

THE QUESTION:

Attn: Ethics Counselor

RE: Request for Ethics Opinions - Presuit Mediation & Arbitration Agreements

Dear Ethics Counselors:

I am a certified arbitrator and mediator. I am acquainted with several non-client attorneys and business people who would like to use my services as an arbitrator or mediator in the event a situation arises requiring same. They have asked that I prepare and provide them with two form agreements which they can entered [sic] into with another party with whom they find themselves in a business dispute. One agreement would be a presuit mediation agreement which would state that any business related dispute between the parties to the agreement must be mediated by me prior to any suit being filed by either party. The second agreement would be an arbitration agreement which would provide that any dispute between the parties must be arbitrated by me in a binding arbitration proceeding subject to the rules of the American Arbitration Association or the [Central Division County] County Bar Association Arbitration Service. Both agreements would provide for my compensation at my regular hourly rates, but I would not provide the agreements to individuals who I knew were in any existing dispute. Please advise whether there are any ethical issues that would prohibit my giving such persons the contemplated form agreements without charge.

Very truly yours,

Certified Circuit Mediator
Central Division

AUTHORITY REFERENCES:

Florida Rules for Certified and Court-Appointed Mediators - 10.030, 10.030(a), 10.070, 10.070(b)(1).

Mediator Qualifications Advisory Panel Opinions - MQAP 96-001.

SUMMARY OF THE OPINION:

Based on the rules governing impartiality (10.070) and general integrity (10.030), the panel has concerns about the appropriateness of naming a specific individual as the exclusive mediator in any pre-suit mediation between an entity and others with whom the entity does business.

OPINION:

Your letter raises interesting questions for consideration, some of which are beyond the scope of this panel's duties. The jurisdiction of this panel is for questions related to court-ordered mediation or mediation conducted by individuals who are certified by the Florida Supreme Court as mediators. As such, your question regarding the propriety of the arbitration agreement is outside the purview of this panel, and thus the panel declines to answer that portion of your question. In order to address the issues which are beyond the jurisdiction of this panel, you may wish to consult other professional codes or obtain advisory ethical opinions from the bodies which oversee and interpret those codes.

The panel believes that your question regarding the use of a form agreement for pre-suit mediation is within its jurisdiction since you are a Florida Supreme Court certified mediator. Specifically, you raise a question regarding the propriety of providing form agreements to "non-client attorneys and business people" for pre-suit mediation.

The panel has concerns about the appropriateness of such an agreement based on the rules governing impartiality (10.070) and general integrity (10.030). Specifically, the panel has the same concerns which were raised in MQAP 96-001 in which the question concerned entering into a contractual relationship with attorneys, businesses, insurance companies, etc. to be their "exclusive purveyor of ADR services." In its response, the panel cautioned the mediator from entering into a contractual arrangement with an entity which would result in a financial connection such that the mediator may lose objectivity and impartiality. At a minimum, if a mediator was to enter into such a relationship, the mediator must make full disclosure of the relationship to the other party to the dispute pursuant to rule 10.070(b)(1).

The panel is concerned about the naming of a specific individual as the exclusive mediator in any pre-suit mediation between an entity and others with whom the entity does business. This raises questions about the general integrity of the mediator since the parties may not have adequate knowledge about mediation or the ability to select a mediator other than the one designated in the contract. See rule 10.030(a). Finally, as a practical matter, such an exclusive agreement might leave the parties in a difficult position if the mediator were no longer available or qualified.

The panel reiterates that the use of pre-suit agreements to mediate and the inclusion of mediation clauses in contracts are not per se unethical. The panel restricts its answer to the scenario posed, that is, a mediator who drafts a form agreement which names that mediator as the exclusive mediator.

Date

Charles Rieders, Panel Chair