

April 15, 2011

**The Question:**

It is respectfully requested that the Committee revisit and clarify MEAC 2010-0003 in light of the guaranteed right of free speech under the First Amendment to the U.S. Constitution, which was not addressed in the Advisory Opinion. See *Babkes v. Unger*, 944 F. Supp. 99 (SD File 1996) ["By restricting the use to which public information can be put (by MEAC 2010-003) implicates the First Amendment's protection of commercial speech. Commercial speech is protected against government interference by the First Amendment as applied to the states through the Due Process clause of the Fourteenth Amendment"]

In the **Summary** portion of MEAC 2010-003, this Committee held:

The use of the word "judge" in the title of mediator's company, as depicted on the stationary, business cards, the title of the website homepage, and other marketing material is prohibited.

In rendering this advisory opinion the Committee relied upon another advisory opinion rendered by a Supreme Court Committee in SC09-1384 (April 1, 2010) interpreting revised Rule 10.610; stating in part:

A review of the case law regarding the restrictions on lawyer advertising, states that the underlying purpose is to restrain lawyer advertising that is "**false, deceptive or misleading**". See also *Baker*

The preceding is similar to the language contained in Rule 10.610 *Standards of Professional Conduct*, which states in part, "A mediator shall not engage in marketing practices which contain **false or misleading information**".

In addition to First Amendment considerations, the use of the word "marketing" needs some clarification. Marketing is defined in *Dictionary.com* as:

1. The act of buying and selling in market
2. The total activities in the transfer of goods [or services] from the producer or seller to the consumer or buyer including advertising.

Based in the foregoing, the following questions are presented for consideration:

1. Is a mediator who previously served as judge and is permitted to state this true fact in a biographical resume, in light of the First Amendment guarantees for commercial speech may such former title be permitted to be stated as commercial speech on letterheads, business cards or web-sites? It would seem that if a mediator's prior service included service as a judge, that statement in marketing material would not only constitute commercial speech but would also be a true statement and not "false, deceptive or misleading" within the context of Rule 10.610.
2. If a mediator, who was a former judge, simply states that fact on a letterhead, business cards, print ads, or a website, and if such statement is true and if, in addition, no claim whatsoever is made of "achieving specific outcomes for the purpose of obtaining business", does the First Amendment protect this true statement against a governmental determination that this is a prohibited marketing practice?
3. In the specific situation where a mediator who was a former judge sends a letter to a sitting judge advising of the outcome of a mediation or to counsel already involved in an ongoing mediation and there is no representation implicit or explicit that such mediator is a "better mediator" than one who was not a former judge and such transmittal is not designed to market the business but to convey information. Is it false, misleading and prohibited if the letterhead used states; "Judge \_\_\_\_\_(ret) or "former judge"?

Certified Circuit Court Mediator  
Southern Division

### **Authorities Referenced**

Rule 10.610, Florida Rules for Certified and Court-Appointed Mediators  
Commentary to Rule 10.610, Florida Rules for Certified and Court-Appointed Mediators  
MEAC Opinion 2010-003  
Florida Supreme Court's Opinion in SC09-1384 (April 1, 2010)

### **Summary**

Answer to Question One: As stated in SC09-1384, "an accurate representation of the mediator's judicial experience in references to background and experience in **bios and résumés** would not be inappropriate." [emphasis added] The MEAC does not have the power or authority to determine the answers to the questions posed with regard to constitutional rights.

Answer to Question Two: The MEAC does not have the power or authority to determine constitutional rights and therefore declines to answer this question.

Answer to Question Three: Yes, it is false and misleading and therefore prohibited for a certified mediator to use letterhead that is entitled "Judge \_\_\_\_\_(ret) or "former judge".

## Opinion

The questioner has requested that the MEAC revisit and clarify MEAC Opinion 2010-003 in light of the guaranteed right of free speech under the First Amendment to the U.S. Constitution. The MEAC respectfully declines to answer questions of constitutional law as outside of the jurisdiction of the MEAC.

The MEAC reaffirms MEAC Opinion 2010-003 as stated in part:

“The use of the word “judge” in the title of the mediator’s company, as depicted on stationery, business cards, the title of a website homepage, and other marketing materials is specifically noted as a prohibition in the Supreme Court’s opinion in SC09-1384 (April 1, 2010) as they interpret the commentary following the revised Rule 10.610:

*“The mediator may not appear in judicial robes in an advertisement for his or her mediation services; the mediator may also not use the title ‘judge’ with or without modifiers to the mediator’s name in any advertisement. Indeed, the use of the title judge in any marketing practice, **including, but not limited to, letterhead and business cards, is inappropriate.** However, an accurate representation of the mediator’s judicial experience in references to background and experience **in bios and résumés would not be inappropriate [emphasis added].”***

The restriction on the use of the term “judge” or “judges” is explained further in the Commentary to the 2010 Revision to Rule 10.610 which states in part, “The roles of a mediator and adjudicator are fundamentally distinct... When engaging in any mediation marketing practice a former adjudicative officer should not lend the prestige of the judicial office to advance private interests ... the use of the word “judge” with or without modifiers to the mediator’s name would be inappropriate.”

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Date

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Beth Greenfield-Mandler, Committee Chair