

FEB 08 2016

1

FLORIDA SUPREME COURT Mediator Ethics Advisory Committee

Opinion Number: 2015-003
Date of Issue: February 4, 2016

The Question

I am a Florida Supreme Court Certified Family, Circuit Civil and County Mediator. I recently mediated a PIP (Personal Injury Protection) case in County Court, which resulted in no agreement (impasse). At the conclusion of the mediation conference, counsel for both parties inquired as to whether I would be willing to serve as an Arbitrator to arbitrate the same case. (Many county court judges will order a case to arbitration soon after a mediation fails to reach an agreement. The trial judge will also select an arbitrator if the parties fail to select an arbitrator of their own choosing within 15 days of the order requiring arbitration.)

Since I received confidential information from both sides in private caucuses during the mediation, I felt it would be inappropriate to conduct an arbitration in the same case, even though both sides said they were willing to waive any potential conflicts. Even if I had not received confidential information during the mediation, I have read and agree with the premise that mediators should mediate and judge's should judge and acting as an arbitrator is similar to acting as a judge, in that an arbitrator makes findings of facts, determines the law and makes a finding in favor of a party with a specific dollar amount. Notwithstanding the willingness of both parties to waive any conflicts, I did not feel comfortable accepting their offer and respectfully declined to arbitrate that case. I believe this is the type of conflict that simply can't be waived by the parties. Because I believe this factual scenario is likely to repeat itself or a judge could appoint me as the arbitrator in a case I previously mediated, I'd like to have the following question answered:

May a mediator who has (or has not) received confidential information during a mediation, also act as an arbitrator in the same case, with (or without) the parties agreeing to waive any potential conflicts of interest (or any confidentiality) from the prior mediation in the same case?

I have located three MEAC decisions that, while not directly on point, are close to the question I propose. I am referring to MEAC 2009-001, MEAC 2009-002, and MEAC 96-002.

Submitted by a Florida Supreme Court Certified County, Family, and Circuit Mediator from the Southern Division

Authorities Referenced

Rule 10.310, Committee Note, Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinion 2009-002

Summary

The Florida Rules for Certified and Court-Appointed Mediators do not contain a prohibition against a mediator serving as an arbitrator in a case the mediator previously mediated. The mediator must ensure the parties have a complete understanding of how the mediator's role will change and they must waive the conflict of interest and confidentiality of the mediation.

Opinion

MEAC believes that the parties may exercise self-determination in deciding whether to have a prior mediator act as an arbitrator in the same case whether or not the mediator has received confidential information during the mediation. The mediator must ensure the parties have a complete understanding of how the mediator's role will change and they must waive the conflict of interest and confidentiality of the mediation.

Although the scenario presented in MEAC 2009-002 differs from the one presented here, the MEAC affirms the cautions expressed in MEAC 2009-002 which are also expressed in the Committee Note to rule 10.310, Self-Determination, Florida Rules for Certified and Court-Appointed Mediators. Paragraph three of the Committee Note states, "on occasion, a mediator may be requested by the parties to serve as a decision-maker. If the mediator decides to serve in such a capacity, compliance with this request results in a change in the dispute resolution process impacting self-determination, impartiality, confidentiality, and other ethical standards. Before providing decision-making services, therefore, the mediator shall ensure that all parties understand and consent to those changes."

If the parties voluntarily agree to have their previous mediator act as an arbitrator, "the mediator should clearly inform the parties, preferably in writing, that he or she will no longer be serving as mediator and would not be able to mediate the present or related matters for them in the future." MEAC 2009-002. The mediator must ensure that the parties are exercising self-determination and that they are voluntarily agreeing to select this mediator as the arbitrator. The mediator must ensure the parties understand the implications of the change in roles, and advise the parties that there may be other methods of alternative dispute resolution available to them. The mediator must explain the possible conflicts of interest and the loss of confidentiality resulting from the mediator becoming the arbitrator. The parties must then agree to waive any conflict and agree to the loss of confidentiality, preferably in writing. Additionally, once this change in role is effectuated, "the former mediator must no longer refer to himself or herself as mediator for the case." MEAC 2009-002.

In summary, while it is not expressly prohibited for a mediator to serve as an arbitrator in the scenario described, the MEAC believes that doing so is inherently laden with hazards and suggests great caution for any mediator that accepts this change in roles.

 2/4/14

Signed and Dated by Susan Dubow, MEAC Committee Chair

Concurrence (in part) and Dissent (in part).

We concur with the Opinion's confirmation of the principle set forth in MEAC Opinion 2009-002 that it is not ethical for a mediator to mediate a dispute or matters related to the dispute when the mediator has previously arbitrated that dispute.

We respectfully dissent from that portion of the Opinion which concludes that a certified or court-appointed mediator can ethically first serve as the mediator of a county court case, and then later serve as the arbitrator of the same case in a court-ordered mandatory non-binding arbitration.

In our view, the principles applied in MEAC Opinion 2009-001 are dispositive of the question posed, and confirm that a mediator cannot ethically adjudicate a case which (s)he has previously mediated, regardless of the agreement of the parties. In that opinion, the Mediator Ethics Advisory Committee stated: "It is not permissible to serve as a general magistrate and mediator for the same case, regardless of the order of service, and even if the parties were to agree." MEAC Opinion 2009-001 (Emphasis added); cf. also Evans v. State, 603 So. 2d 15, 17-18 (Fla. 5th DCA 1992) ("As a caveat, we suggest that mediation should be left to the mediators and judging to the judges. If a judge decides to mediate a case with the consent of all concerned parties, the judge should act only as a settlement judge for another judge who will hear and try the matter in the event mediation fails...").

A fundamental concept engendering public confidence in court-connected mediation is that it is a separate and distinct resolution process from adjudication, in which mediators cannot decide the disputes whose resolution they facilitate, or impose a resolution on the parties. See Fla. R. Med. 10.210, 10.220, 10.230. At the commencement of the mediation session, the mediator is ethically obligated to inform the participants that "mediation is a consensual process," that "the mediator is an impartial facilitator without the authority to impose a resolution or adjudicate any aspect of the dispute," and that "communications made during the process are confidential, except where disclosure is required or permitted by law." Fla. R. Med. 10.420 (a) (Emphasis added).

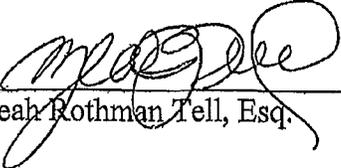
Rule 10.300 of the Florida Rules for Certified and Court-Appointed Mediators ("Mediator's Responsibility to the Parties") reiterates: "The purpose of mediation is to provide a forum for consensual dispute resolution by the parties. It is not an

adjudicatory procedure. Accordingly, a mediator's responsibility to the parties includes honoring their right of self-determination; acting with impartiality; and avoiding coercion, improper influence, and conflicts of interest."(Emphasis added). Rule 10.370 (c) ("Advice, Opinions, or Information") similarly provides: "A mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue." (Emphasis added). Lastly, rule 10.310 (a) ("Self-Determination") provides that decisions resulting from mediation are to be made by the parties: "A mediator shall not make substantive decisions for any party." Acting as the mediator and then the decision-maker creates a non-waivable conflict, since the decision-maker may rely upon information obtained or communications which occurred outside of the adjudicatory process.

The majority refers to the 2000 Revision Committee Note to Fla. R. Med 10.310 in opining that a mediator who has served as the mediator in a case can later serve as the adjudicator of the same dispute. The language of the Committee Note does not support this interpretation:

On occasion, a mediator may be requested by the parties to serve as a decision-maker. If the mediator decides to serve in such a capacity, compliance with this request results in a change in the dispute resolution process impacting self-determination, impartiality, confidentiality, and other ethical standards. Before providing decision-making services, therefore, the mediator shall ensure that all parties understand and consent to those changes. See Rules 10.330 and 10.340.

(Emphasis added). The Committee Note *does* state that the parties and the mediator can *change the dispute resolution process* which they will engage in, and can agree that the mediator will adjudicate the dispute instead of mediating the dispute, provided the mediator ensures that the parties understand the impact of *this change in dispute resolution process*. However, the Committee Note does *not* state that a *mediator who has already completed the mediation process without the parties having reached an agreement can then ethically act as the decision-maker in a second, different dispute resolution process*. Tellingly, MEAC Opinion 2009-001, which addressed the analogous question of service in the dual capacity of mediator and general magistrate, did not even mention the Committee Note in reaching the conclusion that (1) it is unethical for the mediator of a dispute to then serve as the general magistrate adjudicating the dispute, and (2) it is unethical for a general magistrate adjudicating a dispute to mediate the dispute.



Meah Rothman Tell, Esq.

Date: 2/2/2016



Teresa L. Mussetto

Date: 2/10/16