

***Advisory Opinion******MEAC 2012-006***

Mediator Ethics Advisory Committee

Florida DRC, Supreme Court Building Tallahassee, FL 32399

December 6, 2012

**The Question:**

I represented a couple in an adoption. They were co-petitioners in the case and I was the attorney for both of them, not just one of them. They've now split and they both want me to be their mediator.

Question One: Can I do it?

I did an estate plan for a couple with the same arrangement. I was the attorney for both and not for one or the other. They broke up and want me to mediate.

Question Two: Can I?

In both situations, these couples see me as their family lawyer and agree that as they feel comfortable with me, they want me to mediate for them.

Submitted by a Certified Family Mediator  
Southern Division

**Authorities Referenced:**

Rules 10.200, 10.300, 10.330, 10.340, 10.370, Florida Rules for Certified and Court-Appointed Mediators

**Summary:**

Yes, under certain circumstances, an attorney who conducted a joint representation of a couple in an adoption or in working with them on an estate plan, may, upon both parties' request, subsequently serve as their mediator in an unrelated legal proceeding.

**Opinion:**

Rule 10.340(a) 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."

The situations described do not appear to present “a clear conflict of interest.”

An attorney who represents a couple in an adoption or in estate planning may be representing both clients jointly who have a common goal with no inherent or apparent conflicts. The Florida Bar refers to this as “joint representation.” While this type of representation is allowed by The Florida Bar, before an attorney who is conducting a joint representation takes on the role of mediator, specific actions by the attorney must be analyzed and, thereafter, disclosures made regarding confidentiality and privilege.

In the two processes described, the presumption is that the clients had no actual or potential adverse interests and the attorney had no reason to meet separately with either party.

The attorney should ensure all information was shared between the clients and the lawyer, that there was no information revealed by one party to the lawyer and not disclosed to the other party, and that the lawyer had no need for separate meetings with the parties to discuss substantive matters. If these criteria are met, the previous legal relationship would not appear to compromise the mediator’s ability to be impartial.

Although the facts presented in the question regarding estate planning do not seem to present a clear conflict of interest, the potential for substantive differences in desires between the parties may be greater in an estate plan than in an adoption. In estate planning, it is possible that the parties may have adverse interests, not have a shared goal, and not be unified in their needs or desires. The facts presented do not include whether the parties have joint or separate wills and/or trusts, common or different heirs, joint or separate assets and liabilities, and common or unique bequests. Therefore, more careful scrutiny of the joint representation must be made prior to the attorney agreeing to mediate.

In either scenario, after careful analysis, the attorney may serve as the couple’s mediator providing there is no conflict of interest. In conducting the analysis, the lawyer should consider whether a reasonable person would regard the former representation as creating a clear or perceived conflict of interest or the appearance of partiality. “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.” Rule 10.330 (a). If any action in the previous joint representation could be interpreted as creating a perceived or clear conflict, the lawyer should refuse to mediate.

A goal of the Rules for Certified & Court-Appointed Mediators is to “instill public confidence in the mediation process.” Rule 10.200. Parties who have a positive, established relationship with and trust their mediator are likely to have confidence in the mediation process. One of the purposes of mediation is to encourage an amicable future relationship between the parties based on an amicable resolution of their issues. Utilizing a mediator with whom the

parties have a trusted relationship would further that goal provided the necessary analysis has taken place and no actions by the lawyer would create a real or perceived conflict.

Additionally, before the mediation begins, the now mediator should ensure the clients understand the difference between the roles of attorney and mediator. This includes explaining that a mediator's responsibilities include "honoring their right of self-determination; acting with impartiality; and avoiding coercion, improper influence, and conflicts of interest." Rule 10.300. It would be important to make clear to the parties that although an attorney is an advocate who is hired to give legal advice, a mediator is prohibited from doing so according to Rule 10.370(c), and because the parties' interests may now be adverse they should consider and may choose to obtain independent legal counsel, Rule 10.370(b).

The MEAC distinguishes MEAC 2010-008 and 2003-006 because those inquiries involved mediators who were attorneys and had represented only one of the parties in the mediation, not both parties who had a common, united interest as in an adoption, or both parties in estate planning.

December 6, 2012  
Date

  
Beth Greenfield-Mandler, Committee Chair