

FLORIDA SUPREME COURT Mediator Ethics Advisory Committee

Opinion Number: 2013-011

Date of Issue: April 1, 2014

The Question

I have been presented with the enclosed NOTICE OF VENDOR EXPECTATIONS letter from the [attachment omitted]. I have also been told that I will not be allowed to mediate cases to which [name of business omitted] has an insured party unless I sign and return the letter. I have not been inclined to sign the letter for the reasons set forth in my letter to [name of businesses general counsel omitted]. I have enclosed a copy of my letter to [name of general counsel omitted].

I am hereby requesting an opinion letter from MEAC as to whether my signing this letter constitutes an ethical violation and if not, whether I should disclose the letter to mediation participants in [name of business omitted] cases.

Submitted by a Certified County and Circuit Mediator
Northern Division

Authorities Referenced

Rules 10.310(a), 10.330(a), 10.340(a), 10.360(b), 10.520 and 10.620, Florida Rules for Certified and Court-Appointed Mediators

Summary

The Notice of Vendor Expectations (Notice) the mediator is questioning creates a non-waivable conflict of interest because of the language it contains.

Opinion

The Notice of Vendor Expectations (Notice) the mediator is questioning has several provisions which raise ethical concerns for the MEAC. The mediator is being asked by a party to a mediation to sign a document agreeing to comply with, among other provisions, "the ethical conduct policies" (policies) of the party as set forth in the Notice. The party requiring the mediator to sign this Notice is not an entity covered by rule 10.520, Florida Rules for Certified and Court-Appointed Mediators, which might, under certain circumstances, allow an exception. Rather, the entity is one involved as a party in mediations in the state court system. Therefore, the mediator is subject to the Florida Rules for Certified and Court-Appointed Mediators (Rules).

Entering into such an agreement would place the mediator in a clear conflict of interest. A mediator may not bind themselves to the ethical policies proposed by a party.

To elaborate a bit further, the specific provisions which are inconsistent with the Rules are primarily contained under the sections entitled "avoid conflicts of interest" and "keep information secure".

Under AVOID CONFLICTS OF INTEREST, the Notice states "It is imperative that Vendors avoid any interests, relationships, and/or transactions that are or could be perceived by an impartial observer as harmful or detrimental to (business), its reputation, or its interests." (Emphasis added.) In accordance with the requirement of impartiality, a mediator could not agree to this provision without violating the Rules.

The Notice also states that the mediator should: "assure [sic] that the company's best interests prevail . . ." This too would constitute a violation of the Rules.

Under the KEEP INFORMATION SECURE provision, the Notice states, "Vendors are permitted only to share company information with those who have a business need to know and for the purpose for which it was obtained." It is possible that during a mediation, the mediator would be directed by the representatives of the business to share information about the business with the opposing party for the purpose of reaching a settlement agreement. In order to abide by the business policies, the mediator would be required not to convey such information. Rule 10.310(a), Florida Rules for Certified and Court-Appointed Mediators, provides that "decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party." Additionally, Rule 10.360(b), Florida Rules for Certified and Court-Appointed Mediators, states: "Caucus. Information obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party." Abiding by the Notice would directly conflict with the mediator's obligation to protect the parties' rights to self-determination.

This document creates, at a minimum, an appearance of partiality and the MEAC believes it is a conflict of interest which is non-waivable by the parties, even if disclosure were made. Rule 10.330(a), Florida Rules for Certified and Court-Appointed Mediators, provides "A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual." (Emphasis added.) Rule 10.340(a), Florida Rules for Certified and Court-Appointed Mediators, provides "A mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator's impartiality." (Emphasis added.) And according to rule 10.620, Florida Rules for Certified and Court-Appointed Mediators, "A mediator shall not accept any engagement, provide any service, or perform any act that would compromise the mediator's integrity or impartiality." (Emphasis added.)

The MEAC is of the opinion that the Notice submitted to the MEAC in the instant case creates a clear and non-waivable conflict of interest.

 April 1, 2014
Signed and Dated by Beth Greenfield-Mandler, MEAC Committee Chair

Dissent Opinion
MEAC 2013-011

SUMMARY

The signing of The Notice of Vendor Expectations (Notice), outlining principles of ethical conduct, is not a violation of Florida law and The Florida Rules.

An entity engaged in the appointment of mediators (Firm) may establish, consistent with Florida law and The Florida Rules, its own principles of ethical conduct and policy to be followed during the mediation process.

The mediator is not required to disclose the terms of the Notice to interested parties unless the mediator believes there is a perception of a conflict of interest.

OPINION

In the situation at hand, the Notice states both the *Firm's commitment and the Mediator's obligation to comply with applicable law and regulations* [Florida law and The Florida Rules]. It is repeatedly stated in the Notice and admits of no exceptions, express or implied.

The Notice also outlines the Firm's complementary principles of ethical conduct and policy, expressly intended to *form a coherent whole within the law*. There is no inference of a latent contradiction therein.

Nowhere in the Notice does it state a mediator is expected to violate Florida law and The Florida Rules.

There is no factual basis to support the *presumption*, advanced in the majority opinion, that certain cited policies, ipso facto, create a non-waivable conflict of interest. The contractual intention of the Notice is that those cited principles of ethical conduct must be interpreted and applied consistent with Florida law and The Florida Rules.

 4/1/14
Signed and Dated by Patrick Mastronardo, MEAC Committee Member

RECEIVED

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Supreme Court of Florida
Dispute Resolution Center