

October 23, 2009

**The Question**

In a court referred mediation, may a mediator, per agreement of the parties, be designated, in an executed mediation settlement agreement, as the final arbiter and interpreter in the event of a later disagreement between the parties over interpretation of that agreement so as to avoid the necessity of further court proceedings in that regard?

Thank you very much for your willingness to address this inquiry.

Circuit Mediator  
Northern Division

**Authorities Referenced**

Rules 10.310, 10.310 *Committee Note*, 10.330(c), 10.370, 10.420(c), 10.620, 10.640, Florida Rules for Certified and Court-Appointed Mediators  
MEAC Opinions 1996-002 and 1998-006

**Summary**

The Rules for Certified and Court-Appointed Mediators do not contain a specific prohibition against mediators serving as an arbiter and interpreter of a settlement agreement the mediator previously mediated; however, engaging in such activity raises serious ethical concerns.

**Opinion**

The Rules for Certified and Court-Appointed Mediators do not contain a specific prohibition against mediators serving as an arbiter and interpreter of a settlement agreement the mediator previously mediated; however, engaging in such activity raises serious ethical concerns.

A mediator is prohibited from using the mediation to solicit or otherwise attempt to procure future professional services. Rule 10.330(c). Therefore, the mediator must not suggest changing roles to serve as the arbiter or interpreter. Further, a mediator has the affirmative obligation to see that the agreement is memorialized appropriately. Rule 10.420(c). Should the parties raise concern about potential future disagreement regarding interpretation of the mediated agreement, the mediator should assist the parties in addressing those concerns by helping them draft a clear, thorough and precise agreement (hopefully obviating the need for an arbiter or interpreter).

A mediator who facilitates an agreement identifying the mediator as the future arbiter or interpreter, is in the awkward ethical position of assisting to draft an agreement which may accrue to the mediator's benefit (in terms of future work and fees). Further, when a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek legal counsel. Rule 10.370. The Committee believes this includes deciding whether it is in the parties' best interests to choose an arbiter, as well as selecting a specific arbiter. Additionally, a mediator shall decline an appointment, withdraw, or request appropriate assistance when the facts and circumstances of the case are beyond the mediator's skill or experience. Rule 10.640. Parties may not be aware or appreciate that the knowledge and skills required to become a Florida Supreme Court certified mediator are not the knowledge and skills required to serve as final arbiter or interpreter of a mediated agreement.

Despite the significant ethical and legal concerns, parties still have self-determination and may exercise their right to contract, including limiting rights and remedies. Designating a final arbiter and interpreter of a settlement agreement in order to avoid further court proceedings is consistent with the right of the parties to self-determination Rule 10.310. The *Committee Note* to Rule 10.310, Florida Rules for Certified and Court-Appointed Mediators states that parties may occasionally request a mediator agree to serve as a decision-maker. However, as detailed in the *Committee Note*, a mediator agreeing to serve in a decision-making capacity ceases to function as a mediator, and assumes a changed role which impacts 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." Rule 10.310 Committee Note. Additionally, substantive provisions of the rules prohibit a mediator from accepting any engagement, providing any service, or performing any act that would compromise the mediator's integrity or impartiality. Rule 10.620.

In a previous opinion, the Committee opined a mediator should decline appointment as a special [magistrate] ordered to rule on a disputed settlement agreement with respect to which the inquiring individual had served as mediator. MEAC 1996-002. The Committee cited concerns for confidentiality potentially impacting impartiality and integrity should the individual accept dual, conflicting roles in the resolution of the same case. See *id.* Similarly, MEAC 1998-006 raises concerns for loss of objectivity and impartiality should a specific individual be named as exclusive mediator in a form agreement for pre suit mediation. The instant question may be distinguished in relation to both opinions if the parties are exercising self-determination at the conclusion of a mediation and are voluntarily agreeing to select the former mediator as future arbitrator or interpreter, understanding their alternatives and the legal implications of their decisions.

In summary, while it is not expressly prohibited for mediators to function in the capacity discussed in this question, doing so is fraught with peril and should not be undertaken lightly. Mediators choosing to serve in the described manner must carefully navigate to steer clear of ethical violations. A mediator agreeing to serve as a decision-maker may not change roles except in response to an explicit request of the parties. Though fully informed willing parties might choose to proceed in this fashion to avoid going through arbitration with someone

unfamiliar with their circumstances, the mediator should first attempt to have them consider what the sources of disagreement might be and address those accordingly in any agreement. Prior to accepting a decision-making role, 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. The former mediator must no longer refer to himself or herself as mediator for the case. Prior to changing roles, the mediator must also explain how his or her role will change and fully address any foreseeable implications, including resulting loss of party protections afforded by the Florida Rules for Certified and Court-Appointed Mediators or the courts. The parties must agree, again preferably in writing. A mediator would do well to consider declining serving as arbiter or interpreter following service as a mediator for the same parties regarding the same subject matter. It may be the wise decision, better serving the parties, process, and profession.

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Date

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Fran Tetunic, Committee Chair