

November 22, 2004

The Question

I would appreciate a clarification on the response to Question 2003-006 reported in the June 2004 *Resolution Report*

The Committee's opinion begins with the assumption that the present mediation is between the husband and wife who were involved in the dissolution 22 years earlier, in which the mediator had represented one of the parties. However, the language in the opinion then appears to be more general and, if taken literally, suggests that anytime a mediator has ever represented a party, the mediator could never mediate a matter in which the party was later involved, regardless of the passage of time, how unrelated the matters were, and the absence of any other common participant.

This would make it impossible for many mediators to evaluate whether they could mediate disputes, particularly with entities. For example, if a mediator has done a wide litigation or appellate practice, he or she may have represented hundreds or even thousands of clients over a 20 or more year period. The mediator may not be able to recall all of those clients, and may not even know many of them given for example: (1) mergers and acquisitions; (2) in situations when an insurer might pay for the defense of a particular client (if the attorney did not do the billing, he may not even know who the insurer was). These situations could be combined where an insurer who had paid for a defense for the client was later merged into some other entity.

In many situations, mediators who, as counsel, had represented a party (particularly an institutional party, such as an insurer) may have later appeared adverse to that party in other unrelated litigation. It would be hard to imagine how this situation could be reviewed as placing the mediator in a situation that would impair his or her impartiality, when the mediator has appeared as an advocate both for and against a party in the past.

I would appreciate the Committee's clarification as to whether the opinion addresses the particular factual situation of a mediation between the same two parties in a dissolution, or if it is intended to apply broadly to *any* prior representation of any party.

Certified Circuit Civil Mediator
Central Division

Authority Referenced

Rule 10.340, Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinion 2003-006

Summary

MEAC Opinions are based on the facts presented in the question. Prior representation of a party to a mediation, which involved different parties, a different case or different subject matter would be subject to disclosure and *may* be waivable based on a case by case determination.

Opinion

In light of your request for clarification, the Committee notes that all MEAC opinions are based on the Committee's understanding of the facts presented in the question. MEAC 2003-006 was in answer to a question which related to a mediation involving the same parties and the same case and subject matter. If the factual situation provides a different subject matter or party, the conflict, while still existing and thus subject to disclosure, may not rise to the level of a clear conflict and thus may be waivable by the parties. Rule 10.340. Any such determination would have to be made on a case-by-case basis.

Date

Fran Tetunic, Committee Chair