

FLORIDA SUPREME COURT
Mediator Ethics Advisory Committee

Opinion Number: 2017-017
Date Issued: April 11, 2018

The Question

A lawyer/trainee completes a circuit mediation certification training course and embarks on the process of completing the mentoring requirements. He contacts lawyers in his law firm to see if they have any cases that are headed to mediation in the near future. The lawyer/trainee hopes he can contact the lawyer on the other side of the case to secure their consent to observe the mediator. It is worth emphasizing that one of the lawyers in the lawyer/trainee's own law firm will be representing one of the parties in this mediation. Assuming the opposing counsel and the mediator consent to allow the lawyer/trainee to observe the mediator, there are a few issues that may become problematic. The following are a few of the many concerns:

- a. while the lawyer/trainee is shadowing the mediator in the caucuses, he will likely hear information that could potentially expose weaknesses in the other party's case, or reveal litigation strategy;
- b. the party may be reluctant to share information with the mediator during caucuses if there is a chance the lawyer/trainee might hear it and disclose it to the lawyer's in his own firm;
- c. the party may perceive the lawyer/trainee as a "secret agent" who is attempting to learn information that could be leaked to or exploited by the lawyers in the lawyer/trainee's firm.

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

Questions:

1. Is it ever permissible for a trainee who is attempting to fulfill the mentoring requirements for certification to mentor with a mediator when the trainee works in the same law firm as the lawyers who are representing one of the parties in the case?
2. Is it permissible for the mediator to allow a trainee to mentor when the trainee is employed by, in business with, or has a financial relationship with one of the parties in the lawsuit?
3. Do Rules 10.300 (Mediator's Responsibility to the Parties), 10.330 (Impartiality), and 10.340 (Conflicts of Interest), of the Rules for Certified & Court-Appointed Mediators, apply to a person who is completing the mentoring requirements?
4. If the answer to question 3 is no, what responsibility does a mediator have with respect to mentoring and complying with any applicable rules?

Supreme Court Certified County, Circuit, and Appellate Mediator
Southern Division

Authorities Referenced

Rules 10.300, 10.330, 10.340(a), 10.400 and 10.410, Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinions 2008-007, and 2002-005
In re: Procedures Governing Certification of Mediators, AOSC 11-1 (January 10, 2011)

Summary

The MEAC answers several questions relating to a mediator allowing a mediator trainee to observe a mediation in which the trainee has either a clear or a waivable conflict of interest with one of the parties in the mediation or the party's attorney.

Opinion


A mediator trainee applying for certification is required to observe a Florida Supreme Court "certified mediator in the same category for which certification is sought" who is conducting the type of mediation for which certification is sought. In re: Procedures Governing Certification of Mediators, AOSC 11-1, page 6 (January 10, 2011). During the observation, the mediator trainee shadows the mediator in order to learn skills by seeing them practiced. In essence, during the observation, a trainee is an extension of the mediator, both in joint session and in caucus, albeit a silent one.

When analyzing the potential conflict of interest presented by the inquirer under rule 10.340, Florida Rules for Certified and Court-Appointed Mediators, the MEAC believes that if a conflict of interest exists which would render it unethical for the trainee to serve as the mediator in the case if the trainee were already certified, then the trainee has the same conflict as an observer and should not be allowed to observe. We opined in MEAC 2008-007 that "a clear conflict of interest exists whenever a law firm in which a mediator is a partner is part of an adversary process involving a party to the mediation regardless of the size of the law firm, location of other cases or the mediator's lack of personal involvement." In MEAC 2002-005, we stated that "serving as a mediator for a case involving a party to mediation against whom your law firm has cases pending creates a clear conflict necessitating the withdrawal of the mediator, regardless of the express agreement of the parties." Thus, given that the lawyer/trainee in the scenario presented would be unable to mediate the case if he were already certified, it would be a clear conflict of interest for the lawyer/trainee to observe a mediation in

which one of the lawyers in his own law firm will be representing one of the parties in the mediation. The conflict of interest cannot be waived by agreement of the parties.

Under rule 10.340(a), “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.” If a mediator is currently employed by, in business with, or has a financial relationship with one of the parties in the lawsuit being mediated, such a relationship would be a clear conflict of interest requiring the mediator to decline serving in the case, as the relationship would compromise or appear to compromise the mediator’s impartiality. Applying the principle that the trainee is an extension of the mediator, the mediator should refuse to allow a trainee who has such a current relationship with one of the parties to observe the mediation, due to the clear conflict of interest.

There is no authority that requires compliance with the Florida Rules for Certified and Court-Appointed Mediators by a person completing the mentoring requirements to become certified. However, the rules do apply to the Florida Supreme Court certified mediator who is conducting the mediation being observed and rule 10.300, Florida Rules for Certified and Court-Appointed Mediators, charges the mediator with the responsibility of avoiding conflicts of interest. Additionally, rule 10.400, Florida Rules for Certified and Court-Appointed Mediators, requires the mediator to safeguard the process. In that role, the mediator is responsible for ensuring the mediation is conducted in an impartial manner according to rule 10.330, Florida Rules for Certified and Court-Appointed Mediators, and ensuring that nothing, including the mentoring process, interferes with achieving a balanced mediation under rule 10.410, Florida Rules for Certified and Court-Appointed Mediators. Thus, the mediator has a responsibility to screen trainees who ask to observe for possible conflicts of interest and refuse those who have a clear conflict under rule 10.340, Florida Rules for Certified and Court-Appointed Mediators.

 April 11, 2018

Signed and Dated by Susan Dubow, MEAC Committee Chair