

October 19, 2012

The Question:

Background: I am a family mediator and attorney.

Question One: How long after dissolution of my law firm partnership would it be permissible for me to mediate cases in which my former law partners represent one of the parties? My main concern relates to cases in which they became involved AFTER our partnership was dissolved.

Question Two: Is there any circumstance under which I could mediate cases in which my former law partners were involved while our partnership was in effect, if the parties waived the conflict?

Submitted by a Certified Family Mediator

Northern Division

Authorities Referenced:

Rules 10.330, 10.340, Florida Rules for Certified and Court-Appointed Mediators
Committee Note to Rule 10.340
MEAC Opinions 2002-005, 2008-007, 2009-009

Summary:

Question One: In a case in which a mediator's former law partner is representing a party as an advocate subsequent to the mediator leaving the law firm, there is no pre-determined amount of time that must elapse before the mediator may mediate such cases. In conflict of interest cases, each case must be evaluated individually through a series of filters to determine if the conflict is waivable or a "clear" conflict and therefore non waivable.

Question Two: It is a clear conflict of interest for a mediator to mediate a case in which his/her former law partners represented any of the parties while the partnership was in effect. This would be a non waivable conflict.

Opinion:

Answer to Question One: In a case in which a mediator's former law partner is representing a party as an advocate subsequent to the mediator leaving the law firm, there is no pre-determined amount of time that must elapse before the mediator may mediate such cases. In

conflict of interest cases, each case must be evaluated individually to determine if the conflict is waiveable or if the conflict is a “clear” conflict and therefore non-waiveable. A clear conflict will preclude the mediator from taking the case and/or removing him/herself from a case that has been initiated, while a waiveable conflict requires disclosure to the parties and a waiver by them in order for the mediator to proceed.

Rule 10.340 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. Further, according to the Committee Note to Rule 10.340, “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.”

The Committee Note goes on to state, “the duty to disclose thus includes information relating to a mediator’s ongoing financial or professional relationship with any of the parties, counsel, or related entities. Disclosure is required with respect to any significant past, present, or promised future relationship with any party involved in a proposed mediation.”

The first filter should always be: “Do I feel that I can be impartial in this case?” In order to answer such a question, a mediator must be aware of his/her own beliefs and biases and be able to evaluate whether he/she can be impartial.

It is important to note as the mediator is applying this “filter” test, not only the **actuality** of a conflict but also the **appearance** of partiality is mentioned in the rules. In evaluating the nature of conflict, the mediator must reflect on the perception of the parties, not only during the mediation but in the event the outcome is not to their liking. A mediator may want to consider whether an outsider, hearing about the conflict for the first time and being unaware of a waiver, could believe the mediator should have declined service or removed him/herself from the mediation process.

The next filters are the passage of time and the type of relationship. Due to the perception of intimacy the term “partnership” conveys, a mediator should always disclose a former partnership as well as the amount of time which has elapsed since its dissolution. Although the MEAC declines to create a bright-line rule about how much time should pass, the more remote in time the dissolution, the less likely the former partnership alone would create a conflict.

This MEAC opinion is limited to only those conflict cases involving a mediator’s relationship to his former partners, not his/her relationship to the client(s).

Answer to Question Two: The conflict in question two arises because a party in the mediation was the client of the mediator's former law partner during the time the mediator was a partner in the law firm. The MEAC continues to have confidence in its former opinions 2002-005 and 2008-007 which state is a clear (non waivable) conflict of interest for a mediator to mediate a case in which his/her former law partners represented any of the parties while the dissolved partnership was in effect, regardless of whether the parties would like to waive the conflict¹.

The MEAC concludes a fiduciary relationship was created in the representation of the party. Therefore, the same conflict exists after the law partnership is dissolved in cases in which the mediator's former law partners were involved during the partnership's existence.

October 19, 2012

Date

Beth Greenfield-Mandler
Beth Greenfield-Mandler, Committee Chair

¹ In MEAC 2002-005 and 2008-007, the Committee determined that a clear conflict of interest exists whenever a law firm in which a mediator is a partner is part of an adversary process involving a party to the mediation. In MEAC 2009-009, the Committee opined that whether the nature of the legal work is transactional or adversarial, the premise remains that one of the parties has a relationship with the mediator's law firm that cannot be overcome by disclosure of the mediator or waiver by the parties.