

December 16, 2001

THE QUESTION

Re: Potential conflict Mediating cases with firms

A. As part of my law practice, I occasionally refer cases to other law firms that pay me referral attorney fees for those referred legal cases. Likewise, I occasionally accept referral legal cases from other firms, to whom I pay referral attorney fees. Now that I am developing a Mediation practice, I wonder if I have a conflict of interest that would bar me from being able to Mediate *other* unrelated cases for these law firms. Does the answer depend on following certain disclosure requirements? If there is a conflict, how can I remove the conflict and how much time must pass before I am eligible to serve as a Mediator for such firms?

B. Similarly, I wonder if my prior employment with law firms creates a conflict of interest that would bar me from being able to serve as a Mediator for those firms on cases for which I was not previously involved as an attorney.

Thank you for your review and response.

Sincerely,

Circuit Mediator
Northern Division

AUTHORITY REFERENCED

Rules 10.330(a), 10.340(a), (b), and (c), Florida Rules for Certified and Court-Appointed Mediators
Committee Note to rule 10.340, Florida Rules for Certified and Court-Appointed Mediators

SUMMARY

- A. Referring cases to and receiving referrals from a firm for a fee may constitute a conflict necessitating the mediator's withdrawal.
- B. A mediator must disclose former associations, such as previous employment, but is not be required to withdraw unless such past relationship constitutes a clear conflict.

OPINION

2001-009A

Rule 10.340(a), Florida Rules for Certified and Court-Appointed Mediators, prohibits a mediator from mediating any matter presenting a clear or undisclosed conflict of interest. That rule goes on to state that such a conflict 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.” Impartiality is defined in rule 10.330(a) as “freedom from favoritism or bias in word, action, or appearance...”

Referring cases to or receiving referrals from a firm for a fee may constitute a conflict. The Committee opines that, while such situation does not *necessarily* constitute a “clear” conflict necessitating your withdrawal, it *could* rise to that level, depending on the circumstances.

Clear Conflict

If the conflict is clear, disclosure would be insufficient. See rule 10.340(c). To help you determine whether you have a clear conflict, the Committee refers you to the fourth paragraph of the *Committee Note*, which states that “[a clear conflict occurs when] circumstances or relationships involving the mediator cannot be reasonably regarded as allowing the mediator to maintain impartiality.” Factors relevant to whether a clear conflict of interest exists include, but are not limited to, the amount of the referral fees, the recency of the payment of such fees, the frequency of referrals, and the extent of the relationship between the firms.

In this regard, the Committee opines that a current, ongoing referral relationship, that is, one in which the referred case is still pending and the mediator has not yet received the final referral fee, if any, constitutes a clear conflict. A mediator would violate rule 10.340(a) by serving as a mediator of a dispute where counsel for one of the mediating parties is paying, or realistically anticipates paying, the mediator a fee for client referral. Such a situation would be analogous to mediating a case where the mediator’s own firm represented one of the parties to mediation: there would be no way to avoid the appearance of a clear conflict of interest.

No Clear Conflict

The Committee notes that, even if there were no clear conflict, a mediator must disclose prior referral relationships as soon as practical. See rule 10.340(b). After such disclosure is made, the consent of all parties is required if the mediation were to proceed with the mediator. See rule 10.340(c). The Committee recommends that a mediator who has any doubt as to whether a conflict exists should resolve this doubt in favor of acknowledging such conflict and acting accordingly.

The Committee relies not only on rule 10.340 to reach its conclusions, but also the *Committee Note* to that rule. Specifically, the second paragraph of the *Committee Note* states in part as follows:

The duty to disclose ... includes information relating to a mediator’s ongoing financial or professional relationship with any of the parties, counsel, or related entities. Disclosure is required with respect to any significant past, present, or promised future relationship with any party involved in a proposed mediation. While impartiality is not necessarily compromised, full disclosure and a reasonable opportunity for the parties to react are essential.

While the *Committee Note* does not have the same effect as the rule (since it was not adopted by the Supreme Court), the Committee believes it constitutes a reasonable interpretation of the rule. Since the financial relationship described in your question appears to be significant and ongoing, it would clearly fall within the area of required disclosure, as would any significant prior relationship. If all parties agree to your continuing to act as mediator, you may mediate.

2001-009B

The second question relates to your serving as a mediator for a law firm with which you had previously been employed. The Committee suggests that you must disclose such a former association, but may not be required to withdraw unless such past relationship constitutes a clear conflict (see previous discussion). Factors relevant in a former employment situation could include the recency of such employment, the length of such employment, the size of the firm, and the existence of a continuing relationship.

Date

Charles M. Rieders, Committee Chair