

FLORIDA SUPREME COURT Mediator Ethics Advisory Committee

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The Question

Generally, under what circumstances is it ethically permissible for Florida mediators to agree to waive mediator fees?

May a mediator agree, in advance, to waive all or part of an hourly-based mediator's fee if a case does not settle?

More specifically, is it ethical for a mediator to offer to continue mediation after a court-ordered mediation conference on the basis that none of the mediator's time after the initial conference will be billed to either side if the case does not settle?

Rule 10.380 prohibits mediators in Florida from charging contingent fees; the rule provides in sub-part f: "Contingency Fees Prohibited. A mediator shall not charge a contingent fee or base a fee on the outcome of the process."

The general and specific questions noted above do not contemplate a fee arrangement that would be contingent on the outcome of the case in the manner of a contingency percentage such as a personal injury lawyer might charge. The charges would be based on the amount of time incurred by the mediator. However, an invoice for the time incurred after the conference would go out to the parties only if the parties reach a mediated settlement agreement. The *amount* of the fee would not be based on the outcome of the process, but *whether* a fee would be charged at all, for the post-conference time, would depend on whether the case settled or not.

I encounter situations where toward the end of the scheduled mediation conference, especially in cases involving relatively complex negotiations, I remain optimistic about the prospects for settlement, but the parties or their counsel (usually counsel) request a declaration of impasse on grounds that continuing mediation will be a "waste of time and money." I am considering offering to continue to mediate such cases, either by phone and email or with a second session, with the equivalent of a money-back guarantee. I would agree to charge for my time after the initial conference if and only if I am successful in getting the case settled. Is this permissible under the Florida mediator ethics rules?

Submitted by a Certified Circuit Mediator
Central Division

Authorities Referenced

Rules 10.690(a) and 10.380(f), Florida Rules for Certified and Court-Appointed Mediators


Summary

A mediator's fee may never be based on the outcome of the mediation.

Opinion

A mediator's fee may never be based on the outcome of the mediation. Rule 10.380 Fees and Expenses, (f) Contingency Fees Prohibited, clearly states, "a mediator shall not charge a contingent fee or base a fee on the outcome of the process."

Unless prohibited or regulated by the guidelines of a court based mediation program, MEAC is unaware of any restrictions on mediators waiving their fees or working pro bono, provided the fees are waived as to all parties. Rule 10.690, Advancement of Mediation, (a) Pro Bono Service, states, "Mediators have a responsibility to provide competent services to persons seeking their assistance, including those unable to pay for services. A mediator should provide mediation services pro bono or at a reduced rate of compensation whenever appropriate."

 9/4/14
Signed and Dated by Beth Greenfield-Mandler, MEAC Committee Chair