Advisory Opinion *MEAC 2011-014*

Mediator Ethics Advisory Committee c/o Florida DRC, Supreme Court Building, 500 S. Duval Street, Tallahassee, FL 32399

February 7, 2012

The Question:

MEAC 2010-008 has created some confusion for me as to the interplay with prior opinions and their application to a situation in which a mediator joins a law firm. If an attorney with the firm has worked for or represented a party to the mediation in an unrelated matter at any time in the past, is there a clear conflict of interest which prevents the mediator from conducting the mediation?

MEAC 2010-008 states that it is a non waivable conflict for a mediator to conduct a mediation if the mediator has represented a defendant against the specific financial institution involved. The opinion is clearly referencing past representation of a client. MEAC 2010-008 refers to MEAC 2003-006, which states that a mediator has a non waivable conflict if asked to mediate a case in which the mediator has once acted as an advocate for one of the parties. This opinion is based on a family law case and it is not clear in the facts as to whether it is a post dissolution case or a different lawsuit. This opinion can be read broadly enough to include any and all prior representation of a mediation participant. MEAC 2004-007 was a request for clarification of MEAC 2003-006. The Committee noted MEAC 2003-006 involved the same parties, same cases and subject matter. The Committee distinguished the opinion by saying that it is a waivable conflict if the mediator is asked to mediate a case with a prior client as a participant if it is different subject matter or party. MEAC 2002-005 says that a mediator in a firm cannot mediate a case in which the firm has a case pending against a party to the mediation or is actively representing a party in the mediation in another legal matter. The operative concept in this opinion appears to be active legal representation involving a party to the mediation. This opinion was supported in MEAC 2008-007.

MEAC 2009-009 says that it is a conflict for a mediator to conduct a mediation involving a law firm as advocate for a party if the mediator's firm is doing transactional work for the law firm that represents the mediation party.

My question deals with whether there is a conflict if a mediator is asked to mediate a case in which one of parties, be it an individual or business entity, has ever been represented by or been an adverse party in a case involving the firm. It seems that if the logic of MEAC 2010-008 is imputed to a firm situation, it would be a difficult matter for a mediator in a firm to get mediation work, particularly if it is a long standing firm with attorneys who have practiced for many years.

How does MEAC 2010-008 interplay with MEAC 2004-007 in the context of a firm?

Submitted by Certified County, Circuit & Appellate Mediator
Northern Division

Authorities referenced:
Rules 10.340 (a) – (d) and 10.340 Committee Note, Florida Rules for Certified and Court Appointed Mediators
MEAC Opinions *(listed in order as referenced in question):* 2010-008, 2003-006, 2002-005, 2008-007, 2009-009 and 2004-007

Summary

A mediator who is a member of a law firm or professional organization is obliged to disclose any past or present client relationship that firm or organization may have with any party involved in the mediation. There is no dispensation if the conflict is caused by a member of a law firm for which the mediator works or with whom the mediator is affiliated.

Whether the conflict can be waived by the parties in order to allow the mediator to conduct the mediation will depend on the factors of the particular case.

Opinion

Rule 10.340 (a) Conflicts of Interest, states: "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." [emphasis added] Further, rule 10.340 (c) goes on to state: "…if a conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the parties." [emphasis added] In the previous MEAC opinions cited by the questioner, with the exception of 2004-007, the MEAC determined in each set of facts as presented that a conflict of interest "clearly" impaired the mediator's impartiality.

In drafting its decisions and delivering its opinions, the MEAC considers the facts as presented in the submitted question. Whether the conflict can be waived by the parties in order to allow the mediator to conduct a mediation will depend on the factors of the particular case. The MEAC reaffirms its previous opinions, specifically MEAC 2004-007, 2008-007, 2009-009 and 2010-008.

The Committee Note to Rule 10.340 states:

"A mediator who is a member of a law firm or other professional organization is obliged to disclose any past or present client relationship that firm or organization may have with any party involved in a mediation. A conflict of interest which clearly impairs a mediator's impartiality is not resolved by mere disclosure to, or waiver by, the parties. Such conflicts occur when circumstances or relationships involving the mediator cannot be reasonably regarded as allowing the mediator to maintain impartiality."

The scenarios presented in this inquiry are general in nature and not specific enough to determine whether mediator disclosure and party waiver will cure the impediment. A determination would be made looking at the specifics of a particular case.

In order to determine whether a conflict can be cured through disclosure will depend on a variety of factors, including but not limited to: whether the representation is active or occurred in the past; how long in the past; if it involved different parties and/or a related or unrelated subject matter; whether it was the mediator or a member of his/her firm (indirect conflict) who was the advocate for the party and how large and geographically diverse the firm may be.

It is the opinion of the MEAC that if the conflict were indirect and occurred in the past it would potentially be waivable. Regardless of whether a conflict could be waived, full and complete disclosure would be mandatory.

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Date Beth Greenfield-Mandler, Committee Chair