlement Sum" minus the $257,725 which the servicer already had received.

During the servicer's case-in-chief, the servicer's counsel sought to ask the servicer's representative about the parties' mediation communications regarding the settlement amount. The marketer's counsel objected, arguing mediation communications were confidential by statute.

The servicer's counsel responded the settlement amount was unclear from the mediation agreement, and a confidentiality exception existed when an issue arose regarding a mediation agreement's terms. Thus, the servicer's counsel requested the trial court to allow evidence to explain the settlement amount to which the mediation agreement referred.

**The trial court** ruled the mediation communications were confidential, and only permitted the servicer's representative to testify about the dollar amount which the servicer first sought during the mediation. The servicer's representative testified the servicer first sought $765,000.

The servicer's counsel then asked the servicer's representative about the dollar amounts appearing on the servicer's settlement accounting. The servicer's representative testified the servicer had deducted from the $765,189.70 "total due" both the $139,563.15 write-off and the $257,725 in the marketer's commissions received from Arrow before mediation.

During closing arguments, the marketer reiterated its position that the mediation agreement clearly defined the "Settlement Sum" as $350,000. The servicer argued the mediation agreement was ambiguous by not identifying the dollar amount to which “Settlement Sum” referred and thus no meeting of the minds may have occurred on that amount.

**The trial court** issued a final judgment in the marketer’s favor. The trial court found the terms of the mediation agreement were clear and unambiguous, and the “Settlement Sum” under the mediation agreement was $350,000. The trial court further found that because the servicer had received not only the $350,000 from Arrow, but also an additional $412,698.86 in commissions which the marketer should have received from Arrow, the servicer owed the marketer that $412,698.86 surplus, plus pre-judgment interest on that amount. The servicer appealed.

**Question 1:** Is there an exception to confidentiality under section 44.405, Fla. Stat., which would allow the servicer’s representative to testify in court about the parties’ mediation communications in this situation?

**Question 2:** If the servicer’s counsel argued there is an exception and you are the appellate court, how would you rule?

**Scenario Two:** Abrams-Jackson was hired by the school board in August 2010 and began teaching at Palm Beach Lakes High School in October 2014. After a series of negative interactions with Dr. McKeever and the school board, she filed a civil rights action in federal court alleging discrimination, retaliation, and violation of her due process and First Amendment rights. The district court referred the case to a magistrate judge for disposition of all pretrial discovery motions. Discovery disputes began when Abrams-Jackson filed a notice of deposition of school board member Marcia Andrews. The defendants moved for a protective order to preclude the deposition because Andrews swore to having "no personal knowledge about the individual facts of this case." Abrams-Jackson moved to compel the deposition. After a hearing, the magistrate judge granted in part the protective order, denied in part the motion to compel, and scheduled an additional hearing for June 5, 2017, to address the issue of Andrews' deposition.

Plaintiff's counsel Malik Leigh then made a series of social media posts referencing the parties, witnesses, and attorneys in the case. Among other things, Leigh stated that he would be:

[d]eposing Cheryl McKeever . . . get to ask her about all that [b]ullshit about my so-called wholly inappropriate exam . . . . Darron Davis about his lying ass . . . . Robert Avossa about lying on TV about me and other stuff. . . . And Marcia Andrews. [Y]up. [T]hey are trying hard not to let me depose her. Her amazing affidavit detailing how the district retaliate[d] on people is the gift that keeps on giving. He also said that "[tomorrow] I get to depose the MFing Superintendent" and "[a]fter this round [o]f depos in the next 2 weeks, would love to start a shooting campaign."

After seeing those posts, the defendants moved to suspend and reschedule depositions and requested a protective order directing Leigh to "refrain from harassing, threatening, and oppressive conduct toward parties and/or witnesses." Abrams-Jackson moved to extend the discovery deadline and compel depositions. The magistrate judge added those motions to the June 5, 2017, hearing. After the hearing, the magistrate judge found that Leigh's social media posts were "prejudicial to the administration of justice," and "unnecessarily complicated, delayed, and interfered with the discovery process." He also found that Leigh violated the Florida Bar and Local Rules when he "knowingly, or through callous indifference, disparaged, humiliated and discriminated against litigants, witnesses, and attorneys." He then granted the protective order and imposed sanctions against Leigh in the form of attorney's fees for defendants' counsel.

Abrams-Jackson moved to alter or amend the judgment under Rule 59(e), requesting that the court reconsider its order awarding attorney's fees. In that motion, she also argued that the defendants "violated the Good Faith requirement for mediation by not participating or being open to any discussions" and attached the defendants' confidential mediation statement. The defendants opposed the motion for reconsideration and filed a Motion for Sanctions Against Plaintiff for Willful and Intentional Violations of Rule of U.S. Southern District Court 16.2(g)(2) (**SEE RULE BELOW**) and section 44.505, Florida Statutes, Motion to Strike Confidential Mediation Statement from the Docket, and for dismissal of plaintiff’s case with prejudice pursuant to Federal Rules of Civil Procedure 41(b) alleging plaintiff’s counsel acted in bad faith and engaged in willful and deliberate conduct in violating the rules.

Plaintiff’s counsel responded that since the mediation allegedly never actually took place, it was not improper to file the confidential mediation statement in the public record. The magistrate judge found the mediator filed a Final Mediation Report which stated that a mediation conference, which was court ordered, was held and all required parties attended but no agreement was reached.

Local Rule of U.S. Southern District Court 16.2(g)(2)

(g) Trial upon Failure to Settle. (1) Trial upon Failure to Settle. If the mediation conference fails to result in a settlement, the case will be tried as originally scheduled. (2) Restrictions on the Use of Information Derived During the Mediation Conference. All proceedings of the mediation shall be confidential and are privileged in all respects as provided under federal law and Florida Statutes § 44.405. The proceedings may not be reported, recorded, placed into evidence, made known to the Court or jury, or construed for any purpose as an admission against interest. A party is not bound by anything said or done at the conference, unless a written settlement is reached, in which case only the terms of the settlement are binding.

Federal Rules of Civil Procedure 41(b)

INVOLUNTARY DISMISSAL; EFFECT. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under [Rule 19](https://www.law.cornell.edu/rules/frcp/rule_19)—operates as an adjudication on the merits.

**Questions:** If you are the magistrate judge, would you find that the mediation statement is confidential? Was it a violation of section 44.405 and rule 16.2(g)(2) to file the mediation statement in the public record? Are the defendants entitled to civil remedies under section 44.406, Fla. Stat.? Do you think the magistrate judge should dismiss the case under the federal court rules?

**Scenario Three:** When Gulliver Schools, Inc. did not renew Patrick Snay’s 2010–2011 contract as the school’s headmaster, Snay filed a two count complaint asserting causes of action for age discrimination and retaliation under the Florida Civil Rights Act. On November 3, 2011, the parties executed a general release and a settlement agreement for full and final settlement of Snay’s claims, with the school to pay $10,000 in back pay to Snay with “Check # 1”; $80,000 to Snay as a “1099” with “Check # 2”; and $60,000 to Snay’s attorneys with “Check # 3.”

Central to this agreement was a detailed confidentiality provision, which provided that the existence and terms of the agreement between Snay and the school were to be kept strictly confidential and that should Snay or his wife breach the confidentiality provision, a portion of the settlement proceeds (the $80,000) would be disgorged.

13. **Confidentiality** ... [T]he plaintiff shall not either directly or indirectly, disclose, discuss or communicate to any entity or person, except his attorneys or other professional advisors or spouse any information whatsoever regarding ***the existence*** or terms of this Agreement ... A breach ... will result in disgorgement of the Plaintiff’s portion of the settlement Payments.

Four days after the agreement was signed, Gulliver notified Snay that he had breached the agreement based on the Facebook posting of Snay’s college-age daughter, in which she stated:

Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.

The comment went out to approximately 1200 of the daughter’s Facebook friends, many of whom were either current or past Gulliver students. Although the agreement expressly accorded Snay the unilateral right to revoke the agreement within seven days of its execution, Snay took no action to revoke the agreement despite Gulliver’s notification of breach. Snay filed a motion to enforce the settlement agreement with the school, arguing that his statement to his daughter (his deposition testimony was “my conversation with my daughter was that it was settled and we were happy with the results”) and her comment on social media did not constitute a breach of the confidentially provision of the settlement agreement.

**Questions:** Should the trial court enforce the agreement? If the court does enforce it and the school appeals, on what grounds might the appellate court reverse?

**Scenario Four:** Sun Harbor is a townhouse community, which has a "no dogs allowed" policy. Bonura owns a Sun Harbor townhouse where he resides with his fiancée, Natalie Vidoni, and her dog. The underlying litigation was instituted when Sun Harbor filed a complaint against Bonura seeking declaratory relief with respect to whether the presence of his fiancée's dog on the Sun Harbor premises was a violation of the Homeowners' Declaration of Covenants. Sun Harbor also sought removal of the dog via injunction.

Bonura responded by filing a responsive pleading and counterclaim alleging that Sun Harbor's actions in trying to have the dog removed were in violation of Florida's Fair Housing Act and the Federal Fair Housing Act because Bonura's fiancée suffered from a disability, thus entitling her to a reasonable accommodation for the use of an emotional therapy dog.

The parties unsuccessfully participated in presuit mediation pursuant to Chapter 720, Florida Statutes, governing homeowners' associations. Sun Harbor then filed suit. The parties attended mediation a second time, but again no resolution was reached. At the conclusion of the bench trial, the trial court entered final judgment finding Ms. Vidoni resided with Bonura at Sun Harbor and that she was a handicapped person as defined under the Federal Fair Housing Act. Accordingly, the trial court held that she was entitled to an accommodation permitting her to possess her therapy dog. Sun Harbor filed an appeal.

At trial, Bonura sought to introduce information provided at the first mediation to establish Sun Harbor's knowledge of Ms. Vidoni's disability. Sun Harbor objected to any testimony relating to events which occurred during mediation on the basis of privilege. The trial court overruled the objection concluding that Sun Harbor’s counsel had waived any objection by questioning a witness regarding whether the parties had attempted to mediate. Sun Harbor did not delve into any communications taking place at mediation. The trial court entered a final judgment in favor of Bonura in which it determined Ms. Vidoni resided with Bonura at Sun Harbor and she was a handicapped person under the Federal Fair Housing Act. The trial court held Ms. Vidoni was entitled to an accommodation permitting her to possess her therapy dog. Sun Harbor appealed.

**Questions:** Is whether a mediation took place a confidential mediation communication?

If you are the appellate court, do you think Sun Harbor's counsel waived any objection to testimony relating to the contents of conversations during mediation by questioning a witness regarding whether the parties had attempted to mediate?