

FLORIDA SUPREME COURT
Mediator Ethics Advisory Committee

Opinion Number: 2017-015

Date Issued: February 13, 2018

The Question

Suppose Party A accepts an invitation to participate in a presuit mediation with Party B. The case is scheduled for mediation and Party A had no role in the selection of the mediator. Party A contacts his attorney the day before the mediation and arranges for the attorney to attend the mediation, too. On the morning of the mediation, Party A and his attorney learn that the mediator (who is also a lawyer) is a partner in a law firm. The mediator's law firm is representing two different parties (Party C and D) in cases pending against Party A. Party A and his attorney request a different mediator, but no other mediator is available that morning. Party A has flown to the mediation from another state and has incurred the expense of traveling to the mediation.

I would appreciate the Committee's opinions on the following questions.

Questions:

1. Should a mediator disclose his/her relationship with the law firm representing Party C or D prior to the time Party A arrives at mediation? If so, why?
2. When a mediator is a partner in a law firm which is representing Party C and D in separate proceedings against Party A, does the mediator have a conflict of interest that would prevent him/her from mediating with Party A?
3. Assuming the mediator is not the attorney representing Party C or D (other attorneys in the law firm are handling those cases), would the mediator still have a conflict of interest that would prevent him/her from mediating with Party A?
4. If the mediator timely discloses the fact that another lawyer in his law firm is representing Party C and D in proceedings against Party A, and Party A does not object to the mediator proceeding as the mediator, can the mediator ethically handle the case?

Certified County, Circuit, and Appellate Mediator

Central Division

Authorities Referenced

Rule 10.340, Florida Rules for Certified and Court-Appointed Mediators, and Committee Note
MEAC Opinions 2002-005 and 2008-007.

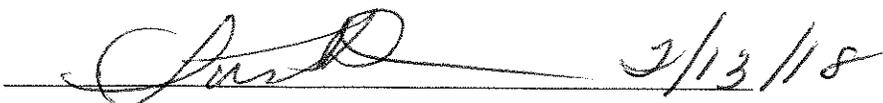
Summary

Disclosure of a conflict of interest shall be made as soon as practical after the mediator becomes aware of the interest or relationship giving rise to the potential conflict of interest. A mediator who is a member of a law firm representing a party who is adverse to a party at mediation has a clear conflict of interest which may not be waived by the parties.

Opinion

In accordance with rule 10.340(b) Conflicts of Interest, Florida Rules for Certified and Court-Appointed Mediators, “the burden of disclosure of any potential conflict of interest rests on the mediator.” The mediator should conduct a conflict check as soon as the mediator is asked to conduct the mediation and has obtained the names of the parties and their attorneys. As explained in the second paragraph of the Committee Note to the rule, “disclosure of relationships or circumstances which would create the potential for a conflict of interest should be made at the earliest possible opportunity and under circumstances which will allow the parties to freely exercise their right of self-determination as to both the selection of the mediator and participation in the mediation process.” In this scenario, the conflict is not waivable; therefore, the mediator should disclose their relationship with the law firm representing party C or D and decline serving in the case as soon as the mediator becomes aware of the conflict so that the parties may retain a different mediator without delay.

The MEAC retains confidence in MEAC Opinions 2002-005 and 2008-007, which directly answer this inquirer’s questions 2, 3, and 4. A clear conflict of interest exists whenever a law firm in which the mediator is a partner is part of an adversary process involving a party to the mediation regardless of the size of the law firm, the location of the other cases, or the mediator’s lack of personal involvement. The personal involvement of the mediator in the law firm’s representation of a client in a case pending against party A is not necessary. Such a scenario creates a clear conflict necessitating the withdrawal of the mediator regardless of the express agreement of the parties to use the mediator despite the conflict.



Signed and Dated by Susan Dubow, MEAC Committee Chair