Advisory Opinion MEAC 2010-008

Mediator Ethics Advisory Committee c/o Florida DRC, Supreme Court Building, 500 S. Duval Street, Tallahassee, FL 32399

October 12, 2010

The Question

The following are issues that are currently occurring throughout the State of Florida, and due to the potential consequences to the parties involved in mediation, it appears that this is of great public importance. Therefore, a prompt opinion from the Mediation Ethics Advisory Committee (hereinafter referred to as "MEAC") would be greatly appreciated. It is my belief that it is unethical for a Mediator to be engaged in any of the behavior addressed in the below outlined issues. Additionally, I further contend that the Rules prohibit the following outlined behavior, and that the issues have already been previously addressed in MEAC opinions, however, there seems to be some disagreement with my opinion so I am asking for clarification, direction and a written opinion for the following questions.

The first issue is when a Mediator is assigned to handle a mediation conference, through one of the newly created Residential Mortgage Foreclosure Mediation Programs (RMFMP), he/she utilizes the mediation conference to solicit future business by handing out his/her business cards, brochures, and other marketing items.

Question One: Would it ever be considered appropriate for a Mediator to utilize a mediation conference to solicit future business from the parties of the mediation conference? For example: Giving marketing propaganda to the Plaintiff's Attorneys (the Financial Institutions), and paying for lunches for the Plaintiff's Attorneys (attending several mediation conferences throughout a specific day that the Mediator has been assigned to their cases) in an effort to obtain future business directly from the Financial Institutions?

The second issue is when a Mediator is assigned to handle a mediation conference, through one of the newly created Residential Mortgage Foreclosure Mediation Programs, he/she arrives at the scheduled mediation conference, speaks with the parties in an effort to offer a better "deal" than the cost of mediation through the Residential Mortgage Foreclosure Mediation Program. Then the assigned Mediator directs the parties to postpone or continue the mediation conference in an effort to hold the mediation conference at his/her office at a later date, at a reduced rate, so as to circumvent the Residential Mortgage Foreclosure Mediation Program to build his/her private mediation practice.

Question Two: Would it ever be considered appropriate for a Mediator to utilize a mediation conference to solicit and "remove" business from the Residential Mortgage Foreclosure Program?

The third issue, and clearly the most detrimental to the parties involved in a mediation conference is when an Attorney, acting as the assigned Mediator, through a Residential Mortgage Foreclosure Program, has represented a party previously (as as Attorney usually representing a Defendant in a foreclosure action) against one of the current parties in the current mediation. It is my belief that the Attorney, now Mediator, must disclose to the parties his/her prior representation,

the attorney, now mediator must believe that he/she can remain neutral, and then he/she must ask the parties if they would like to continue with the mediation conference after full disclosure has been made, or if either party would prefer another Mediator handle the mediation conference.

Unfortunately, the Plaintiff's Attorneys (representing the Financial Institutions) have stated that they have requested another Mediator in the above circumstance, which has been occurring very frequently, however, the Mediator has advised that he/she will "Impasse" the current mediation conference, and basically too bad for the parties, and the Residential Mortgage Foreclosure Mediation Program Manager doesn't have a system in place to replace the conflicted Mediator with a different Mediator.

Question Three: The questions are as follows: Should the Mediator immediately recuse himself/herself from a mediation conference when he/she has represented Defendants against a specific Financial Institution that is present at a current mediation conference? Should the Mediator ever "Impasse" a mediation simply because one or both parties feel that there is a conflict of interest with the Mediator and one of the parties have requested a different, neutral Mediator? Should the Program Manager of the Residential Mortgage Foreclosure Mediation Program provide another Mediator immediately upon discovering the conflict of interest with one of the parties and the assigned Mediator?

Sincerely,
Certified Circuit Civil, Family and County Mediator
Central Division

Authorities Referenced

Rules 10.310, 10.330(c), 10.340(a) and (c), 10.510, 10.620, Florida Rules for Certified and Court-Appointed Mediators
Committee Note to Rule 10.340, Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinions 2001-006, 2003-006, 2004-005

Summary

Answer to Question One: A mediator assigned through the Residential Mortgage Foreclosure Mediation Programs (RMFMP) or in any other mediation venue may not use the mediation conference to solicit future business from the parties during the mediation conference.

Answer to Question Two: It is not appropriate for a mediator to use a RMFMP mediation conference (or any other mediation conference) to solicit and remove the mediation to his office for private mortgage foreclosure mediation.

Answer to Question Three, Part A: A mediator should recuse himself/herself from a mediation conference when he/she has represented defendants against a specific financial institution that is a party at a current mediation conference. This is a non waivable conflict.

Answer to Question Three, Part B: A mediator should not declare an impasse simply because one or both parties feel there is a conflict of interest with the mediator and one of the parties has requested a different, neutral mediator.

Answer to Question Three, Part C: The actions of a Program Manager of a RMFMP are outside of the jurisdiction of the MEAC which is charged with providing ethical guidance to certified and court-appointed mediators.

Opinion

Answer to Question One: As stated in Rule 10.330(c), "A mediator shall neither give nor accept a gift, favor, loan or other item of value in any mediation process. During the mediation process, a mediator shall not solicit or otherwise attempt to procure future professional services." In MEAC Opinion 2001-006, the Committee opined that letters to attorneys and other parties advertising one's services are permissible. Further, the Committee clarified that "lunches and golf outings paid for by the mediator for the purpose of developing goodwill and attracting future clients are inappropriate activities." In MEAC Opinion 2004-005, the Committee opined that providing a party, upon request, with information which could have been provided at an earlier point in the mediation process does not constitute solicitation of services and thus is not a violation of these rules. In that example, a party had requested the mediator's business card.

Answer to Question Two: It is not appropriate for a mediator to use a mediation conference to solicit and "remove" business from any process or program to which s/he has applied and/or been assigned, including the Residential Mortgage Foreclosure Mediation Program (RMFMP). As referenced above, in Rule 10.330(c), "during the mediation process, a mediator shall not solicit or otherwise attempt to procure future professional services." In addition, Rule 10.340, subsections (a) and (c) state, "A mediator shall not create a conflict of interest during the mediation…..A conflict of interest arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromise or appears to compromise the mediator's impartiality."

In the example provided, the "Mediator directs the parties to postpone or continue the mediation conference in an effort to hold the mediation conference at his/her office at a later date, at a reduced rate, so as to circumvent the RMFMP to build his/her private mediation practice." The solicitation actions of the mediator simultaneously impair the mediator's ability to be impartial and create a conflict of interest. Rule 10.620.

Answer to Question Three, Part A: Yes, a mediator should recuse himself/herself from a mediation conference when the mediator has previously been an advocate for a mediation party. According to MEAC Opinion 2003-006, if a mediator once acted as an advocate for a party, it would be unethical to conduct a mediation with that party irrespective of waivers from all the parties. Serving as a mediator when one has been an advocate for or against one of the parties to the mediation is a conflict that cannot be remedied by consent of the parties. The conflict arises when, as stated in Rule 10.340(a), "any relationship between the mediator and mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator's impartiality." Further, Rule 10.340(c) forecloses the option to disclose the possible conflict, and seek agreement of the parties by stating, "However, if a conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the parties." The Committee Note to Rule 10.340 further elucidates that there may be circumstances or relationships involving the mediator which "cannot be reasonably regarded as allowing the mediator to maintain impartiality" in which case mere disclosure to or waiver by the parties is insufficient.

A mediator having represented a defendant against a financial institution which is now a party to a mediation involves such a relationship and circumstance.

Answer to Question Three, Part B: A mediator should withdraw from a mediation upon a request from a party to find a replacement mediator. Given the facts presented, it would not be appropriate for a mediator to report to the court that the mediation resulted in "impasse". "Impasse" is a term used in mediation to signify negotiation occurred and no resolution could be reached. In the instant case, there were no negotiations only a request for another mediator. Therefore to "impasse" such a mediation is a violation of 10.510 as not "candid, accurate or fully responsive to the court".

Further, in declaring an impasse in these circumstances, the mediator is not observing his or her obligation to safeguard the mediation process because s/he is ending the mediation process prematurely and for an inappropriate reason. Rule 10.400. The premature ending of the mediation when the parties desire to mediate further is additionally disrespectful to the parties in violation of Rule 10.310.

Answer to Question Three, Part C: The actions of a Program Manager of a RMFMP are outside of the jurisdiction of the MEAC which is charged with providing ethical guidance to certified and court-appointed mediators.

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Date Beth Greenfield-Mandler, Committee Chair