

FLORIDA SUPREME COURT
Mediator Ethics Advisory Committee

Opinion Number: 2017-004

Date Issued: September 20, 2017

The Question

I recently learned about a questionable billing practice utilized by at least one mediator. I would appreciate the Committee's thoughts on the following business practice:

The mediator sends a written explanation of the mediator's fees to the parties or their counsel prior to mediation. The letter complies with the requirements of Rule 10.380(c) and includes the basis for and amount of charges, postponement and cancellation fees, the basis for other charges, and the parties' *pro rata* share of mediation fees. Importantly, the written explanation informs the parties that the mediator's fee will be equally divided between them which is also consistent with Rule 10.380(b)(3).

When the parties and counsel arrive at the mediation, the receptionist at the mediator's office learns that the defendant is not represented by counsel (defendant is a *pro se* party). The receptionist informs the lawyer for the plaintiff that the mediator's policy concerning *pro se* parties is to require the plaintiff's counsel (or the plaintiff) to be responsible for the entire mediator's fee in the event the *pro se* party fails to pay. The receptionist informs the lawyer that the mediator will not mediate the case unless the lawyer signs a document agreeing to this arrangement. The lawyer, who is reluctant to cancel the mediation now that all parties are present and is concerned about court imposed deadlines for completing mediation, signs the document.

Questions:

1. When a mediator provides a written explanation of fees and costs prior to mediation and informs the parties how the mediator's fee will be divided, is a mediator permitted to change those conditions prior to mediation?
2. Are there any problems with the mediator changing the conditions or terms of payment on the morning of the mediation after the parties and counsel arrive at the mediation?

3. Is it permissible for the mediator, without the consent of all parties, to unilaterally change the parties' pro rata share of the mediator's fees?
4. Is a mediator permitted to condition his/her performance on one of the parties or lawyers agreeing to pay the other parties' share of the mediator's fee in the event that party fails to pay?
5. Is the mediator's business practice consistent with Rule 10.310 – Self Determination, or Rule 10.330 – Impartiality?

FSC Circuit, Appellate, and County Court Mediator
Central Division

Authorities Referenced

Rules 10.200, 10.220, 10.300, 10.310, 10.330, 10.340, 10.380, and 10.410, Florida Rules for Certified and Court-Appointed Mediators

Summary

A mediator's business practices regarding fees and expenses must be consistent with rule 10.380 and the other standards of ethical conduct in the Florida Rules for Certified and Court-Appointed Mediators. Any change in the terms and conditions of the fees and expenses must be agreed upon by the parties so as to be consistent with self-determination and impartiality.

Opinion

At the outset, it is important to note the general principle regarding mediation fees and costs stated in rule 10.380(a), Florida Rules for Certified and Court-Appointed Mediators, that "a mediator holds a position of trust." "The public's use, understanding, and satisfaction with mediation can only be achieved if mediators embrace the highest ethical principles," rule 10.200. The parties' trust is established by their experiences with the mediator.

Answer to Question One:

The MEAC believes any change to the terms and conditions of fees and costs after the parties have received the mediator's written explanation of them should only occur if the mediator proposes the revisions with enough advance notice to allow the parties a reasonable amount of time to make an informed and voluntary decision regarding the revisions or opt to choose another mediator. Allowing the parties such time will: safeguard the parties' trust in the mediator; protect their self-determination and avoid any appearance of coercion by the mediator, rules 10.220, 10.300, 10.310(b); avoid the appearance of partiality in the event that the change could appear to favor one party, rule 10.330(a); and maintain equal bargaining power between

the mediator and the parties regarding the fees and costs, rule 10.410. The mediator's conduct prior to the beginning of mediation sets the tone for the entire process.

Answer to Question Two:

The situation posed in the second question highlights the ethical issues raised by the mediator changing the terms of the fee and cost payment after the parties have received the mediator's written explanation. Changing the terms and conditions upon arrival of the parties at mediation may create an environment in which the parties may believe that they are being improperly influenced or coerced to agree to the new terms and conditions, and they have no choice but to do so or incur the cost (lost salary for time away from work, transportation, child care, etc.) and time delay of scheduling mediation with another mediator. Additional pressure to agree may be experienced by the parties if they have an upcoming court date which does not permit them to choose a different mediator. The parties arrive at mediation relying on the terms and conditions they have received. Creating an environment in which the parties are asked to make a decision about new fee and cost terms and conditions quickly, perceive that they have no choice, or feel like they do not have equal bargaining power with the mediator, is likely to break their trust in the mediator and affect their satisfaction with the mediation process. As with any issue presented at mediation, the rules mentioned above require that the parties must be allowed sufficient time to make an informed and voluntary decision regarding the changes, including, if needed, time to negotiate the changes.

Answer to Question Three:

It is not permissible for the mediator, without the informed and voluntary consent of all parties to unilaterally change the parties' pro rata share of the mediator's fees as doing so would violate the parties' rights to self-determination and fail to maintain the mediator's impartiality as explained above.

Answer to Question Four:

The mediator may not condition their performance on one of the parties or lawyers agreeing to pay the other party's share of the mediator's fee in the event that the other party fails to pay unless the mediator has provided the parties or their lawyers with a written explanation of this condition prior to mediation as required by rule 10.380(c) and the parties have agreed to it as required by 10.380(c)(4). If the mediator made such a condition without meeting the requirements of the rule, the mediator would be failing to maintain their impartiality, rule 10.330(a), and creating a conflict of interest under rule 10.340(a) by favoring the party who is not responsible for their own fee.

Answer to Question Five:

As explained above, the business practices described by the inquirer are not consistent with rules 10.310 and 10.330.

 

Signed and Dated by Susan Dubow, MEAC Committee Chair