

FLORIDA SUPREME COURT
Mediator Ethics Advisory Committee

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Supreme Court of Florida
Dispute Resolution Center

Opinion Number: 2013-010
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The Question

In small towns there is sometimes a dual relationship that exists since there are not a lot of mediators around and a mediator may do business with an in-law or ex in-law who is an attorney advocating for his or her client. I have the following questions in that regard:

Question One: Is there anything required beyond simple disclosure by the mediator to the clients when a son/daughter or ex-husband or ex-wife is the attorney of record for one of the parties?

Question Two: What is ethically mandatory?

Question Three: Should a written disclosure and signed waiver document be used in each case that tells the judge that the customers or clients agreed that this mediator was authorized to mediate and that they are aware of the relationships discussed with them during disclosure?

Question Four: Has the mere perception of an ethics violation created an uneven, unbalanced mediation process even though no real apparent violation may have occurred if the mediator can be totally impartial?

Question Five: If another mediator is available on a list of contract mediators or volunteer mediator list, should the mediator who might give this perception of potential ethics difficulty refer the case to another mediator?

Question Six: What would the best practices be for this situation other than avoidance altogether?

Submitted by
Certified County, Family, Dependency and Circuit Mediator
Northern Division

Authorities Referenced

Rules 10.330(a), 10.340(a) and (c), Rules for Certified and Court-Appointed Mediators
MEAC Opinion 2004-008

Summary

It is a clear conflict of interest for a mediator to mediate a case when a party's attorney is or was previously related to the mediator. A clear conflict of interest cannot be waived regardless of disclosure.

Opinion

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," rule 10.340(a), Florida Rules for Certified and Court-Appointed Mediators. This rule also provides that a "mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest." Impartiality is defined as "freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual." (Emphasis added.) Rule 10.330(a), Florida Rules for Certified and Court-Appointed Mediators.

In MEAC 2004-008, the Committee stated,

if there is a clear conflict, the mediator must withdraw from (or not accept) the mediation 'regardless of the express agreement of the parties.' Rule 10.340(c). An example of a clear conflict would exist if you were asked to mediate a case your daughter is personally handling as opposed to a case from her firm with which she has no involvement. A case your daughter is personally handling would be a nonwaivable, clear conflict, while her firm's case with which she had no involvement, may be waivable after disclosure, depending on the circumstances.

The MEAC sees the circumstances described in 2004-008 as analogous to the questions you have raised.

To answer your questions directly:

Question One: Is there anything required beyond simple disclosure by the mediator to the clients when a son/daughter or ex-husband or ex-wife is the attorney of record for one of the parties?

Answer to Question One: Disclosure does not resolve the clear conflict of interest created by this situation. The conflict is non-waiveable.

Question Two: What is ethically mandatory?

Answer to Question Two: Mediators may not mediate a matter that poses a clear or undisclosed conflict of interest. In this instance, the mediator should either withdraw from an ongoing mediation or refuse to mediate the case.

Question Three: Should a written disclosure and signed waiver document be used in each case that tells the judge that the customers or clients agreed that this mediator was authorized to mediate and that they are aware of the relationships discussed with them during disclosure?

Answer to Question Three: It would be inappropriate for any disclosure or waiver document to be provided to the court as a disclosure does not resolve the clear conflict of interest created by this scenario.

Question Four: Has the mere perception of an ethics violation created an uneven, unbalanced mediation process even though no real apparent violation may have occurred if the mediator can be totally impartial?

Answer to Question Four: Appearance is at least as important as actuality. Rule 10.340(a), Conflicts of Interest, states that a mediator shall not mediate if the conflict “compromises or **appears** to compromise the mediator’s impartiality.” (Emphasis added.) Impartiality, the definition of which was provided above, is “in word, action, or **appearance**.” (Emphasis added.) Rule 10.330(a), Florida Rules for Certified and Court-Appointed Mediators.

Question Five: If another mediator is available on a list of contract mediators or volunteer mediator list, should the mediator who might give this perception of potential ethics difficulty refer the case to another mediator?

Answer to Question Five: The manner by which your circuit assigns volunteer or contract cases when there is a conflict with the assigned mediator is beyond the jurisdiction of the MEAC. However, the MEAC would caution that referrals to a specific mediator by the inquirer could lead to other violations of the rules. In the circumstances described by the inquirer, best practice would be for the mediator, to refer the case back to the program coordinator.

Question Six: What would the best practices be for this situation other than avoidance altogether?

Answer to Question Six: Declining to mediate or immediate withdrawal of the mediator in a case that poses a clear conflict of interest is the ethically required action.


Signed and Dated by Beth Greenfield-Mandler, MEAC Committee Chair, 