

April 4, 2002

THE QUESTION

Please advise me on the ethical propriety of the following set of facts:

A husband and wife make an appointment to meet with a certified mediator to negotiate a divorce settlement. The parties meet jointly with the mediator and neither is represented by legal counsel. The mediator receives relatively limited personal information from the parties, such as their ages, occupation and length of marriage, and then begins explaining the legal issues which will need to be resolved. More specifically, the mediator states that where there is a significant discrepancy in the parties' incomes, the party with lower earnings should request alimony and attorney's fees. With regard to the discussion concerning alimony and attorney's fees, the mediator made the comment that "I'm acting more like a lawyer giving legal advice than a mediator."

The meeting lasts approximately 30 to 45 minutes. At the conclusion of the meeting the parties schedule another appointment for the purpose of actually mediating a divorce settlement. As the parties are leaving, the husband asks whether the mediator could represent either of the parties as a lawyer after having conferred with them as a mediator, and the mediator responds in the negative.

Several days later, the husband sends a letter to the mediator stating that at their initial meeting he felt the mediator had acted more as an advocate for the wife than as a neutral party, and that the mediator had effectively given legal advice to the wife by encouraging her to seek alimony and attorney's fees. The husband then informs the mediator that he will not participate in any mediations conducted by that mediator.

Under these circumstances, can the mediator then become counsel of record for the wife in the parties' divorce?

I would appreciate your written opinion on this situation as expeditiously as possible.

Very truly yours,

Circuit Mediator
Northern Division

AUTHORITY REFERENCED

Rules 10.310, 10.330(a) and (c), 10.360(a), 10.370(b) and (c), Florida Rules
for Certified and Court-Appointed Mediators
MQAP Opinions 94-003 and 97-009

SUMMARY

Under these circumstances, it would be ethically inappropriate to become counsel of record for either of the parties' in their pending divorce.

OPINION

The Committee, prior to answering your question, would like to clarify that the first meeting with the husband and wife was part of the mediation process. See MQAP 97-009. The implicit distinction made between this meeting and a subsequently-scheduled (but never held) "actual mediation" is not of significance for the purpose of applying the ethical rules. Thus, despite the assertion that the mediator may have been acting more like an attorney giving legal advice, the individual at that time was acting in the capacity of a mediator.

While functioning as a mediator during a session, one is bound by the mediation code of conduct, specifically rule 10.370(c), which provides that "[Consistent] with standards of impartiality and preserving party self-determination . . . a mediator may provide information that the mediator is qualified by training or experience to provide." Even assuming that, as an attorney, one were qualified to advise the party with the lower earnings to seek alimony and attorney fees, as a mediator such advice would constitute a violation of the requirement of impartiality and self-determination. Rule 10.330(a) defines impartiality as freedom from favoritism or bias and includes a commitment to assist all parties, as opposed to any one individual. Rule 10.310 (Self-Determination) mandates that decisions during mediation are to be made by the parties. By essentially advising one party to seek relief which would necessarily be at the expense of the other, the Committee believes the mediator breached the duty imposed under rule 10.370(c). In accordance with rule 10.370(b), the appropriate response of a mediator who believes a party does not understand his or her legal rights is to advise that party to seek independent legal advice.

In response to your specific question, the Committee opines that there could be a violation of rule 10.330(c), which prohibits a mediator from soliciting or otherwise attempting to procure future professional services if "the mediator" accepted the role of wife's attorney in this case. The Committee also feels that there may be a violation of the confidentiality requirement in rule 10.360(a) if the attorney represents the wife after serving as a mediator in relation to the same case, since as mediator, one may have been privy to confidential information which could be used to the husband's detriment. See MQAP 94-003.

April 4, 2002
Date

Charles M. Rieders
Charles M. Rieders, Committee Chair