

THE QUESTION:

Dear Distinguished Panel Members:

I am concerned about the extent of disclosure that must be made by certified and court-appointed mediators pursuant to Rule 10.070 (b) (1) and (2) and the clarifying Committee Notes. As a mediator, I frequently mediate with the same attorneys and claim representatives on a regular basis. In these situations, I always disclose to the other parties and attorneys involved in the case that I have previously mediated with some of the other attorneys and/or claim representatives involved in the mediation.

However, I am extremely concerned about the extent of disclosure, if any, a certified or court-appointed mediator must make when the mediator has mediated with a certain PARTY in a previous (or several previous) mediation conference. For example, must mediators disclose the fact that they have previously mediated a case involving a physician who is currently a defendant in a medical malpractice case that they are assigned to mediate? Do mediators have an affirmative duty to disclose this information to opposing parties and their counsel regardless of the nature of the prior mediations? If the physician in the medical malpractice case was a plaintiff in the previously mediated collections case, must the mediator make a disclosure? What should a mediator do if she previously mediated a medical malpractice case in which the same physician was the defendant? If the mediator were to make the disclosure, might such a disclosure create an inference that the doctor engaged in prior malpractice? What should a mediator do if the defendant-doctor's attorney specifically directs the mediator NOT to disclose that the mediator previously mediated with the defendant-doctor? Similarly, is a mediator required to disclose that she mediated several other cases in which a party was the plaintiff in personal injury cases? Could the mere disclosure of this information by the mediator seriously prejudice the potential outcome of the case at mediation?

I greatly appreciate the Panel's consideration of this question. Thank you for your assistance.

Sincerely Yours,

Certified County, Family and Circuit Mediator
Southern Division

AUTHORITY REFERENCES:

Florida Rules for Certified and Court-Appointed Mediators - 10.070(a)(2), 10.070(b)(1), 10.070(b)(2), 10.070(b)(3).

SUMMARY OF THE OPINION:

While you may wish to disclose the fact that you have mediated with the attorney previously, such disclosure is not required under (b)(1). Similarly disclosure is not required under (b)(2) unless there is a close personal relationship or other circumstance, none of which are apparent in your hypothetical. However, nothing would preclude such disclosure by the mediator as a matter of practice. The same holds true for the relationships posited in the question for the remaining categories of persons, namely claims representatives and parties (physicians).

OPINION:

You point out that the questions which you raise invoke the provisions of rule 10.070(b)(1) and (2). The former requires the mediator to "disclose any current, past, or possible future representation or consulting relationship with any party or attorney involved in the mediation." The latter requires the mediator to "disclose to the parties or to the court involved any close personal relationship or other circumstance . . . which might reasonably raise a question as to the mediator's impartiality." In your question, you discuss three different categories of participants in mediation, specifically, attorneys, claims representatives, and parties.

In relation to attorneys who attend mediation with you on numerous occasions, the panels sees no problem under the facts you allege, that is, no other relationship besides that of attorney-mediator. While you may wish to disclose the fact that you have mediated with the attorney previously, such disclosure is not required under (b)(1). Similarly, disclosure is not required under (b)(2) unless there is a close personal relationship or other circumstance, none of which are apparent in your hypothetical. However, nothing would preclude such disclosure by the mediator as a matter of practice.

The panel reaches a similar conclusion in relation to a claims representative who may attend mediation with you on a repetitive basis. That fact standing alone would not operate to invoke the requirement for disclosure. While subsection (b)(1) would apply to claims representatives, and since a claims representative is a party for the purposes of this rule, there would be no violation, as your hypothetical contains no allegations establishing a relationship prohibited by the rule. Subsection (b)(2) would apply only if there were a close personal relationship with the claims representative or other circumstance which would require disclosure. However, as with attorneys, nothing would preclude such disclosure by the mediator as a matter of practice.

The final category involves parties (e.g. physicians) who may attend mediations in various capacities (e.g. plaintiff in a collection action and defendant in a malpractice suit). Again, the panel believes that both (b)(1) and (b)(2) are not applicable. The former could apply if there is any current, past or possible future representation or consulting relationship with any party. However, since your question does not posit such a relationship, the panel sees no reason to require disclosure. In relation to (b)(2), while the panel believes that the existence of any close personal relationship also refers to parties, such relationship must, at the very least, be more than multiple appearances at mediation.

You also raise what we believe to be the tangential issue of whether the mediator should defer to an attorney's request not to disclose. Whereas the panel believes the question

of disclosure is not reached (since under the facts you assert no disclosure is necessary), the mediator may wish to do a personal assessment to see if the mediator has been affected by the actions of the attorney so as no longer to be impartial, in which case withdrawal may be appropriate under rule 10.070(a)(2).

On your last question, to wit, whether disclosure could seriously prejudice the outcome of the mediation, the panel believes that if disclosure is required, so be it. The panel can only assume that the rule does not anticipate prejudice would always exist if disclosure is made. The panel believes this situation is covered by rule 10.070(b)(3), which provides that after disclosure the mediator may serve if both parties so desire, unless, of course the mediator believes there is a clear conflict of interest, in which case withdrawal is mandatory.

Date

Charles Rieders, Panel Chair