

FLORIDA SUPREME COURT
Mediator Ethics Advisory Committee

Opinion Number: 2017-001

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The Question

Rule 10.370(b) states that “[w]hen a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the *right* to seek independent counsel.” [Emphasis added]

The Committee Notes to Rule 10.370(b) state “The primary role of the mediator is to facilitate a process which will provide the parties an opportunity to resolve all or part of a dispute by agreement if they choose to do so. A mediator may assist in that endeavor by *providing relevant information or helping the parties obtain such information from other sources.*” [Emphasis added].

Rule 10.370(a) permits a mediator to provide information that the mediator is qualified by training or experience to provide so long as it does not compromise standards of impartiality or party self-determination.

Suppose an unrepresented plaintiff pursues claims against a defendant. During the mediation, the mediator learns that the unrepresented plaintiff has a number of significant potential new and different claims against the defendant that are not the subject of the current mediation or any current lawsuits. The mediator suspects some of those claims may be viable negligence or malpractice cases against the defendant. Consistent with Rule 10.330, the mediator maintains impartiality throughout the mediation even after learning about the potential new claims. The unrepresented plaintiff refuses to settle with the defendant, so the mediation results in an impasse.

Following the mediation, the unrepresented plaintiff contacts the mediator to discuss his case and also goes into additional details about the other potential negligence claims he has against the same defendant. He has not filed a lawsuit to pursue any of those additional claims. The mediator believes the unrepresented plaintiff needs to hire a lawyer or to contact a not-for-profit advocacy group to assist him with his potential claims against the defendant. The mediator is aware of a lawyer who specializes in these types of claims and is also aware of a not-for-profit advocacy group that advocates and litigates claims on behalf of similarly situated plaintiffs. The mediator has no past or ongoing relationship with the lawyer or not-for-profit advocacy group.

Rule 10.370(b) is limited to circumstances where the mediator believes the party does not understand how *an agreement* may affect legal rights or obligations. The rule does not appear to create a continuing duty for the mediator that extends past the end of the mediation, i.e. a situation where a party contacts the mediator after the mediation concludes.

Does Rule 10.370, or the Committee Notes, permit the mediator, post mediation, to recommend that the unrepresented party contact a specific lawyer or not-for-profit advocacy group to advance his potential claims against the defendant, or is such a referral inconsistent with Rule 10.330 and the mediator’s duty to maintain impartiality throughout the mediation process?

Submitted by a FSC County, Circuit and Appellate Mediator
Central Division

Authorities Referenced

Rules 10.330(a), 10.370(b) and 10.620, Florida Rules for Certified and Court-Appointed Mediators

Summary

A mediator may not refer a party to a specific lawyer or not-for-profit advocacy group when contacted by the party after a mediation. Such a referral would be inconsistent with the mediator's duty to maintain impartiality throughout the mediation process.

Opinion

A mediator's impartiality is essential to the mediation process and must be maintained throughout the entire process. Rule 10.330(a), Florida Rules for Certified and Court-Appointed Mediators, states:

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.

There is no rule which prohibits a mediator from speaking to a party after a mediation; however, the mediator must continue to provide information in a manner "consistent with standards of impartiality" under rule 10.370(a). In order to refrain from "bias in word, action, or appearance" and continue the "commitment to assist all parties, as opposed to any one individual," rule 10.330(a), the mediator in the question presented may continue to advise a party of their right to seek independent legal counsel as set forth in rule 10.370(b) after a mediation, but should not recommend a specific lawyer or not-for-profit advocacy group. A specific referral would be inconsistent with the mediator's duty to maintain impartiality throughout the mediation process as it would be assisting one individual. The mediator's continuing duty to remain impartial is confirmed by rule 10.620, Integrity and Impartiality, "A mediator shall not accept any engagement, provide any service, or perform any act that would compromise the mediator's integrity or impartiality."


Signed and Dated by Susan Dubow, MEAC Committee Chair