

September 16, 2003

THE QUESTION

A mediation has been scheduled with me, as Mediator, to be held in my office on [date omitted]. Each party is represented by counsel. I received a telephone call from the former husband's counsel this morning informing me that I had represented the former wife in the parties' dissolution of marriage in 1981. (The former wife has a different name now). I have no recollection of the case and would not have scheduled it if I had known that I had represented the former wife. The former husband's counsel has discussed this matter with her client, and with opposing counsel. I have been informed by the former husband's counsel that the parties and their counsel have all waived any possible conflict and all involved would like me to conduct this mediation.

I would appreciate an advisory opinion as to whether there is now a conflict that prohibits me from mediating this case.

Sincerely,

Certified Family, Circuit and Dependency Mediator
Northern Division

AUTHORITY REFERENCED

Rule 10.340(a) and Committee Notes, Florida Rules for Certified
and Court-Appointed Mediators
MEAC Opinions 94-002, 94-003, 97-002 and 99-001

SUMMARY

Having once acted as an advocate for one party, it would be unethical for a mediator to subsequently conduct a mediation, irrespective of waivers from all parties, since there would be a clear conflict of interest pursuant to rule 10.340(a).

OPINION

The Committee assumes that the present mediation is between the husband and wife who were involved in the dissolution 22 years earlier. In such a situation, the Committee believes that it would be unethical to conduct the mediation, irrespective of waivers from all parties, since there would be a clear conflict of interest under rule 10.340(a).

The concept of conflict is defined in that rule as existing "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." While Committee Notes are not part of the

rule, the Committee is of the opinion that the following commentary from the Committee Notes expresses a reasonable and correct interpretation of what constitutes a conflict and is thus persuasive on the issue:

Potential conflicts of interests which require disclosure include the fact of a mediator's membership on a related board of directors, full or part time service by the mediator as a representative, advocate, or consultant to a mediation participant, present stock or bond ownership by the mediator in a corporate mediation participant, or any other form of managerial, financial, or family interest by the mediator in any mediation participant involved in a mediation. A mediator who is a member of a law firm or other professional organization is obliged to disclose any past or present client relationship that firm or organization may have with any party involved in a mediation. (emphasis supplied)

The only reference to a clear conflict occurs later in the Committee Notes:

A conflict of interest which clearly impairs a mediator's impartiality is not resolved by mere disclosure to, or waiver by, the parties. Such conflicts occur when circumstances or relationships involving the mediator cannot be reasonably regarded as allowing the mediator to maintain impartiality.

The mere passage of time cannot reasonably be regarded as allowing the mediator to maintain impartiality if the mediator once acted as an advocate for one party. Rather than attempting to assess each case individually for a potential conflict or confidentiality violation, the Committee is of the opinion that the better approach for a mediator is to completely avoid conducting mediations in which a former client is a party.

The situation of serving first as an attorney and then as a mediator is to be distinguished from the converse. The Committee has previously addressed the situation of serving first as a mediator and then as an attorney, opining that it is objectionable if the same case is involved (see MEAC 94-002 and 94-003), but not necessarily objectionable if an unrelated case is the subject of the representation (see MEAC 97-002 and 99-001).

Date

Fran Tetunic, Committee Chair