

FLORIDA SUPREME COURT  
Mediator Ethics Advisory Committee

Opinion Number: 2018-002

Date Issued: August 21, 2018

### The Question

Prior to an appellate mediation, the lawyers for the appellant and the appellee provide the mediator with confidential pre-mediation statements. Those statements identify a few appellate court decisions that might be relevant to the issues on appeal. Prior to the mediation, the mediator conducts some research, reviews the cases identified by counsel, and he finds another appellate case/decision that neither counsel has identified. The mediator believes this appellate case/decision may be very helpful and relevant to the negotiations. The holding in the case may help one party in the appeal to the detriment of the other party.

During the early stages of the mediation, the mediator asks the lawyers if there are any appellate court decisions, other than the cases they identified in their pre-mediation statements, that might be helpful to resolving the issues on appeal and, more importantly, to advancing the settlement discussions. Despite the mediator's best efforts, neither of the attorneys seems to be aware of the case the mediator discovered in his own research.

The mediator is aware of the importance of remaining impartial throughout the mediation process and is committed to assisting all parties, as opposed to one individual consistent with Rule 10.330. The mediator is also mindful of his obligations under Rule 10.370 which allow him to provide information that he is qualified by training or experience to provide. The mediator is also aware of the Committee Notes to Rule 10.370 which state, in relevant part, "The primary role of the mediator is to facilitate a process which will provide the parties an opportunity to resolve all or part of a dispute by agreement if they choose to do so. A mediator may assist in that endeavor *by providing relevant information or helping the parties obtain such information from other sources.*" [Emphasis added].

The mediator believes the appellate court decision is relevant to the resolution of the issues in the mediation, that the attorney's may have overlooked this information, and that each of the attorneys and their clients should be informed of the case so they can consider what impact, if any, it has on their willingness to settle or advance the case through the appellate process.

#### Questions:

1. If a mediator is aware of a case that neither attorney/party is aware of and which the mediator believes may be important to resolving the issues in the mediation, is the mediator permitted to disclose the existence of this case to the attorneys/parties consistent with Rule 10.330, 10.370, and the Committee Notes to 10.370?

2. After disclosing the existence of the case to each of the attorneys/parties, is the mediator permitted to ask them what difference, if any, the case has on their chances of succeeding in the appeal, their willingness to settle, or their interest in proceeding with the appeal?

3. Does the answer to question 1 or 2 differ if the mediator believes the appellate decision will clearly improve one party's position to the detriment of the other party's position?

4. Suppose the mediator decides during a caucus to disclose the existence of the appellate decision to only the attorney/party who would be adversely impacted by the holding in the case. Would the mediator be permitted to ask the attorney/party to consider what would happen to their chances of succeeding on appeal if the opposing attorney/party discovers this case?

Florida Supreme Court Certified County, Circuit, and, Appellate Mediator  
Central Division

### **Authorities Referenced**

Rules 10.330(a), 10.370(a) and (c), and 10.420(b), Florida Rules for Certified and Court-Appointed Mediators  
MQAP 1995-002

### **Summary**

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.

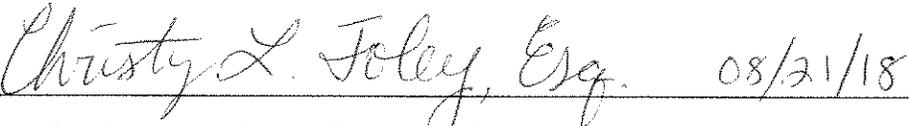
### **Opinion**

The Florida Rules for Certified and Court-Appointed Mediators emphasize the importance of a mediator adhering to the principle of impartiality. Conducting a mediation with impartiality means that a mediator has a commitment to assist all parties as opposed to any one individual and must remain free from "favoritism or bias in word, action, or appearance," rule 10.330(a).

The rules are explicit with respect to a mediator's role and various limiting provisions on mediator conduct. While a mediator may provide information that the mediator is qualified by training or experience to provide, the mediator may only do so consistent with standards of impartiality according to rule 10.370(a) and (c). Subdivision (c) provides that a mediator "shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue," and any discussion of possible outcomes of the case or the merits of a claim or defense must be consistent with the standards of

impartiality and preserving party self-determination. Thus, a mediator, while fulfilling the role of reality tester during mediation, must be aware of, and consciously avoid crossing the line between partiality and impartiality. The rules require that the mediator neither bias the process in favor of, nor in opposition to a party.

In the scenario described by the inquirer, providing case law to one or both parties would violate the standards of impartiality as doing so may assist one party to the detriment of the other party. Furthermore, providing case law would cross the line between being a mediator and an advocate. It is improper for a mediator to provide legal advice by any method within the scope of a mediation, whether such advice be by statement, question, any other form of communication, or providing case law. See MQAP (Mediator Qualifications Advisory Panel, the predecessor of the MEAC) 1995-002. In the event that not being permitted under the ethical rules to disclose the case to one or both of the attorneys makes the mediator so uncomfortable that the mediator is unwilling to continue to serve as the mediator, the mediator may withdraw, rule 10.420(b).

  
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*Signed and Dated by Christy Foley, MEAC Committee Chair*