The Craig S. Barnard Chapter of the American Inns of Court LIV and Carbolic Smokeball Present

CARBOLIC SCHOOL OF LAW
GRADUATING THE GREATEST
ARBITRATORS AND MEDIATORS SINCE 2010

Overview:

This presentation covers ethics, professionalism and practice information in mediation and arbitration. The format of the presentation is a law school class. The pupillage is divided into two groups: one for mediation, and the other for arbitration. Each group performs a skit that includes a variety of scenes relating to mediation or arbitration. During each skit, a professor calls on the other pupillages in the audience and asks them questions using the socratic method. After the audience responses, the correct answers to the questions are shown on the overhead projector screen.

Description:

6:15 PM to 6:20 PM
Opening Remarks/Introduction

6:20 PM to 6:38 PM
Mediation Skit

6:38 to 6:55 PM
Arbitration Skit

6:55 PM to 7:00 PM
Closing Remarks/Conclusion/Adjournment

Proposed Mediation Skit Outline

Cast:

AM: Attorney/Mediator – Damon Turco
AMA: Attorney/Mediator's Assistant - Chipi
H: Husband - Hebert
W: Wife – Pica
HA: Husband's Attorney – Pascuzzi
WA: Wife's Attorney – Mixon
J: Judge - Phillips

Scene One: Pre-Mediation

Attorney-Mediator standing in mediation room waiting for parties to arrive.

Assistant: Mr. Jabroni has arrived for your next mediation.
AM: Please send him back.
AMA: Don't you represent Mr. Jabroni in the waste disposal partnership litigation?
AM: The one and only! I'm also mediating his divorce today. His wife sounds like a real piece of work! She better settle or she'll be swimming with the fishes!! Just kidding. Send him in when he gets here.
H: Hey, ya liar!
AM: Mr. Jabroni! Good to see you. Thanks for coming in a little early. And it's lawyer, by the way, not liar.
H: Yeah, whatever.
AM: Listen, Mr. Jabroni, I don't know if I was clear about this in our last conversation when I told you to put nothing about me representing you in your family mediation in writing. But, just in case I wasn't clear, I don't think it would be a good idea for your wife or the other attorneys to know that I am also representing you in the waste disposal partnership litigation. I noticed you didn't put your partnership interest on your financial affidavit for the divorce, so it probably won't come up anyway.
H: Yeah, well my wife don't know about my partnership interest or the company. I told her my brother owns it so, if it comes up, I'll just say that.
AM: Phew, that's a relief! I'm glad we're on the same page. Now let's see what we can do about hammering out a fair settlement with your Wife.!
H: Hey, I'll decide what's fair.
AM: You're the boss!!
Assistant: Mr. Mediator, the attorney for the husband is here as well as the wife and her attorney.
AM: Ok, send them back.
HA: Good morning, gentlemen.
H: Oh, hey, it's my other, I mean, my attorney, Attorney Uninformo.
WA: Good morning, I'm Attorney Cutthroat and this is my client, Mrs. Jabroni.
W: Hello gentlemen . . . Hello to you too, Vinny.

WA: If I do my job, by the end of my representation, she won't be a Jabroni at all!

1. Must a mediator disclose acceptance of future work for one of the parties?

Yes.

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.

(b) Withdrawal for Partiality. A mediator shall withdraw from mediation if the mediator is no longer impartial.

(c) Gifts and Solicitation. 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.

Fla. R. Med. 10.330

Rule 10.340. Conflicts of Interest

(a) Generally. A mediator shall not mediate a matter that presents 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.

(b) Burden of Disclosure. 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.

Fla. R. Med. 10.340(a), (b).

2. Can the mediator continue to mediate if after disclosure, all parties waive any conflicts?

No.

Rule 10.340. Conflicts of Interest

(c) Effect of Disclosure. 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.

Fla. R. Med. 10.340(c).

"A conflict of interest which clearly impairs a mediator's impartiality is not resolved by mere disclosure to, or waiver by, the parties." Mediator Ethics Advisory Comm. Op. 2005-006 (Jan. 18, 2006) (available at

http://www.flcourts.org/gen_public/adr/MEAC%20Opionions/index%20of%20opinions.shtml). An example of a clear conflict is a lawyer-mediator mediating a case for a current client in another matter. Id.

Scene Two: Mediation

AM: Attorney Cutthroat, you represent the petitioner, so why don't you begin.
WA: Gladly. This is a twenty year marriage. My client has been a homemaker the entire time. She hasn't worked a day in her life as opposed to the Husband who has worked a very successful used car salesman. He's consistently made $250,000 a year for the past ten years. However, he's claiming that coincidentally, just after my client's filing of her petition, the used car market dried up and he's literally sold zero cars in the past four months, down from an average of 62 cars a month for the preceding ten years.
W: He's a liar! He's selling cars like they're going out of style!
AM: Whoa, whoa, whoa. Easy everybody. We don't need anybody's engine overheating. That's a little used car humor for you. Anyway, I'm sure your husband or his attorney has reasonable explanation. I've never met a used car dealer or an attorney without one.
HA: And a reasonable explanation we have. However, it involves technical industry jargon that my client can better articulate.
H: Thanks, Uninformo. See, here's the deal. My wife filed her petition on July 5, right after the huge president's day sell-a-thon. By that time, all our good American inventory was already sold. All that we had left for months was third rate imports. Anyway, I also slipped in the shower and hurt my right hand which I use to shake the customer's hand and seal the deal. My doctor says I'll never shake again. Once my boss heard about it, he cut my hours to zero. Here, he even wrote me a letter!
WA: Let me see that! (Grabs the letter)
AM: What's it say?
WA: It says, "Vinny Jabroni, you ain't never gonna work again! Signed, your good friend and boss, Loui Lemonchello.
W: Oh, this is ridiculous! Loui Lemonchello has been your best friend for thirty years. He was your best man at our wedding! I don't care what that thing says, I'm not leaving here without alimony!
AM: I think it's time we caucus! Husband and Attorney Uninformo, you stay here. Wife and Attorney Cutthroat, you come with me.

3. Is it unethical to bluff about the value of the case or anticipated evidence when in fact you have no factual support for that position during a mediation?

Yes if the lawyer is presenting a false statement of fact and not an opinion.

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;

R. Regulating Fla. Bar 4-4.1(a).

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.

However, 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 . . .

R. Regulating Fla. Bar 4-4.1(comments)

Scene Three: Mediation Caucus with Wife

W: (crying) He's hiding money! He said he was going to do this if I ever tried to get a divorce and now it's happening!! I am screwed!!
WA: Listen, this is all very frustrating, but it's not the end of the case. If you're husband isn't willing to be reasonable here, then you're not going to settle.
AM: Well, I wouldn't go that far counselor. Would you mind if I was candid with your client for a moment?
WA: Please, go right ahead.
AM: Mrs. Jabroni, you may think you know a lot about what's going on. You've probably received advice from your parents, your sister, your cousin, and your hair dresser. They've all told you that you should get alimony because they know someone else who went through a divorce and that person got alimony, so you should, too. The fact is, though, that none of your confidants knows the case of Sneaky v. Sneaky. It's a little known case that is exactly on point with your situation. And your judge, the judge that's going to rule on your case, loves this case. And, unfortunately, if you proceed, the truth is that you're not going to get alimony. You're just going to waste time and money trying to get it.

W: (Crying harder) But, but, but, ...my hairdresser said!!!!
WA: No hold on just a minute here. I haven't heard of that case. We're not settling on anything here!
AM: Well, unfortunately it looks like we're at impasse, I'll go tell the other side. (shout's in the direction of the Husband and Uninformo) We're at impasse, gentlemen!
H: Well, don't need this anymore! (rips up the letter from his boss).
HA: You know, we could have used that at trial.
H: No problem, I'll just have him write us a better one.

4. Can a mediator give his or her opinion about the law in the case or how a case will turn out?

A mediator may provide information that the mediator is qualified by training or experience to provide. However, a 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.

Fla. R. Med. 10.370(a), (c).

Rule 10.370. Advice, Opinions, or Information

(a) Providing Information. 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.

(c) Personal or Professional Opinion. A mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A 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.

5. Can a party to a mediation destroy photographic or documentary evidence prepared for mediation in the event of an impasse or a settlement?

No. 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. § 44.405(5), Fla. Stat.

Scene Four: Courthouse Halls

AM: (Walking towards Judge) Oh, hi, Judge. Still on the family bench I hear.
J: Ah, yes, I am the envy of all my judicial colleagues.
AM: Well don't worry, that's what rotations are for. By the way, Attorney Cutthroat says, "Hi."
J: Cutthroat?! I haven't seen that gal in years. She and I used to work felony together at the State Attorney's Office. Where did you see her?
AM: Oh, I mediated the Jabroni matter last week and Cutthroat is representing the Wife.
J: Well don't tell me anything about the case, it's probably before me.

AM: Oh, not only is it before you, but the Wife is a nutjob! Hopefully, for Cutthroat's sake, she's on her meds when she stumbles into your courtroom. Coo-coo, coo-coo!!
J: Enough, it's not really appropriate-
AM: (interrupting) Oh, don't worry. The Husband's case is so strong, there's nothing to decide. Have fun!

6. Can a mediator disclose his or her opinion on the merits of the case to the Court or other third parties?

No.

A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. § 44.405(1), Fla. Stat. Exceptions include mandatory reporting of abuse and neglect of children or vulnerable adults, or the commission of a crime. See § 44.405(4), Fla. Stat.

7. Can a mediator be personally liable for an improper disclosure?

Yes, if the disclosure was not an official act, or if the mediation was not court ordered if done in bad faith, with malicious purpose or wanton and willful disregard.

In court ordered mediations, a mediator has the same judicial immunity in the same manner and to the same extent as a judge. § 44.107(1), Fla. Stat. A judge is not immune from liability for nonjudicial actions, and a judge is not immune for actions, even though judicial in nature, that are taken in the complete absence of jurisdiction. Kalmanson v. Locket, 848 So. 2d 374 (Fla. 5th DCA 2003).

A person serving as a mediator in any noncourt-ordered mediation has immunity from liability arising from the performance of that person's duties while acting within the scope of the mediation function is such mediation is: (a) Required by statute or agency rule or order; (b) Conducted under ss. 44.401-44.406 by express agreement of the mediation parties; or (c) Facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by ss. 44.401-44.406. The mediator does not have immunity if he or she acts in bad faith, with malicious purpose, or in a manner exhibit wanton and willful disregard of human rights, safety, or property. § 44.107(2), Fla. Stat.

Scene Five: Pre-trial

W: I can't believe you, you are really stooping to a new low with this zero income argument!
H: I don't care, you won't get a dime so long as my boss is my bestfriend!
W: Ah-ha! I knew that letter wasn't real! I can't believe you lied at mediation and fabricated evidence to support your position!
H: And it won't end there, you won't ever get my money!

W: Oh yes I will! Not only am I going to tell the judge about what you did and said at mediation, I'm going to report your idiot attorney to the bar!
H: Oooooo, I'm so scared (sarcastically)! Hey, maybe I can help prepare you for the job market. I will have a large order of no alimony with a side of attorneys fees please! Oh wait, my attorney would like to supersize the fees!
W: You are such a piece of garbage!
H: Oh, garbage you say?! That reminds me, you didn't even find out about my ownership interest in the waste disposal partnership and it's too late for you to get any discovery now! I knew using my attorney on that case as our mediator was a good idea!
W: Your attorney served as our mediator? What?! Now this, the judge has to hear!

7. If a mediation results in an impasse and one party's attorney subsequently learns that the other party and its attorney knowingly made a material factual misrepresentation during the mediation which could be considered professional misconduct by the opposing counsel, is the attorney who learns of the misrepresentation obligated to disclose it to the court or the bar? If so would the confidentiality rules relating to mediation prevent such disclosure? Can the misrepresentation be used to impeach the other party at trial?

Answer:

Part one: Yes the attorney may be obligated to disclose the misrepresentation of opposing counsel to the bar if the misrepresentation is material enough to raise a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer. R. Regulating Fla. Bar 4-8.3

Part two: No the confidentiality rule does not prevent the attorney from reporting the misrepresentation. The Mediation Confidentiality and Privilege Act provides an exception "for any mediation communication 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." Fla. Stat. §44.405(4)(a)(6)

Part three: No the misrepresentation can not be used to impeach the other party at trial. Although there is an exception provided for reporting misconduct, the misrepresentation otherwise remains confidential and is not discoverable or admissible for any other purpose, unless it is permitted by another statutory exception. Fla. Stat. §44.405(4)(b)

Scene Six: Subsequent Litigation

(In the courtroom at trial.)
J: This is the final hearing on the matter of Jabroni v. Jabroni. Please make your appearances for the record.
WA: Attorney Cutthroat for the Wife, Ms. Jabroni.
HA: Attorney Uninformo for the Husband, Mr. Jabroni.
J: No opening statements, gentlemen. Mr. Cutthroat, please call your first witness.
WA: Your honor, I call Ms. Jabroni.

J: Ms. Jabroni, you may take the stand. Do you swear to tell the truth, the whole truth, and nothing but the truth so help you god?
W: Yes, your honor.
J: Counsel, you may proceed.
WA: Thank you, your honor. Ms. Jabroni, do you believe your husband has been honest about his income in this litigation?
W: No, I do not.
WA: Why do you feel that way, Ms. Jabroni?
W: Because that Jabroni (pointing at Husband) told me he fabricated the letter from his boss regarding his income for the purpose of being successful at mediation. I'm not letting him get away with that!!
HA: OBJECTION!!
J: On what grounds do you object?

8. Can settlement negotiations in mediations be disclosed at trial?

No. All mediation communications are confidential

§ 44.405, Fla. Stat.

Carbolic Smokeball Presentation 2010
Arbitration Skit Dialogue and Questions

Cast of Characters

Professor Plum	Amy Fischer
Kim Kardashian	Nicole Atkinson
Kim Kardashian Attorney	Heline Kottler
Playboy rep Hugh Heffner:	Tim Beckwith
Playboy Attorney	Jeff Liggio
Mr. Frank (Neutral arbitrator)	Hon. Frank Castor
Mr. James (Non-neutral arbitrator)	Scott Curry
Ms. Kristen (Non-neutral arbitrator)	Kristen Pinto
Evidence Custodian	George Hebert Jr.
AV Control/PowerPoint by	Greg Morse

Scene One: Lawyer Working with Non-lawyer Arbitration Corporation

Non-neutral arbitrator (Mr. James) speaking to Playboy attorney (Mr. Jeffrey) before arbitration begins.

Mr. James (Non-neutral arbitrator):

> Mr. Jeffrey, good to see you, before we get started with this arbitration I wanted to run something by you.

Mr. Jeffrey (Playboy Attorney):

> Sure. What's up?

Mr. James (Non-neutral arbitrator):

> I have a tremendous business opportunity for you, if you are interested.

Mr. Jeffrey (Playboy Attorney):

> Tell me more.

Mr. James (Non-neutral arbitrator):

> Well, it is easy money for you. My company handles arbitrations for clients, and I want you to be our go-to attorney, sort of in an in-house counsel role.

Mr. Jeffrey (Playboy Attorney):

What would I have to do?

Mr. James (Non-neutral arbitrator):

All you would have to do is sign Statements of Claims and show up at arbitrations. That's it. I will handle the rest. I will get the clients and handle working with them, doing the investigations. I will draft the Statements of Claims and take care of all of the paperwork.

Mr. Jeffrey (Playboy Attorney):

How do I get paid?

Mr. James (Non-neutral arbitrator):

The clients would pay me, and then I would pay you. Like I said, it is really easy money. I am only making this offer to a few attorneys. You want to do this deal.

Mr. Jeffrey (Playboy Attorney):

I'll think about it…

Mr. James (Non-neutral arbitrator):

Ok, good deal. By the way, don't tell anyone but I haven't had a chance to review the file on our arbitration for today. What's it all about?

Mr. Jeffrey (Playboy Attorney):

It's a juicy one. Kim Kardashian has sued Playboy for making Kinky Kim, a sex doll, using her likeness. Playboy says that they she agreed to allow Playboy to make Kinky Kim when she signed the contract to pose for Playboy magazine.

Mr. James (Non-neutral arbitrator):

Thanks.

[INTERLUDE FOR QUESTION ONE]

May an attorney work with a corporation that represents clients in arbitration matters?

No. It would be unethical to do so due to problems concerning conflicts of interest, solicitation, fee-splitting, and assisting the unauthorized practice of law.
Authority: See Florida Bar Ethics Opinion 95-2. (1995); Rules 4-1.4 and 4-1.2; Rules 4-7.4(a) and 4-8.4(a); Rule 4-1.5(a); 4-5.4(a) and (b); Rule 4-5.5

Scene Two: Presenting False Evidence in an Arbitration

Playboy attorney (Mr. Jeffrey) speaking with Hef before arbitration begins

Mr. Jeffrey (Playboy Attorney):

Hef, are you ready?

Hef: Ready? I was born ready! And with the help of these little blue marvels (shakes pill bottle), I will still be ready at 3AM.

Mr. Jeffrey (Playboy Attorney):

Hef, Hef, I didn't mean that kind of ready, I meant ready to testify.

Hef: Ahhh, testify, suuuuurrrrre. I will sway those arbitrators in no time.

Mr. Jeffrey (Playboy Attorney):

Hang on a minute. Those arbitrators are highly skilled professionals.

Hef: Let me let you in on a little secret. Every red-blooded American male, except for maybe Ryan Seacrest and Neil Patrick Harris, has playmate envy!

Mr. Jeffrey (Playboy Attorney):

Playmate envy?

Hef: Sure, have you seen the bevy of beauties, who hang with my octogenarian ass.

Mr. Jeffrey (Playboy Attorney):

Okay, let's move on. When you testify you will have to tell the truth, even about those d-o-c-u-m-e-m-t-s

Hef: Yes, of course. The truth. Sort of like when Kendra asked me why America likes watching her on TV. And I told her it is because of her razor sharp wit and breathtaking intellect.

So, yesss, tell the trrrutth.

Mr. Jeffrey (Playboy Attorney):

Hef, really bad things will happen if the other sides figures out you destroyed key documents and are lying about it to the arbitrators.

Hef: Right. They will lock me up in the International Arbitration Prison in the Hague. Wait a minute, hmmm, the Hague – that's in the Netherlands, Holland – blondes – oh la la – I think I have another idea for a (opens centerfold and looks at it)

[INTERLUDE FOR QUESTION TWO]

What is a lawyer required to do if he/she learns, during an arbitration proceeding, that his/her client intends to lie in the client's testimony?

Refuse to offer the evidence.

Rule 4-3.3, Subdivision (a)(4) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence.

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered.

If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[INTERLUDE FOR QUESTION THREE]

If the client proceeds to give false testimony in the arbitration, is the lawyer required to take remedial action, even if it would require disclosing client confidences?

First, address with Client confidentially and give client chance to correct. Second, disclose to panel and they should decide corrective measures.

Under Rule 4-3.3(a)(4), if perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to first address it with the client confidentially, if circumstances permit, and should try to get the client to correct or agree to correct the testimony. In any case, the advocate should ensure disclosure is made to the court. It is for the tribunal then to determine what should be done – making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing.

The lawyer's duty not to assist witnesses, including the lawyer's own client, in offering false evidence stems from the Rules of Professional Conduct, Florida statutes, and caselaw.

Rule 4-1.2(d) prohibits the lawyer from assisting a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.

Rule 4-3.4(b) prohibits a lawyer from fabricating evidence or assisting a witness to testify falsely.

Rule 4-8.4(a) prohibits the lawyer from violating the Rules of Professional Conduct or knowingly assisting another to do so.

Rule 4-8.4(b) prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

Rule 4-8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Rule 4-8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Rule 4-1.6(b) requires a lawyer to reveal information to the extent the lawyer reasonably believes necessary to prevent a client from committing a crime.

This rule, 4-3.3(a)(2), requires a lawyer to reveal a material fact to the tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, and 4-3.3(a)(4) prohibits a lawyer from offering false evidence and requires the lawyer to take reasonable remedial measures when false material evidence has been offered.

Rule 4-1.16 prohibits a lawyer from representing a client if the representation will result in a violation of the Rules of Professional Conduct or law and permits the lawyer to withdraw from representation if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent or repugnant or imprudent. Rule 4-1.16(c) recognizes that notwithstanding good cause for terminating representation of a client, a lawyer is obliged to continue representation if so ordered by a tribunal.

Scene Three: Arbitration agreement issues: Signature required? Unconscionable?

Arbitration panel is assembled, counsel and parties are seated at tables. Ms. Kottler (Attorney for Kim) objects formally to the panel. Kim interjects with her objections as well.

Ms. Kottler (Kim's Attorney):

> Before we begin, my client has informed me that she never agreed to any arbitration at all, and wasn't told about any arbitration requirement when she entered into the contract.
>
> Further, even a cursory review of this document shows that it is very one sided, in favor of Playboy, and takes away some Florida statutory rights and remedies.
>
> As a result the arbitration provision of this contract is unconscionable, and we object to this arbitration.

Kim Kardashian:

> That's right! I never agreed to arbitration on this issue!
>
> Hef gave me this contract to sign when I agreed to pose for Playboy. There was a separate page in there about arbitration that required my signature, but I NEVER signed it and the contract had NOTHING to do with any sex dolls!!
>
> I NEVER agreed that Playboy could make a sex doll using my image, and I CERTAINLY didn't agree to go to arbitration about it!!
>
> My Dad was a BIG-TIME lawyer, and he always said don't sign anything that you don't want to and that I have the right to talk to a REAL judge about ANYTHING when I am sued!!

Mr. Jeffrey (Playboy's Attorney):

> The Plaintiff wasn't forced to sign the contract, but she did so. While the arbitration agreement is unsigned, the contract for the photo shoot incorporates by reference the arbitration agreement so she agreed to arbitration.
>
> The contract that we sent her asks her to review the arbitration agreement, and if she had told us that she didn't agree we would have rescinded it.

Mr. Frank (Neutral Arbitrator):

> Thank you counsel. We will rule on the unconscionability issue at the conclusion of the arbitration.

[INTERLUDE FOR QUESTION FOUR]

Is an unsigned written arbitration agreement enforceable?

Yes.

4th DCA Case: John Hall Electrical Contracting, Inc., 792 So. 2d 580 (4th DCA 2001) (affirming the trial court's enforcement of the arbitration agreement in the written contract did not violate Fla. Stat. § 682.02 (2000).

Section 682.02 required only that an arbitration clause be in writing, not that both parties sign it.

Section 682.02 was unlike the statute of frauds, Fla. Stat. § 725.01 (2000), which required that certain agreements or promises, or some note or memorandum thereof, be in writing and signed by the party to be charged therewith.

One purpose of a signature on a contract was to evidence the signer's intent to be bound by its terms. Here, the parties' assent to the terms of the written contract was established by their words and conduct).

[INTERLUDE FOR QUESTION FIVE]

Is the arbitration agreement unconscionable?

Answer: Maybe. In order to determine whether an arbitration agreement is unconscionable, it must be both procedurally and substantively unconscionable. The manner in which the contract photo shoot incorporated by reference the arbitration agreement may make the agreement procedurally unconscionable. Further, the fact that the arbitration agreement takes away some Florida statutory rights and remedies may make the agreement substantively unconscionable.

Procedural unconscionability relates to the manner in which the contract was entered and involves such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms, *Palm Beach Motor Cars Limited, Inc. v. Jeffries*, 885 So.2d 990, 992 (Fla. 4th DCA 2004). In fact, "even a well-defined arbitration provision may be procedurally unconscionable if contained within a contract of adhesion," *National Financial Services, LLC v. Mahan*, 19 So.3d 1134, 1136 (Fla. 3d DCA 2009). See also: *Romano v. Manor Care, Inc.*, 861 So.2d 59 (Fla. 4th DCA 2003).

The fact that a contract can be rescinded after it has already been entered doesn't affect whether or not it is unconscionable. Powertel, Inc. v. Bexley, 743 So.2d 570 (Fla. 1st DCA1999);

It is substantively unconscionable to employ an arbitration agreement to obtain a waiver of rights to which the signatory would otherwise be entitled under common law or statutory law. *Hialeah Automotive, LLC v. Basulto*, 22 So.3d 586, 590 (Fla. 3d DCA 2009). In Romano, supra, the 4th District held that the elimination of punitive damages and the right to attorney's fees constituted substantive unconscionability "to a great degree." See also Powertel, supra (elimination of right to punitive damages and class action constituted substantive unconscionability).

Scene Four: Disqualification of Counsel

Panel is assembled, parties and counsel are seated at tables. Counsel for parties raise preliminary matters to panel.

Mr. Jeffrey (Playboy Attorney):

> Gentlemen, before we proceed we have a few procedural issues that we would like to address to the arbitration panel.
>
> First, we need to advise the panel that Ms. Kottler, Ms. Kardashian's attorney, is not authorized to appear in this forum or participate as counsel in this arbitration.

> While Ms. Kottler is licensed as an attorney in the State of California, where this action was originally filed, Ms. Kottler is not an attorney licensed to practice law in the State of Florida and thus she may not serve as counsel in this arbitration.

Mr. Frank (Neutral Abritrator):

> So you move to disqualify because Ms. Kottler is not qualified to appear in this matter as she is not a licensed attorney in the State of Florida.
>
> Ms. Kottler, your response?

Ms. Kottler (Kim Kardashian Attorney):

> Counsel is correct that I am not licensed in Florida; however, no Florida rule of law precludes a non-Florida attorney from acting as a counsel in an arbitration.
>
> Moreover, I am not aware of any additional requirements other than that on be an attorney in good standing, licensed in some U. S. jurisdiction.
>
> Further, the panel will recall that Ms. Kardashian filed this action in Federal Court in California. In referring the parties, the Court referred the respective parties and counsel to arbitration.
>
> That order authorizes me to continue to act as counsel, regardless of where the arbitration is held, as any order of enforcement shall be before the California court, where I am authorized to practice.

[INTERLUDE FOR QUESTION SIX]

Can a lawyer who is admitted to practice in another state but not in Florida represent a client in an arbitration proceeding in Florida without having a Florida lawyer as co-counsel?

Yes.

Rule 4-5.5, Subdivisions (c)(3) and (d)(3) permit a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in Florida if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services are performed for a client who resides in or has an office in the lawyer's home state, or if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation if court rules or law so require.

[INTERLUDE FOR QUESTION SEVEN]

If so, is the out-of-state lawyer required to file papers with the Florida Bar relating to the arbitration?

Yes.

The lawyer must file a verified statement with The Florida Bar in arbitration proceedings as required by rule 1-3.11 unless the lawyer is appearing in an international arbitration as defined in the comment to that rule.

For the purposes of this rule, a lawyer who is not admitted to practice law in Florida who files more than 3 demands for arbitration or responses to arbitration in separate arbitration proceedings in a 365-day period shall be presumed to be providing legal services on a regular, not temporary, basis; however, this presumption shall not apply to a lawyer appearing in international arbitrations as defined in the comment to rule 1-3.11.

Scene Five: Disqualification of Counsel (Continuation of Scene Four)

Panel is assembled, parties and counsel are seated at tables. Counsel for parties raise preliminary matters to panel.

Mr. Frank (Neutral Arbitrator):

> Other preliminary motions counsel?

Mr. Jeffrey (Playboy Attorney):

> As a second basis for disqualification, I would submit that Ms. Kottler is breaching her duty of loyalty owed to Playboy International, her former client.
>
> Ms. Kottler must be disqualified based on her previous representation of Playboy International in a commercial transaction involving the purchase of "Sex-O-Rama," a toy manufacturing company in Taiwan.
>
> Having previously represented Playboy International, Ms. Kottler should be disqualified from appearing in this forum in this action representing Ms. Kardashian in a suit against her former client.
>
> This would constitute a clear and obvious breach of her ethical duty of loyalty to Playboy International.

Mr. Frank (Neutral Arbitrator):

> So you are also seeking to disqualify Ms. Kottler on the basis of her previous representation of Playboy International in a business acquisition.
>
> Ms. Kottler, your response?

Ms. Kottler (Kim Kardashian's Attorney):

First of all your Honors, I would respectfully object to counsel positing any motion to disqualify in this forum.

When Ms. Kardashian filed this action in California federal court based on diversity, Playboy International should have raised any issues on a motion to disqualify in that judicial forum.

Having failed to move to disqualify immediately upon being served with this action, Playboy International has waived the disqualification issue.

Moreover, an arbitration panel would never have jurisdiction over issues involving the qualifications for the practice of law or for issues of ethical conflict.

Exclusive jurisdiction for resolving issues involving ethical breaches or violations of the applicable Professional Rules of Responsibility lies with the Circuit Court and/or the applicable bar (Florida or California), and thus jurisdiction over issues involving ethical issue cannot be delegated by private agreement.

So as a preliminary matter, we would object that this forum does not have jurisdiction to address either of those issues.

Having failed to raise the issue of a conflict in the Federal Court when the action was first brought, the matter has also been waived.

This arbitration panel is without jurisdiction to interpret duties or breach of duties under the Rules of Professional Responsibilities.

Mr. Frank (Neutral Arbitrator):

Response Counsel?

What jurisdiction does this panel have to disqualify counsel based on rules outside the purview of the rules of arbitration?

Moreover, didn't you waive this issue by not raising it immediately in the district court?

Mr. Jeffrey (Playboy Attorney):

First, on the jurisdictional issue, the arbitration agreement is broad and encompassing enough to address all issues related and surrounding the arbitration.

Thus, the arbitration agreement encompasses not only arbitrating the substantive issues of the claim, but also issues of privilege and disqualification related to the claim.

Second, waiver arises from active participation in litigation without raising the issue. We moved to stay immediately.

Mr. Frank (Neutral Arbitrator):

We will reserve on the jurisdictional issue, but Ms. Kottler let's hear your response on the substantive argument that you should be disqualified based on a conflict due to your previous representation of Playboy International.

Ms. Kottler (Kim Kardashian's Attorney):

This new-found argument for disqualification is factually without basis. My limited contact with Playboy International involved a transaction entirely unrelated to Ms. Kardashian's involvement with Playboy International.

I merely acted as one of a gaggle of attorneys inserted into a transaction involving Playboy International's acquisition of Sex-O-Rama, a Taiwanese sex toy manufacturer, about two years ago.

In conjunction with this representation, I had no intimate exchanges, and no confidences were disclosed. After that transaction was consummated, I had no further relationship with Playboy International or intercourse with its principals.

There is no current or ongoing relationship with Playboy International and that previous contact is entirely unrelated to the current dispute.

Counsel has failed to state a basis for disqualification based on any breach of duty of loyalty.

Mr. Frank (Neutral Arbitrator):

Response Counsel?

Mr. Jeffrey (Playboy Attorney):

First, as a procedural matter, this panel should be aware that the law presumes that confidences are exchanged between an attorney and the client in the course of representation.

The requirement of providing dispositive proof of the disclosure of confidences only arises where disqualification of an individual attorney is sought because of

that individual's previous law firm provided legal services to the opposing party, not where the individual provided the representation.

As to the facts, opposing counsel learned intimate details about Playboy's procedures, practices, policies, preferences, predilections, perversities and pre-dispositions.

We also understand that Ms. Kottler "knew" Mr. Hefner. In fact, Ms. Kottler met Ms. Kardashian in conjunction with the sale of the "Sex-O-Rama" at a closing party at the Playboy Mansion.

Having worked on the "Sex-O-Rama" deal, Ms. Kotler learned about Playboy's techniques and practices.

We have learned that Sex-O-Rama became the facility for manufacturing the important component parts of the doll that Ms. Kardashian claims is a knock-off. While Playboy International vehemently contests the claim that there is any similarity between its doll and the respective parts of Ms Kardashian, nonetheless, the factual premise of this claim shows that the acquisition of Sex-O-Rama is bound or tied up with reproducing likenesses of Ms. Kardashian.

The fact that this representation ended two years ago is entirely irrelevant insofar as counsel had an intimate and personal involvement in the business affairs of Playboy International, learned intimate details and was taken into the confidences of Playboy International and its principals.

Mr. Frank (Neutral Arbitrator):

We seem to have a threshold issue as to whether the arbitration agreement itself extends to arbitrating disqualification based on interpretation to applicable ethical rules.

The first issue we must confront is whether this arbitration panel or the Court presiding in the underlying case should interpret the arbitration agreement to determine if this issue is "arbitrable."

[INTERLUDE FOR QUESTION EIGHT]

Who decides whether Kardashian’s attorney should be disqualified based on her previous representation of Playboy? The Court presiding in the case where the action was filed or the arbitration panel?

Assuming a broad arbitration provision, the arbitration panel.

Reuters Recycling of FL, Inc. v. City of Hallendale, 993 So.2d 1178 (Fla. 4th DCA 2008); but see, Morgan Stanley DW, Inc. v. Kelly & Warren, P.A., 2002 WL 34382748 (S.D. Fla. 2002)(Issue is for court if not party to arbitration agreement).

[INTERLUDE FOR QUESTION NINE]

Should Kardashian's attorney be disqualified based on her previous "intercourse" with Playboy International?

If atty-client relationship existed, irrefutable presumption arises that confidences were exchanged.

If relationship existed, must prove "the same matter or substantially related to matter in which attorney represented former client." Metcalf v. Metcalf, 785 So.2d 747 (Fla. 5th DCA 2001)(Disqualification required where wife disclosed confidential details re: marriage).

[INTERLUDE FOR QUESTION TEN]

Is the outcome different if the attorney had intercourse with Mr. Hefner?

No.

"Although disqualification of counsel is a prophylactic device to protect the attorney-client relationship, it also serves to destroy relationships by depriving a party of their own choosing."

Disqualification is "extraordinary remedy and should be granted sparingly."

Receipt of privileged documents is grounds for disqualifying counsel based on unfair tactical advantage.

No disqualification if no informational advantage is gained.

Whitener v. First Nat'l Bank of FL, 901 So. 2d 366 (Fla. 5th DCA 2005)

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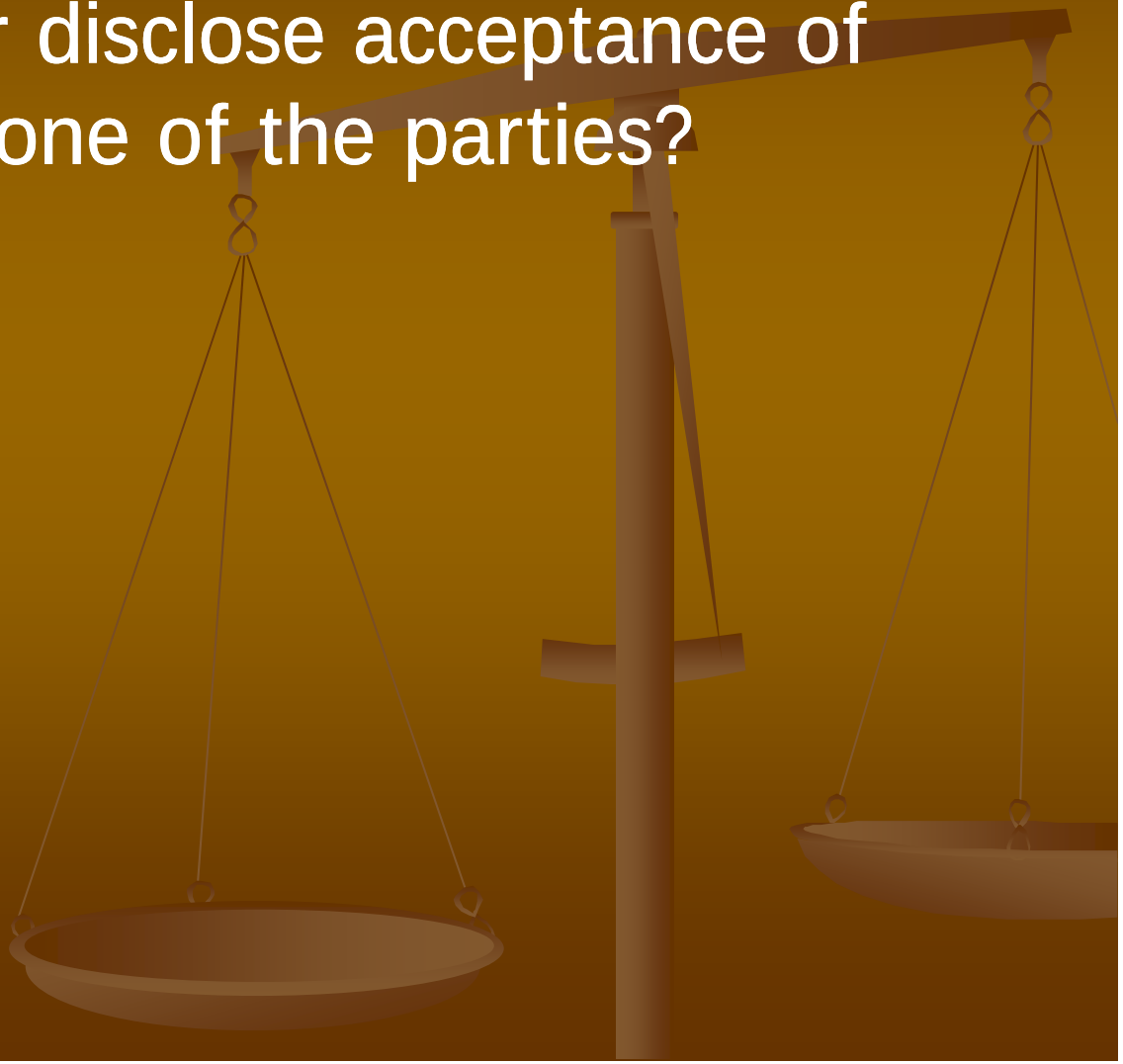
Mediation 101

- Attorney/Mediator (Damon Turco)
- Attorney/Mediator's Assistant (Javier Chipi)
- Husband (George Hebert)
- Wife (Sonja Pica)
- Husband's Attorney (David Pascuzzi)
- Wife's Attorney (Chrichet Mixon)
- Judge (Stephen Phillips)
- PowerPoint (Greg Morse)

Question 1

- Must a mediator disclose acceptance of future work for one of the parties?



Question 1 Answer & Authority

- YES.

- **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.
- **(b) Withdrawal for Partiality.** A mediator shall withdraw from mediation if the mediator is no longer impartial.
- **(c) Gifts and Solicitation.** 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.
- Fla. R. Med. 10.330
- **Rule 10.340. Conflicts of Interest**
- **(a) Generally.** A mediator shall not mediate a matter that presents 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.
- **(b) Burden of Disclosure.** 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.
- Fla. R. Med. 10.340(a), (b).

Question 2

- Can the mediator continue to mediate if after disclosure, all parties waive any conflicts?

Question 2 Answer & Authority

- NO.

- **Rule 10.340. Conflicts of Interest**
- **(c) Effect of Disclosure.** 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.
- Fla. R. Med. 10.340(c).
- "A conflict of interest which clearly impairs a mediator's impartiality is not resolved by mere disclosure to, or waiver by, the parties." Mediator Ethics Advisory Comm. Op. 2005-006 (Jan. 18, 2006) (available at
- http://www.flcourts.org/gen_public/adr/MEAC%20Opionions/index%20of%20opinions.shtml). An example of a clear conflict is a lawyer-mediator mediating a case for a current client in another matter. Id.

Question 3

- Is it unethical to bluff about the value of the case or anticipated evidence when in fact you have no factual support for that position during a mediation?

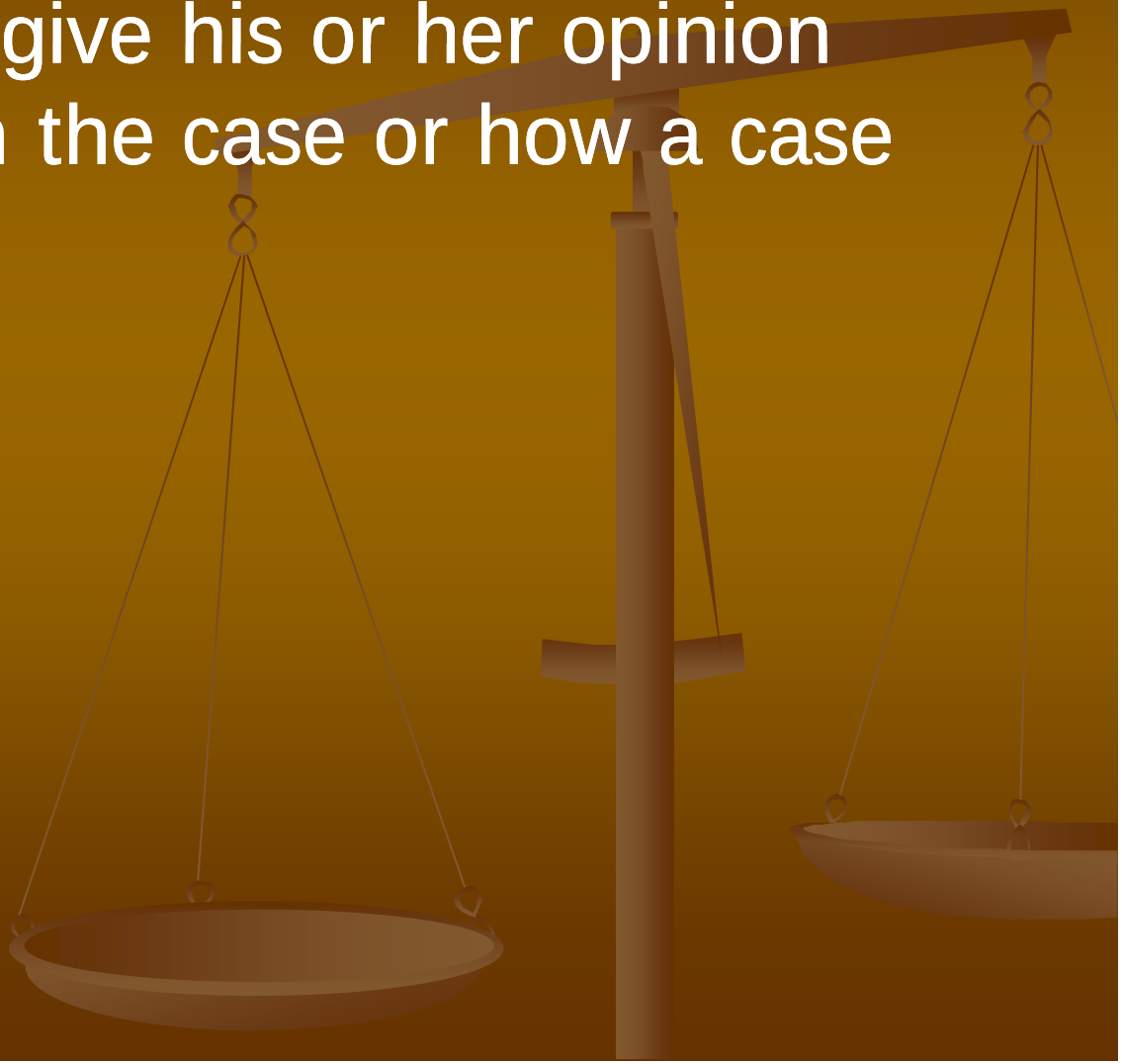
Question 3 Answer & Authority

- YES, if the lawyer is presenting a false statement of fact and not an opinion.

- **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;
- R. Regulating Fla. Bar 4-4.1(a).
- 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.
- However, 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 . . .
- R. Regulating Fla. Bar 4-4.1(comments)

Question 4

- Can a mediator give his or her opinion about the law in the case or how a case will turn out?



Question 4 Answer & Authority

- A mediator may provide information that the mediator is qualified by training or experience to provide. However, a 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.

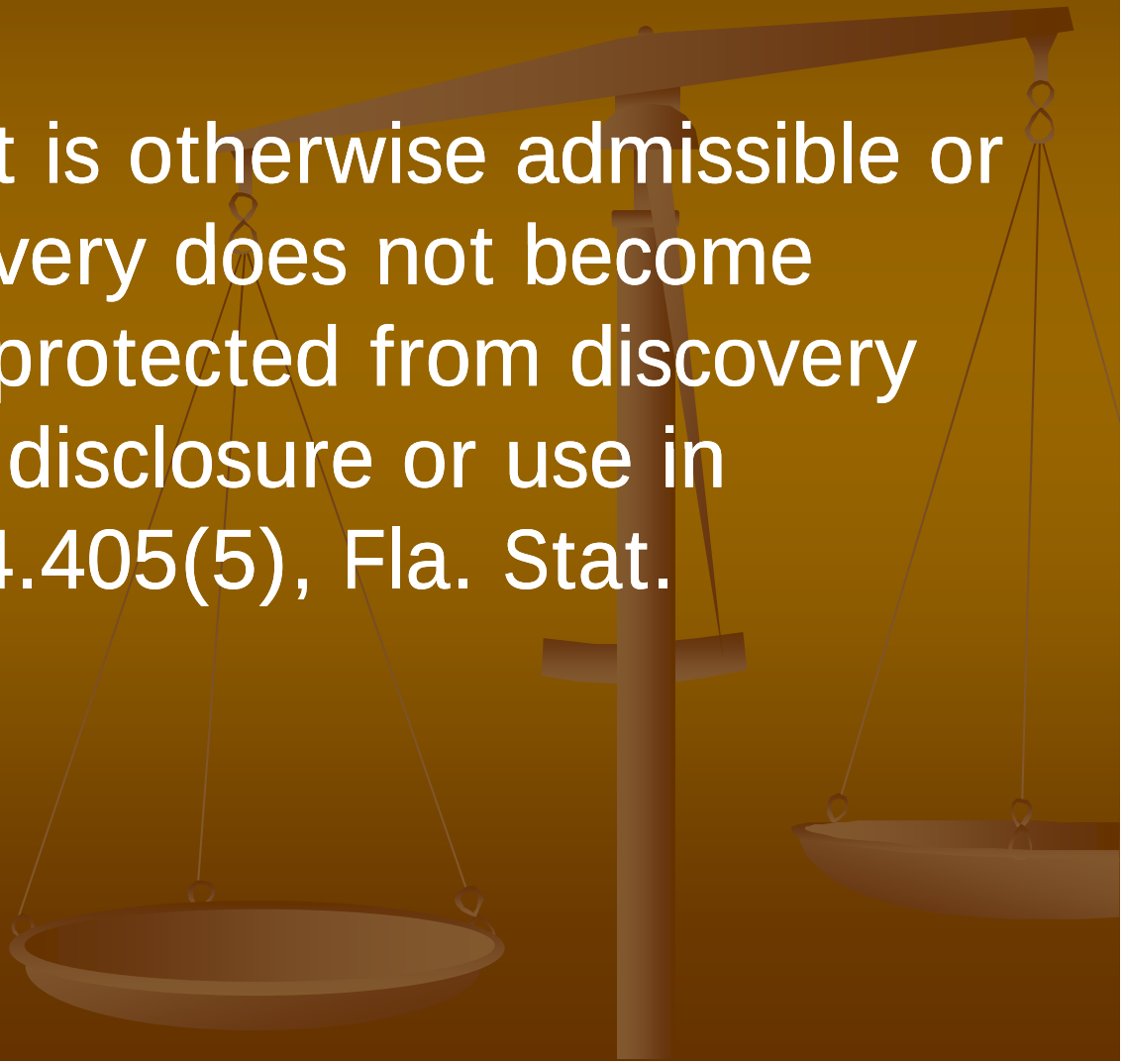
- Fla. R. Med. 10.370(a), (c).
- **Rule 10.370. Advice, Opinions, or Information**
- **(a) Providing Information.** Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.
- **(c) Personal or Professional Opinion.** A mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A 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.

Question 5

- Can a party to a mediation destroy photographic or documentary evidence prepared for mediation in the even of an impasse or a settlement?

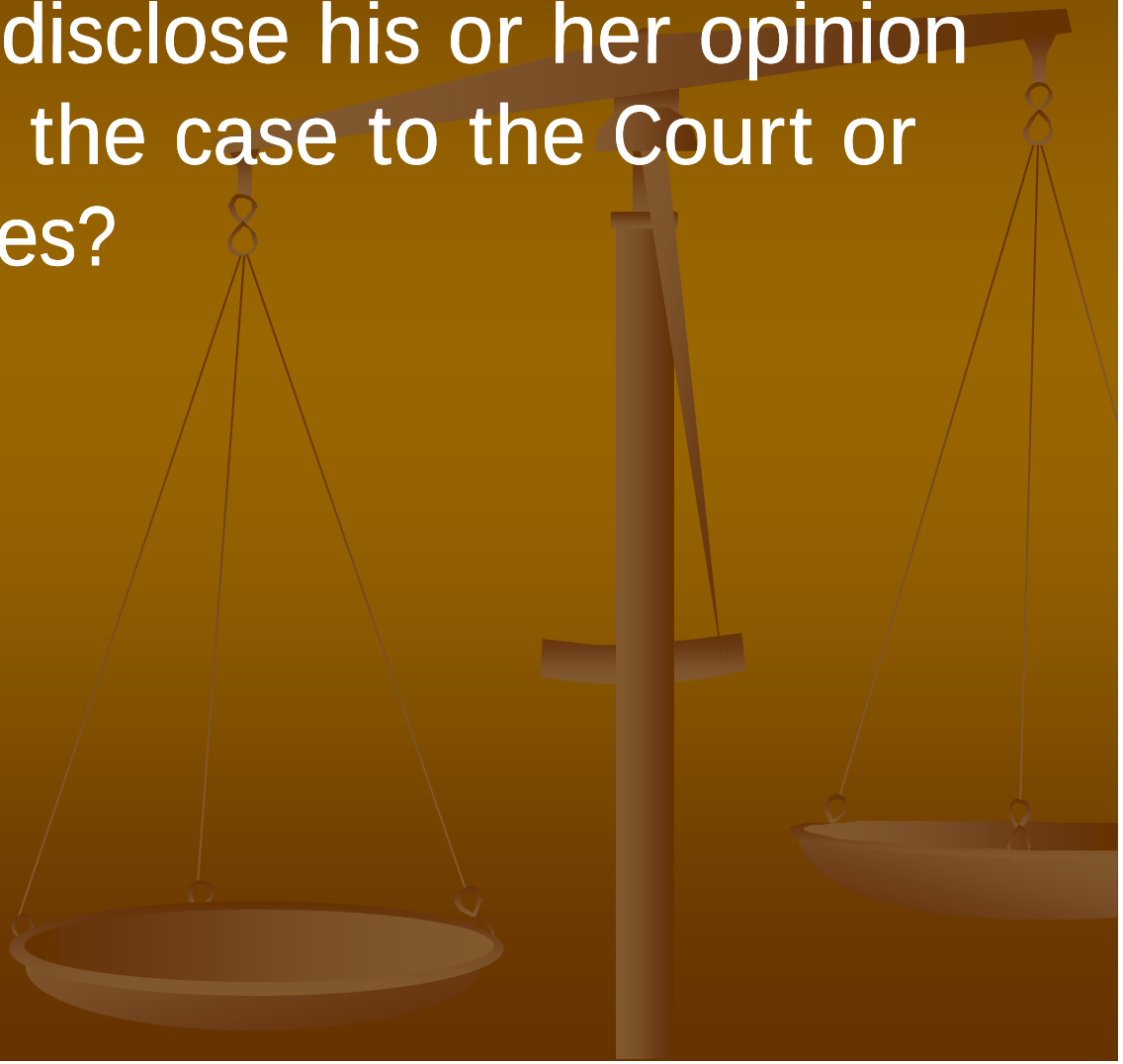
Question 5 Answer & Authority

- NO.
- 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. § 44.405(5), Fla. Stat.



Question 6

- Can a mediator disclose his or her opinion on the merits of the case to the Court or other third parties?

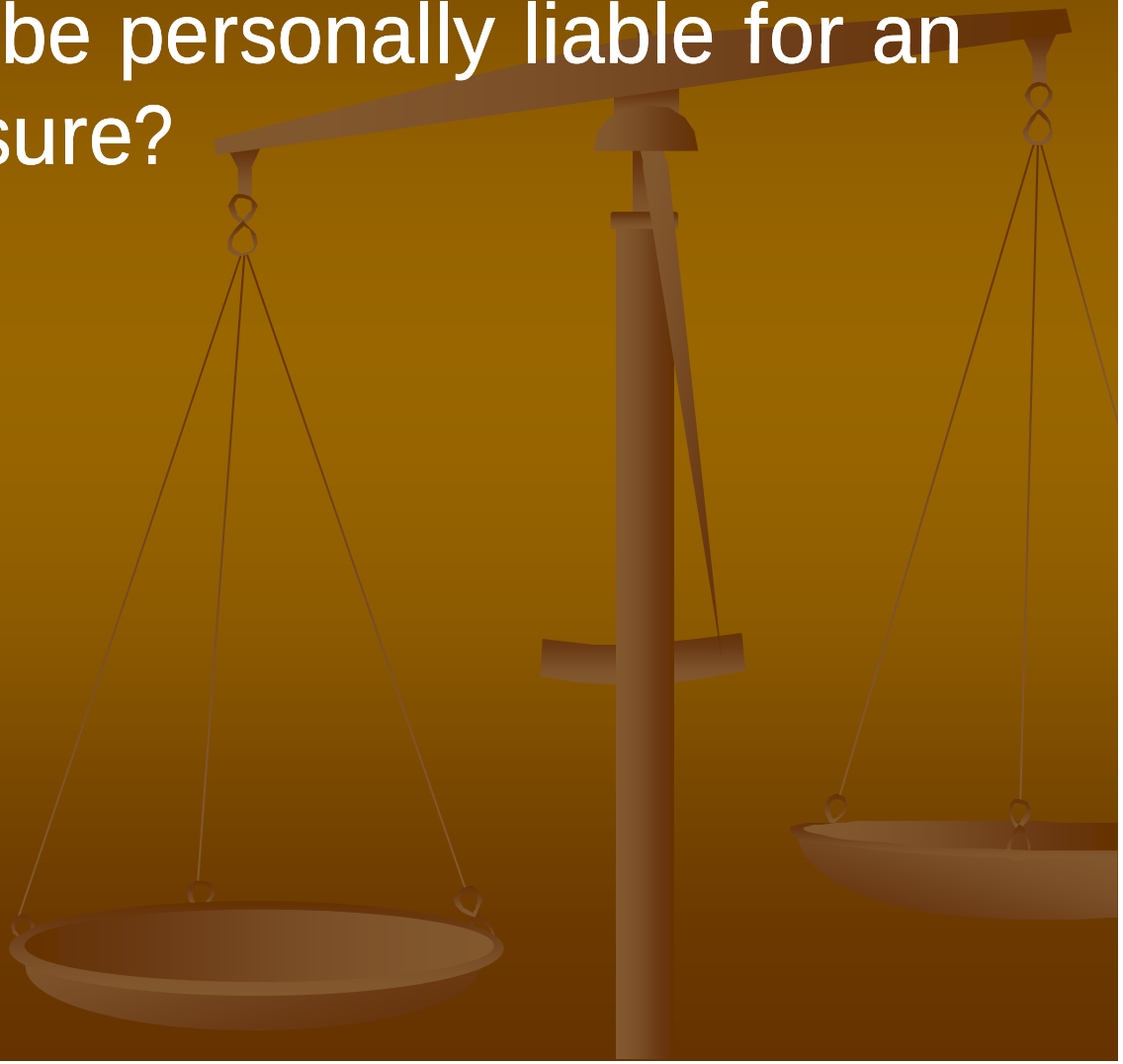


Question 6 Answer & Authority

- No
- A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. § 44.405(1), Fla. Stat. Exceptions include mandatory reporting of abuse and neglect of children or vulnerable adults, or the commission of a crime. See § 44.405(4), Fla. Stat.

Question 7

- Can a mediator be personally liable for an improper disclosure?

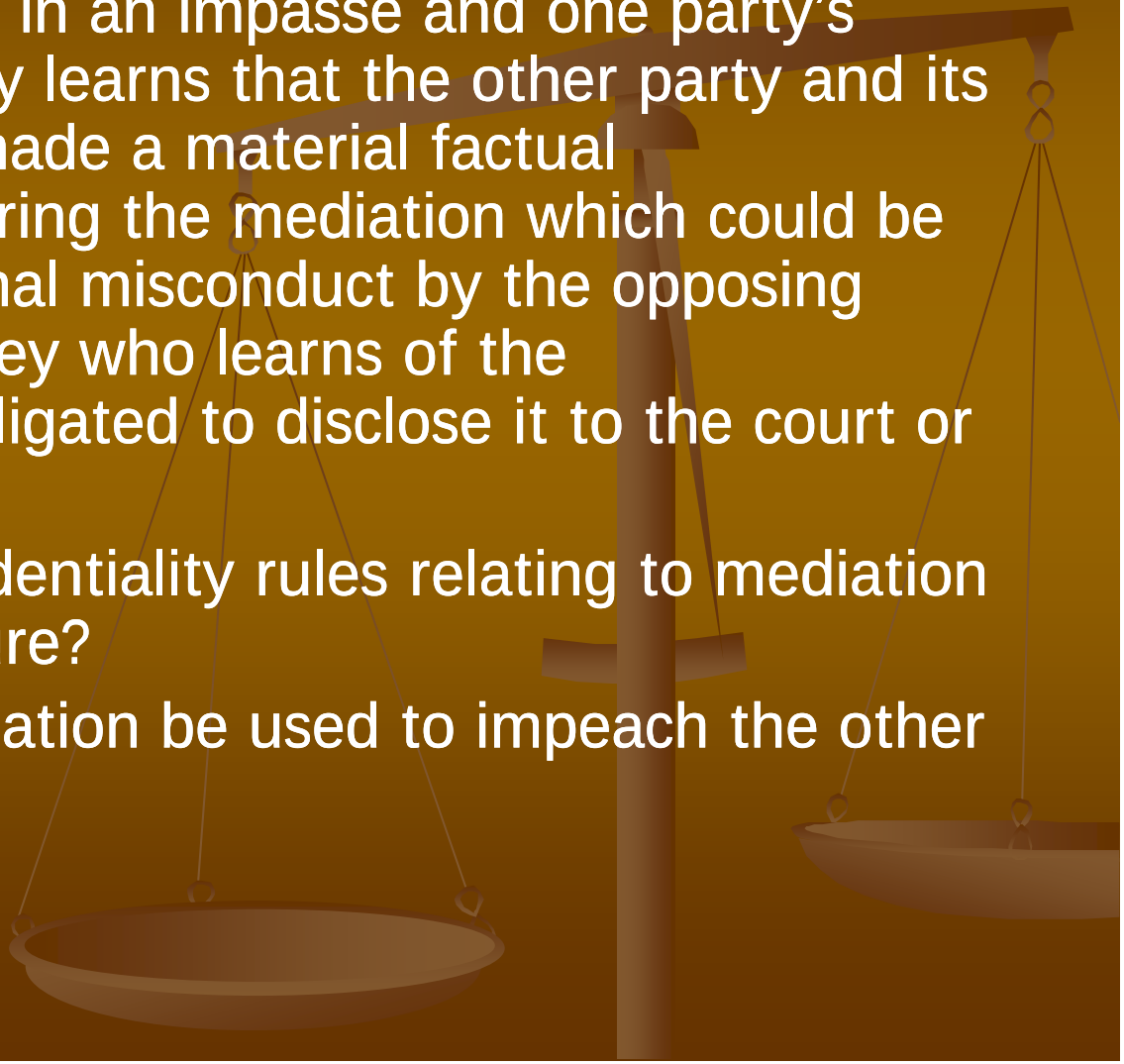


Question 7 Answer & Authority

- YES, if the disclosure was not an official act, or if the mediation was not court ordered if done in bad faith, with malicious purpose or wanton and willful disregard.
- In court ordered mediations, a mediator has the same judicial immunity in the same manner and to the same extent as a judge. § 44.107(1), Fla. Stat. A judge is not immune from liability for nonjudicial actions, and a judge is not immune for actions, even though judicial in nature, that are taken in the complete absence of jurisdiction. Kalmanson v. Locket, 848 So. 2d 374 (Fla. 5th DCA 2003).
- A person serving as a mediator in any noncourt-ordered mediation has immunity from liability arising from the performance of that person's duties while acting within the scope of the mediation function is such mediation is: (a) Required by statute or agency rule or order; (b) Conducted under ss. 44.401-44.406 by express agreement of the mediation parties; or (c) Facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by ss. 44.401-44.406. The mediator does not have immunity if he or she acts in bad faith, with malicious purpose, or in a manner exhibit wanton and willful disregard of human rights, safety, or property. § 44.107(2), Fla. Stat.

Question 8

- If a mediation results in an impasse and one party's attorney subsequently learns that the other party and its attorney knowingly made a material factual misrepresentation during the mediation which could be considered professional misconduct by the opposing counsel, is the attorney who learns of the misrepresentation obligated to disclose it to the court or the bar?
- If so would the confidentiality rules relating to mediation prevent such disclosure?
- Can the misrepresentation be used to impeach the other party at trial?



Question 8 Answer & Authority

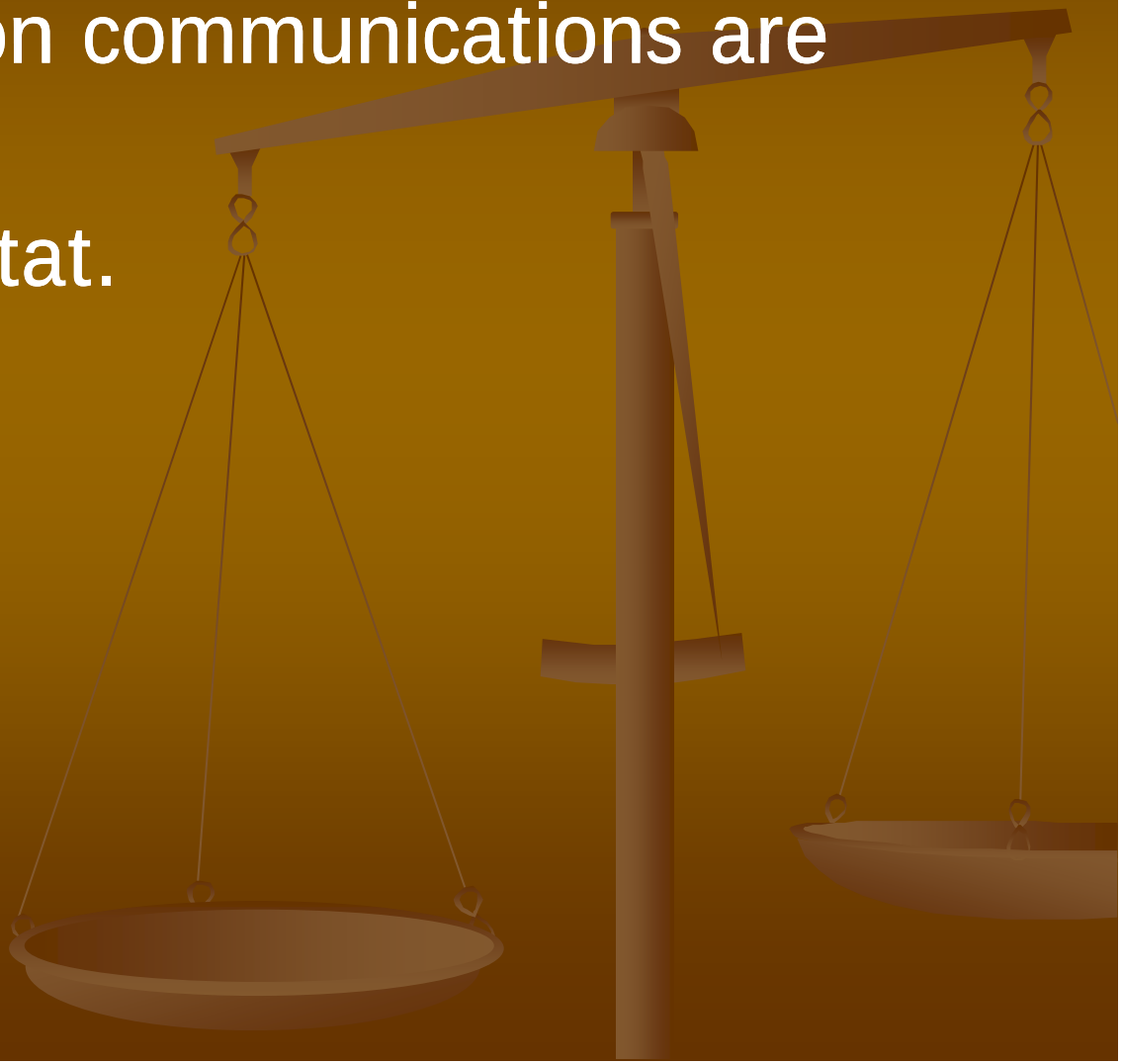
- Part one: Yes the attorney may be obligated to disclose the misrepresentation of opposing counsel to the bar if the misrepresentation is material enough to raise a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer. R. Regulating Fla. Bar 4-8.3
- Part two: No the confidentiality rule does not prevent the attorney from reporting the misrepresentation. The Mediation Confidentiality and Privilege Act provides an exception "for any mediation communication 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." Fla. Stat. §44.405(4)(a)(6)
- Part three: No the misrepresentation can not be used to impeach the other party at trial. Although there is an exception provided for reporting misconduct, the misrepresentation otherwise remains confidential and is not discoverable or admissible for any other purpose, unless it is permitted by another statutory exception. Fla. Stat. §44.405(4)(b)

Question 9

- Can settlement negotiations in mediations be disclosed at trial?

Question 9 Answer & Authority

- NO. All mediation communications are confidential
- § 44.405, Fla. Stat.



Course: Arbitration 101

- Arbitration:
  - Professor Plum: Amy Fischer
  - Kim Kardashian: Nicole Atkinson
  - Kim Kardashian Attorney: Heline Kottler
  - Playboy rep Hugh Heffner: Tim Beckwith
  - Playboy Attorney: Jeff Liggio
  - Arbitrators: Frank Castor, Javier Chipi, Scott Curry
  - Evidence Custodian: George Hebert Jr.
  - PowerPoint by: Greg Morse

Question 1

- May an attorney work with a corporation that represents clients in arbitration matters?

Question 1 Answer & Authority

- No. It would be unethical to do so due to problems concerning conflicts of interest, solicitation, fee-splitting, and assisting the unauthorized practice of law.
- Authority: See Florida Bar Ethics Opinion 95-2. (1995); Rules 4-1.4 and 4-1.2; Rules 4-7.4(a) and 4-8.4(a); Rule 4-1.5(a); 4-5.4(a) and (b); Rule 4-5.5

Question 1 Authority Explanation

- The inquirer's proposal raises numerous issues regarding the Rules of Professional Conduct. First, the attorney-client relationship must be a direct one. See Florida Ethics Opinions 61-1, 67-14, and 67-15. An attorney must have direct communication with the clients and take direction from the clients. See Rules 4-1.4 and 4-1.2, Rules of Professional Conduct. The role of the nonattorney in gathering information and preparing statements of claim in the inquirer's proposal may be a barrier to that direct relationship.

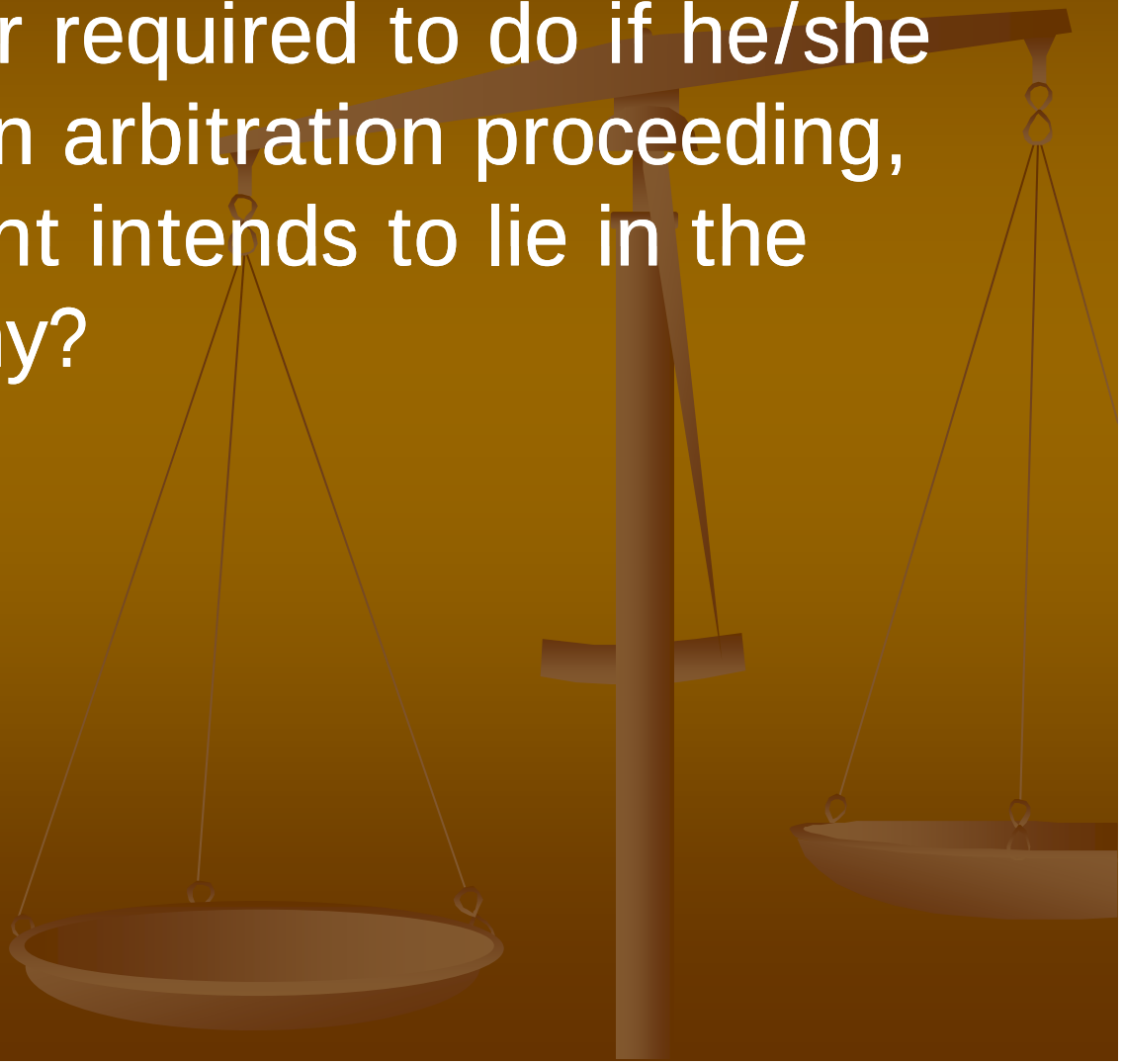
  The proposal also raises the question of prohibited solicitation. An attorney may not solicit business through direct contact with a potential client, and he may not allow another to solicit legal business on his behalf. See Rules 4-7.4(a) and 4-8.4(a), Rules of Professional Conduct. The nonattorney may be soliciting business for the inquirer through direct contact with potential clients in the inquirer's proposal. Rule 4-1.5(a) provides that "[a]n attorney shall not enter into an agreement for, charge, or collect ... a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar." Any advertising of the company would have to follow the Rules of Professional Conduct regarding attorney advertising (Rules 4-7.1 through 4-7.8, Rules of Professional Conduct).

  The business arrangement also appears to interfere with the client's right to choose his own attorney, since it appears that the nonattorney will actually determine who will represent the client in negotiation and at the arbitration. See Florida Ethics Opinions 66-44 [withdrawn] and 70-18. The proposal also implicates rules prohibiting assisting the unauthorized practice of law and splitting fees with nonattorneys. See Rules 4-5.4(a) and (b) and Rule 4-5.5, Rules of Professional Conduct.

  The inquirer should also consider whether he may have some personal conflict in representing the clients given his relationship with the company. See Rule 4-1.7(b), Rules of Professional Conduct. In a similar arrangement regarding living trust preparation, the Florida Supreme Court stated "If the lawyer is employed by the corporation selling the living trust rather than by the client, then the lawyer's duty of loyalty to the client could be compromised." The Florida Bar re: Advisory Opinion - Nonlawyer Preparation of Living Trusts, 613 So. 2d 426 (Fla. 1992). The Court went on to say, "In light of this duty of loyalty to the client, a lawyer who assembles, reviews, executes, and funds a living trust document should be an independent counsel paid by the client and representing the client's interests alone." Id.

Question 2

- What is a lawyer required to do if he/she learns, during an arbitration proceeding, that his/her client intends to lie in the client's testimony?

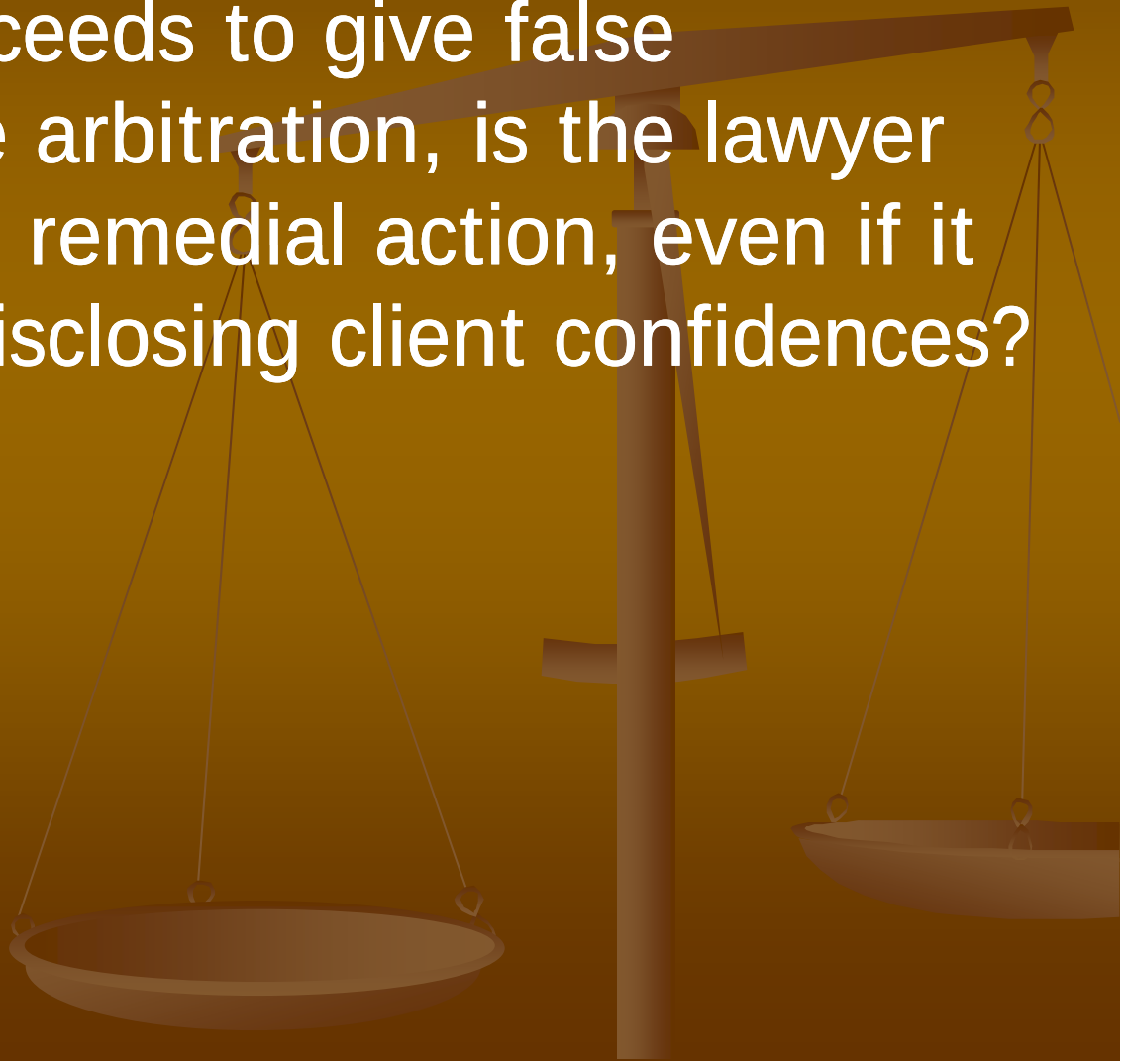


Question 2 Answer & Authority

- Refuse to offer the evidence.
- Rule 4-3.3, Subdivision (a)(4) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence.
- If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

Question 3

- If the client proceeds to give false testimony in the arbitration, is the lawyer required to take remedial action, even if it would require disclosing client confidences?



Question 3 Answer & Authority

- First, address with Client confidentially and give client chance to correct. Second, disclose to panel and they should decide corrective measures.

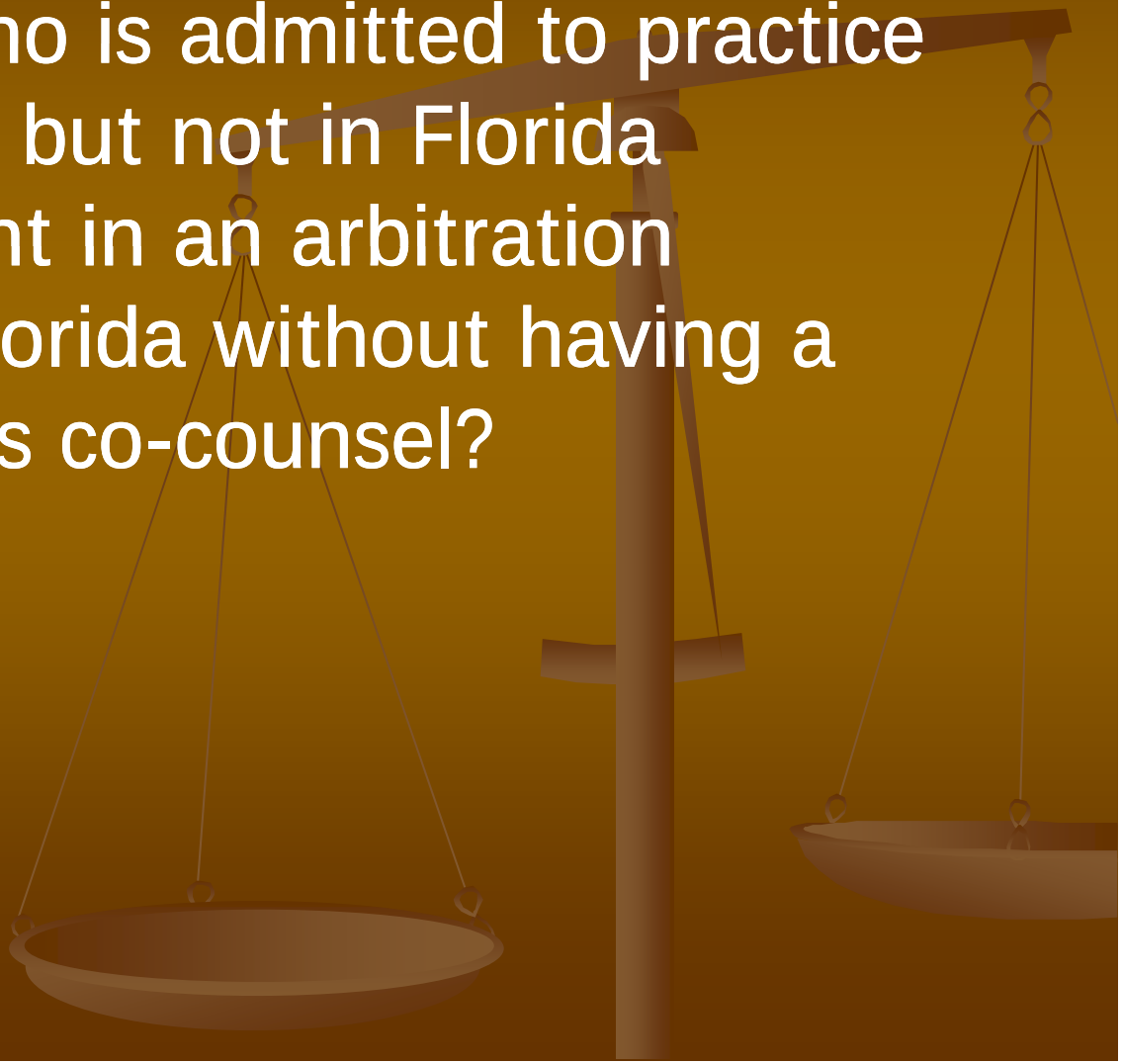
- Under Rule 4-3.3(a)(4), if perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to first address it with the client confidentially, if circumstances permit, and should try to get the client to correct or agree to correct the testimony. In any case, the advocate should ensure disclosure is made to the court. It is for the tribunal then to determine what should be done – making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing.

Question 3 Authority

- The lawyer's duty not to assist witnesses, including the lawyer's own client, in offering false evidence stems from the Rules of Professional Conduct, Florida statutes, and caselaw.
- Rule 4-1.2(d) prohibits the lawyer from assisting a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.
- Rule 4-3.4(b) prohibits a lawyer from fabricating evidence or assisting a witness to testify falsely.
- Rule 4-8.4(a) prohibits the lawyer from violating the Rules of Professional Conduct or knowingly assisting another to do so.
- Rule 4-8.4(b) prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.
- Rule 4-8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- Rule 4-8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice.
- Rule 4-1.6(b) requires a lawyer to reveal information to the extent the lawyer reasonably believes necessary to prevent a client from committing a crime.
- This rule, 4-3.3(a)(2), requires a lawyer to reveal a material fact to the tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, and 4-3.3(a)(4) prohibits a lawyer from offering false evidence and requires the lawyer to take reasonable remedial measures when false material evidence has been offered.
- Rule 4-1.16 prohibits a lawyer from representing a client if the representation will result in a violation of the Rules of Professional Conduct or law and permits the lawyer to withdraw from representation if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent or repugnant or imprudent. Rule 4-1.16(c) recognizes that notwithstanding good cause for terminating representation of a client, a lawyer is obliged to continue representation if so ordered by a tribunal.

Question 4

- Can a lawyer who is admitted to practice in another state but not in Florida represent a client in an arbitration proceeding in Florida without having a Florida lawyer as co-counsel?

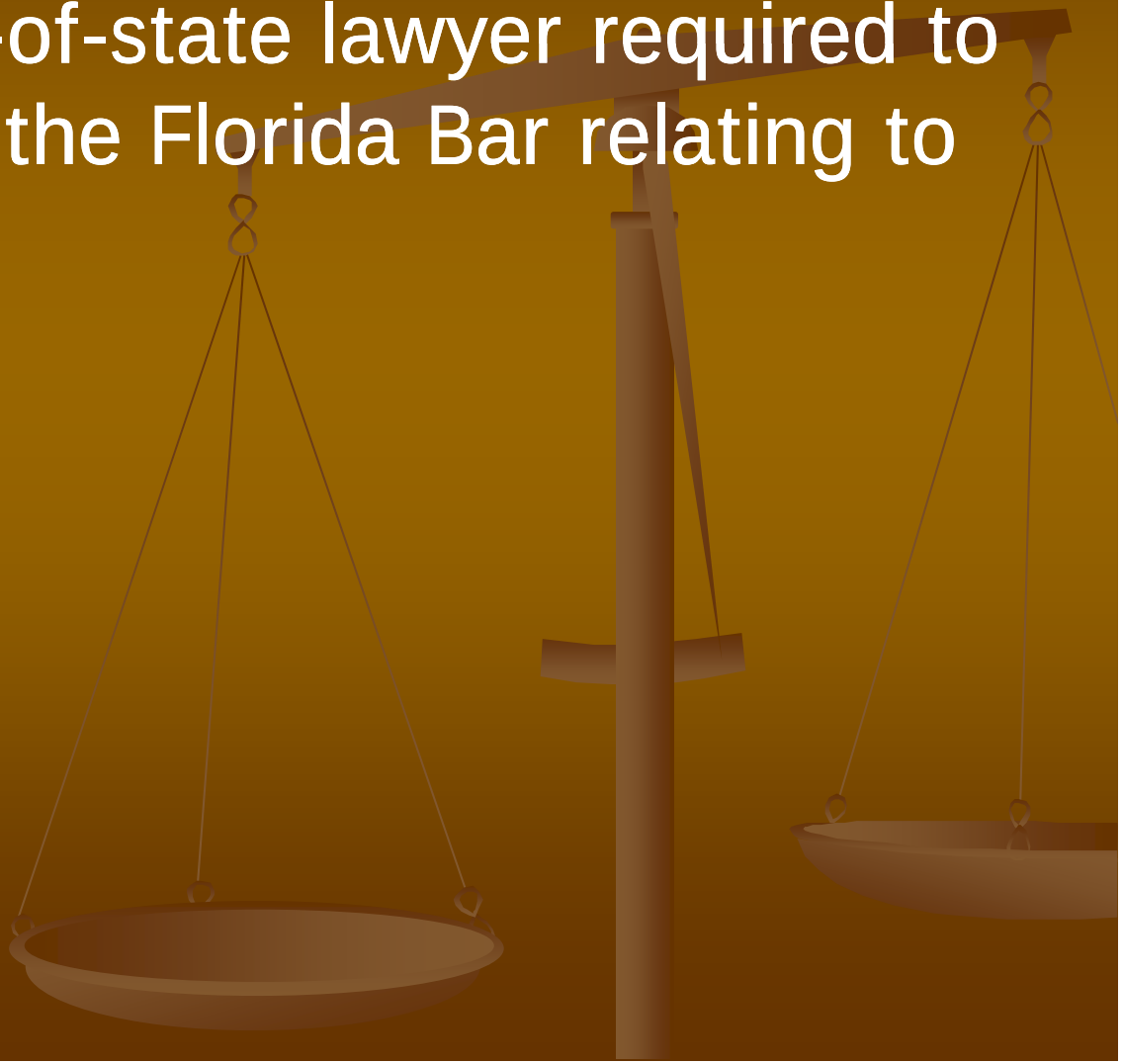


Question 4 Answer & Authority

- Yes. Rule 4-5.5, Subdivisions (c)(3) and (d)(3) permit a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in Florida if those services are in or reasonably related to a ***pending or potential arbitration***, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services are performed for a client who resides in or has an office in the lawyer's home state, or if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation if court rules or law so require.

Question 5

- If so, is the out-of-state lawyer required to file papers with the Florida Bar relating to the arbitration?



Question 5 Answer & Authority

- Yes.
- The lawyer must file a verified statement with The Florida Bar in arbitration proceedings as required by rule 1-3.11 unless the lawyer is appearing in an international arbitration as defined in the comment to that rule.
- For the purposes of this rule, a lawyer who is not admitted to practice law in Florida who files more than 3 demands for arbitration or responses to arbitration in separate arbitration proceedings in a 365-day period shall be presumed to be providing legal services on a regular, not temporary, basis; however, this presumption shall not apply to a lawyer appearing in international arbitrations as defined in the comment to rule 1-3.11.

Question 6

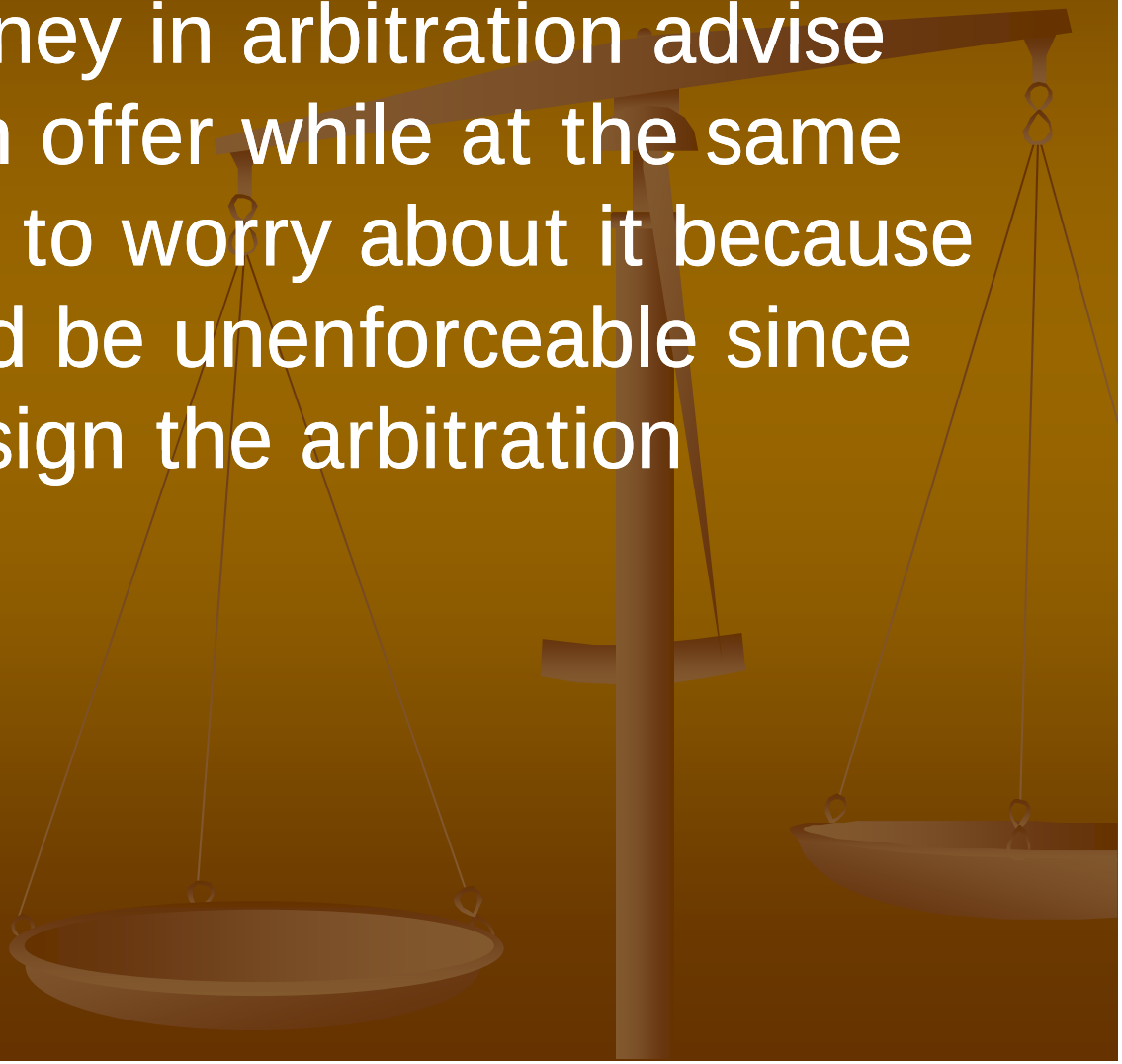
- An Arbitration is being held in beautiful Poland and one party is from Sunny Siberia, Russia and the other party is from Australia. Each party is bringing an attorney barred in their resident country to Poland for the arbitration.
- Can the attorney from Australia and the attorney from Siberia represent clients in arbitration in Poland?

Question 6 Answer & Authority

- Generally, Yes
- Most leading institutional rules recognize the parties' rights of representation in the arbitral proceedings, either expressly or implicitly providing that a party is entitled to be represented by persons of its own choice (see, eg, UNCITRAL Rules, article 4; ICC Rules, article 21(4); LCIA Rules, article 18(1); ICDR Rules, article 12; WIPO Arbitration Rules, article 13(a); ICSID Arbitration Rules, rule 18(1)). These rules reflect the overwhelming practice in international arbitration, which is to leave the parties almost entirely free — for better or worse — to select their own representatives and advisers. However, it should be noted that, at various times, Japan, China, Singapore, Turkey, Portugal, Thailand and the former Yugoslavia have all forbidden foreign lawyers from appearing in arbitrations sited locally — even in international arbitrations.

Question 7

- May Kim's Attorney in arbitration advise her to accept an offer while at the same time stating not to worry about it because the award would be unenforceable since Kim refused to sign the arbitration agreement?

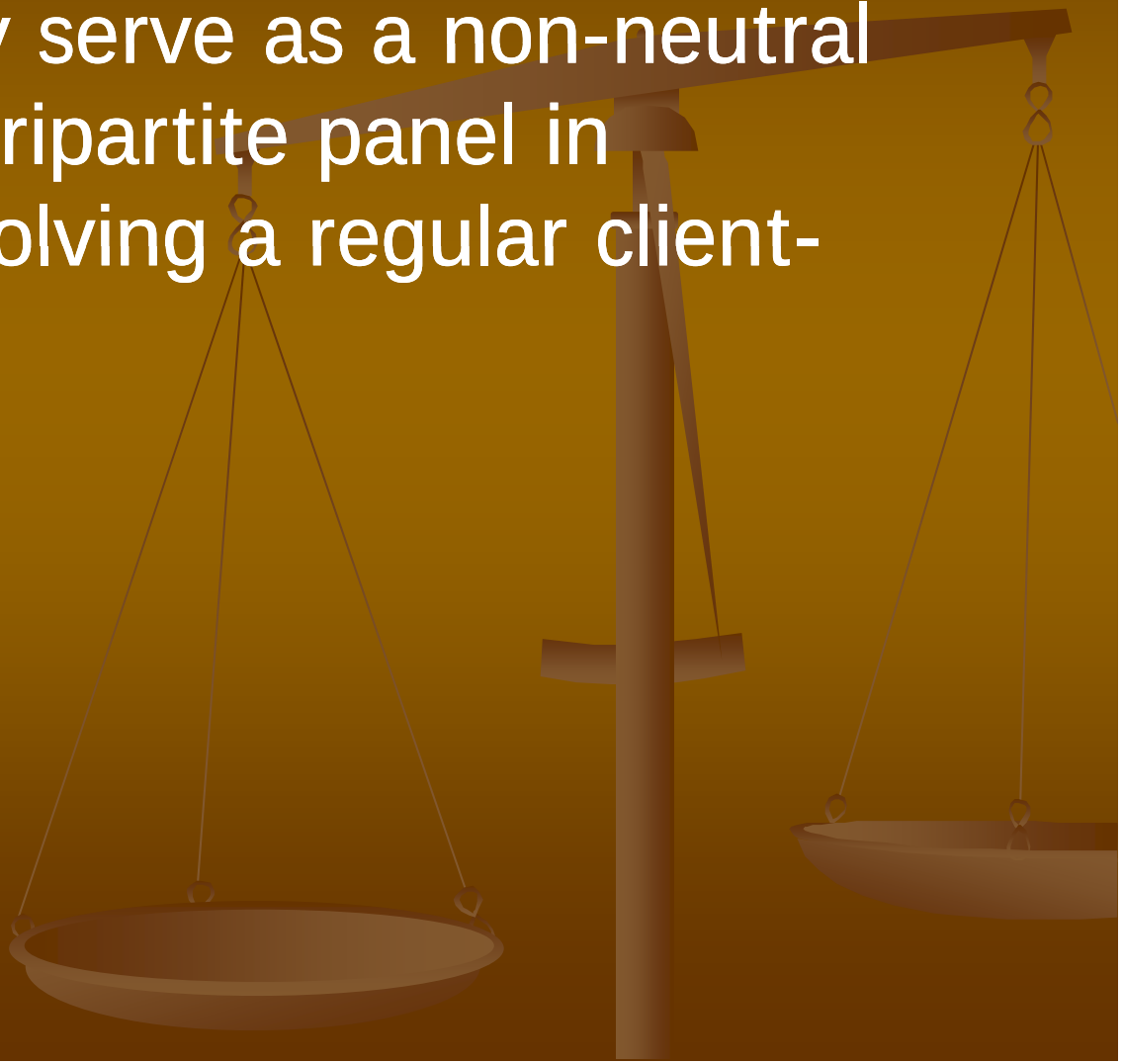


Question 7 Answer & Authority

- No.
- Advising against good faith in negotiations and settlement would be dishonest, fraudulent, or deceitful conduct by the lawyer, in violation of Rule 4-8.4. Also, an arbitration agreement need not be signed, so the lawyer is incorrect in his analysis of enforceability of the award as well.
- Florida Bar Rules of Professional Conduct
- Rule 4-8.4: A lawyer shall not: (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation...
- *4th DCA Case*: *John Hall Electrical Contracting, Inc.*, 792 So. 2d 580 (4th DCA 2001) (affirming the trial court's enforcement of the arbitration agreement in the written contract did not violate Fla. Stat. § 682.02 (2000). Section 682.02 required only that an arbitration clause be in writing, not that both parties sign it. Section 682.02 was unlike the statute of frauds, Fla. Stat. § 725.01 (2000), which required that certain agreements or promises, or some note or memorandum thereof, be in writing and signed by the party to be charged therewith. One purpose of a signature on a contract was to evidence the signer's intent to be bound by its terms. Here, the parties' assent to the terms of the written contract was established by their words and conduct).

Question 8

- May an attorney serve as a non-neutral arbitrator on a tripartite panel in proceedings involving a regular client-party?



Question 8 Answer & Authority

- YES, despite the evident partiality, provided that the lawyer's relationship with the client-party is disclosed and the lawyer is capable of serving with integrity and fairness to all concerned, and the evident partiality does not prejudice a party's rights.
- Florida Bar Ethics Opinion 87-10 (1988): Neither the Florida Arbitration Code nor the decisions of Florida's appellate courts require that arbitrators appointed by the disputants to a tripartite panel be impartial. This is made clear in the recent case of *Lee v. Marcus* , 396 So.2d 208 (Fla. 3d DCA 1981), which quotes the material portions of the Arbitration Code and an earlier decision by the First District Court of Appeal:

  As the very nature of the widely employed three-person arbitration panel itself implies, the arbitrators designated by the parties are not intended to be entirely disinterested or impartial. To the contrary, each is expected to be, in the vernacular, no more than unprejudiced on the side of the contestant which has appointed him. As was accurately said in *Finklestein v. Smith,* 326 So.2d 39, 40 (Fla. 1st DCA 1976),

  [a]rbitrators appointed by disputants to a tripartite panel are expected by the disputants and should be understood by the courts to act as partisans only one step removed from the controversy.

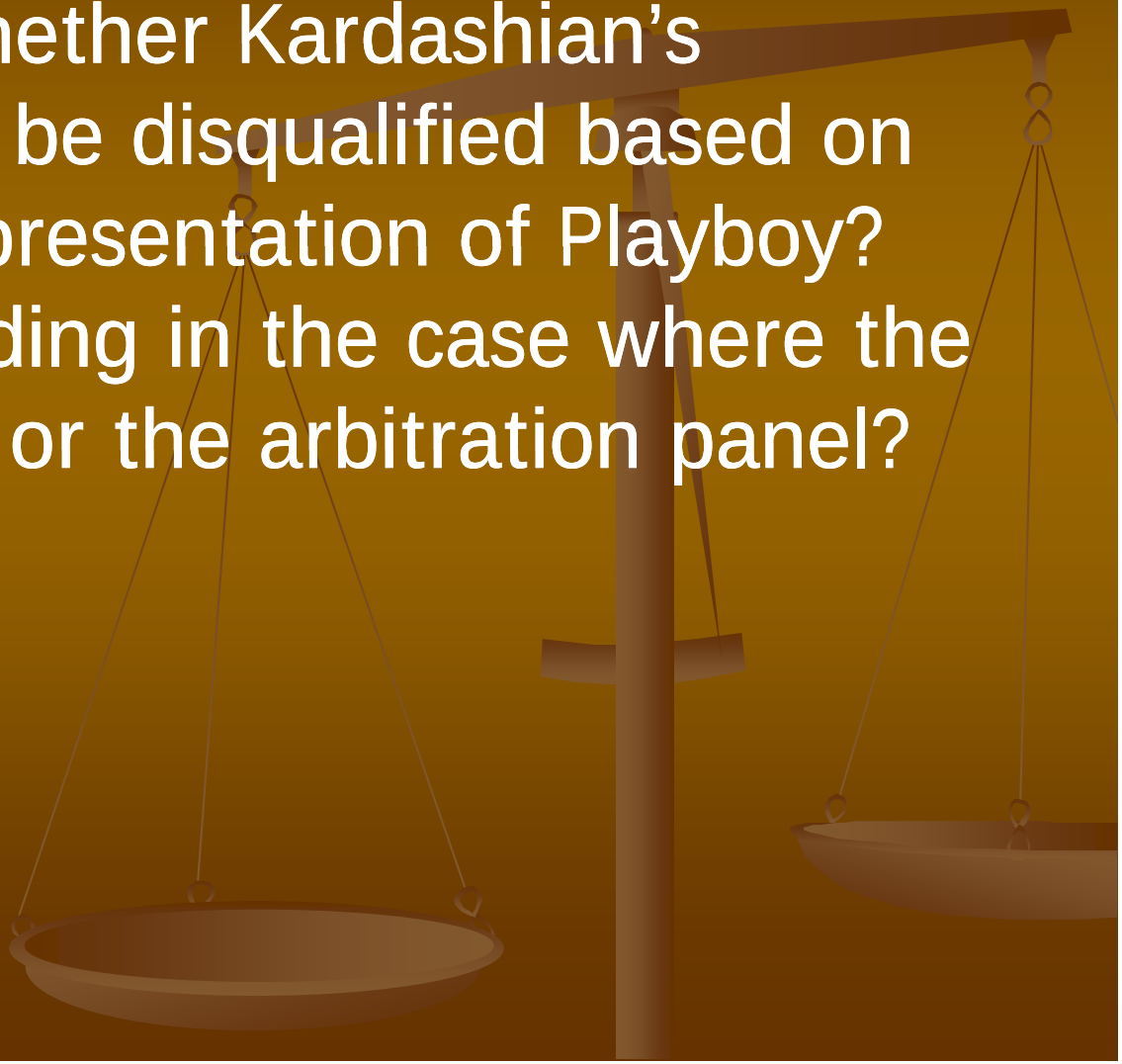
  The Florida Arbitration Code embodies this view. Section 682.13(1)(b), Florida Statutes (1979), provides that an award shall be vacated when

  (b) [t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.

  Since "evident partiality" is pointedly a basis for vacation only in the case of a neutral arbitrator, it is apparent that this provision reflects an understanding of the not disinterested nature of the party-appointed arbitrator. Accordingly, it has been held, seemingly without exception, that-absent overt corruption or misconduct in the arbitration itself, which is not alleged here-no arbitrator appointed by a party may be challenged on the ground of his relationship to that party.
- *4th DCA Case*: *Brandon Jones Sandall Zeide Kohn Chalal & Musso, P.A., et al. v. Beasley & Howard, P.A., et al.,* 925 So. 2d 1142 (4th DCA 2006) (affirming the trial court order denying the petition to vacate the arbitration award because a mere appearance of partiality was insufficient to vacate the award. Fla. Stat. § 682.13(1)(b) requires evident partiality prejudicing a party's rights and here both sides knew that the social and professional relationships among the parties and arbitrators might lead to unrelated contacts during the arbitration).

Question 9

- Who decides whether Kardashian's attorney should be disqualified based on her previous representation of Playboy? The Court presiding in the case where the action was filed or the arbitration panel?

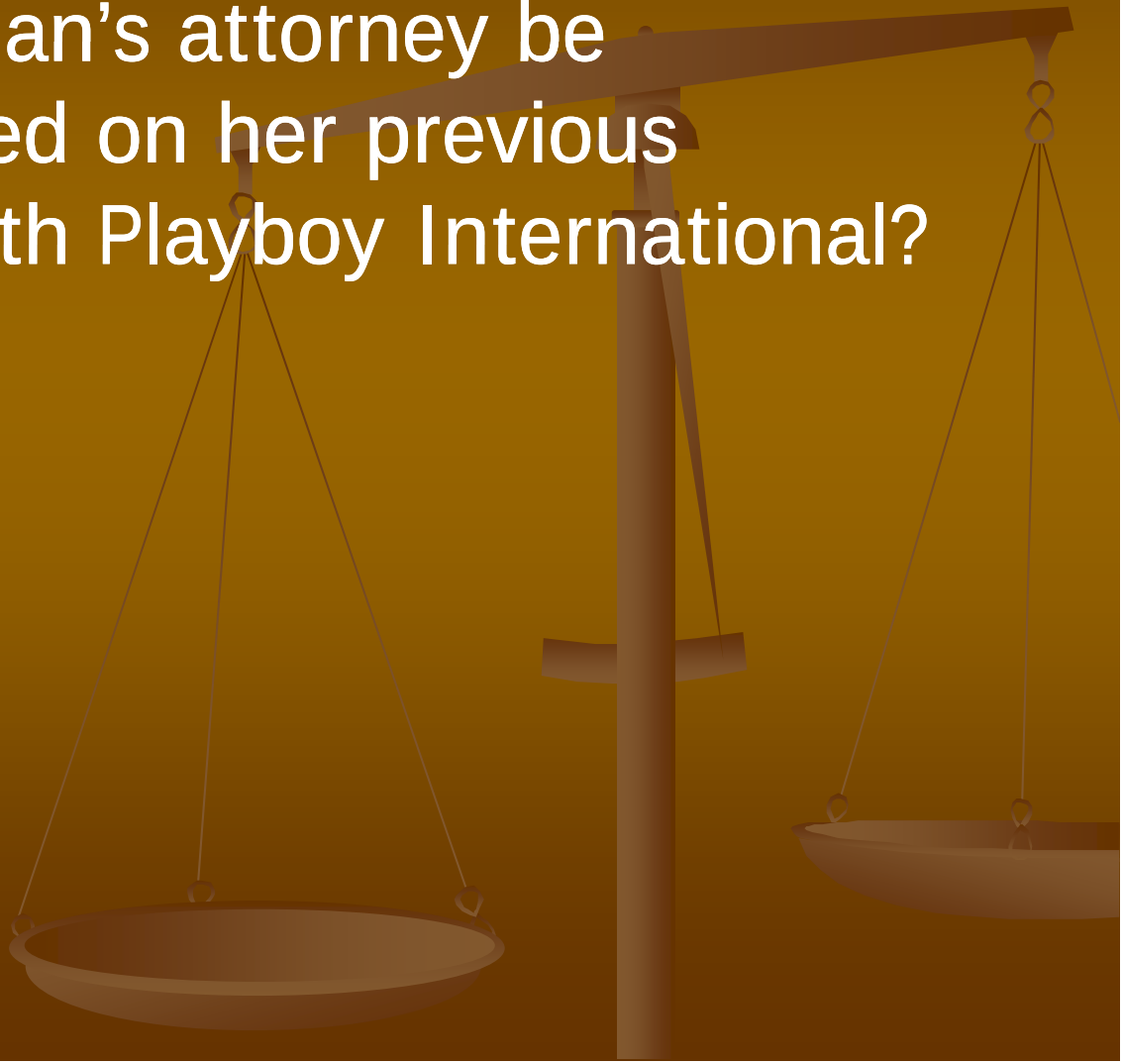


Question 9 Answer & Authority

- Assuming a broad arbitration provision, the arbitration panel. *Reuters Recycling of FL, Inc. v. City of Hallendale*, 993 So.2d 1178 (Fla. 4th DCA 2008); but see, *Morgan Stanley DW, Inc. v. Kelly & Warren, P.A.*, 2002 WL 34382748 (S.D. Fla. 2002)(Issue is for court if not party to arbitration agreement).

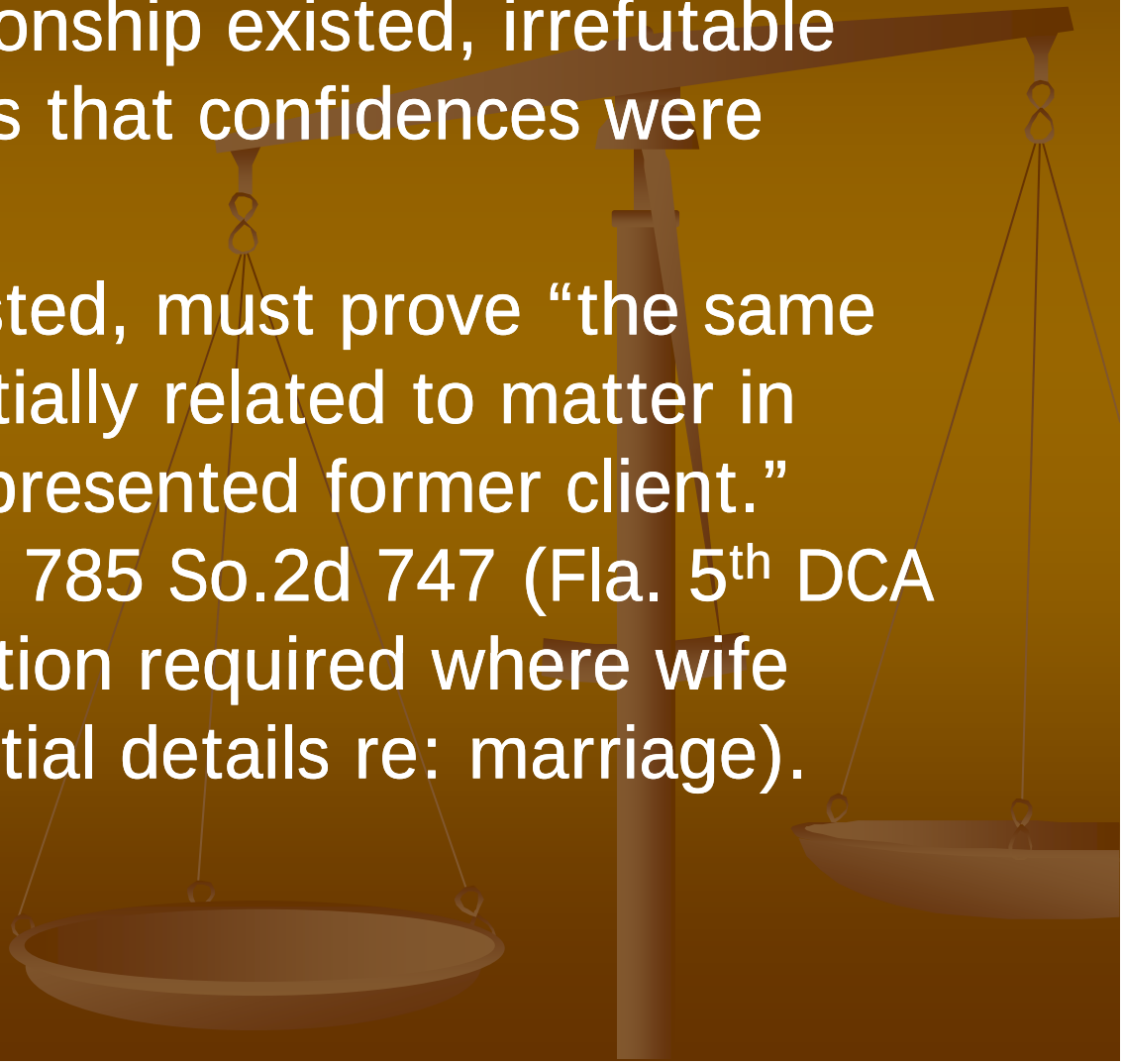
Question 10

- Should Kardashian's attorney be disqualified based on her previous "intercourse" with Playboy International?



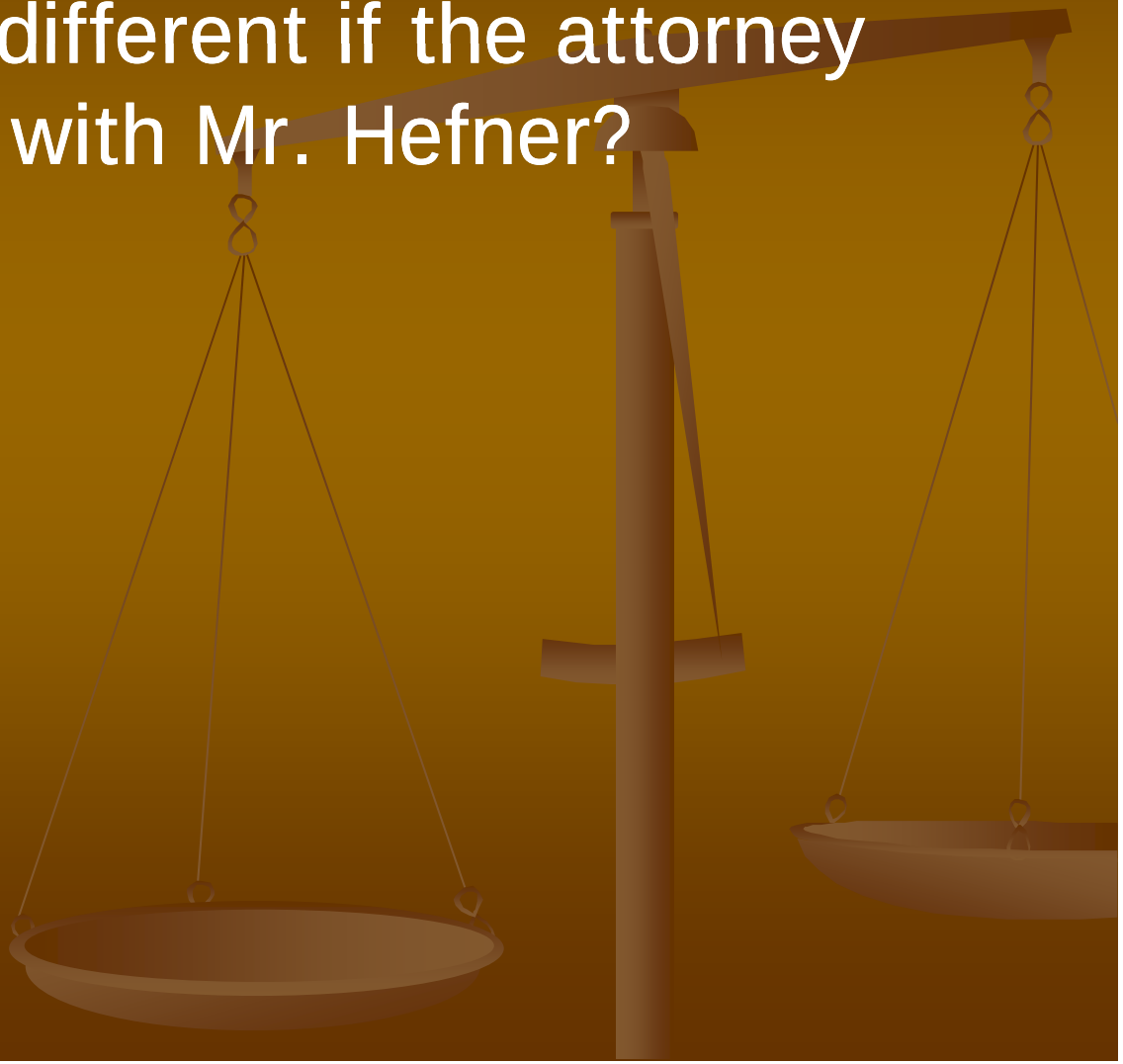
Question 10 Answer & Authority

- If atty-client relationship existed, irrefutable presumption arises that confidences were exchanged.
- If relationship existed, must prove "the same matter or substantially related to matter in which attorney represented former client." *Metcalf v. Metcalf*, 785 So.2d 747 (Fla. 5th DCA 2001)(Disqualification required where wife disclosed confidential details re: marriage).



Question 11

- Is the outcome different if the attorney had intercourse with Mr. Hefner?



Question 11 Answer & Authority

- No.

CARBOLIC SMOKEBALL

- THANK YOU FOR TAKING OUR CLASS