

January 18, 2006

The Question

I am a Workers' Compensation Defense Attorney as well as a Certified Civil Circuit Mediator. I was recently requested to mediate a case by an adjuster who works for a national third party administrator which also happens to administer claims for two of my clients. I have never worked with this adjuster or the accounts she would be representing at the Mediation conference, although I have been informed the re-insurer (coverage in excess of \$250,000) in her cases may be the same re-insurer used by my clients.

I request an advisory opinion as to whether it would be unethical for a Mediator to conduct a Mediation in which one of the participants uses the same third party administrator used by the Mediator's clients. Also, would it be unethical for a Mediator to conduct a Mediation if some of his clients use the same re-insurer as a participant in a Mediation?

Submitted by a Certified Circuit Mediator
Central Division

Authority Referenced

Rules 10.330, 10.340, and 10.620, Florida Rules for Certified and Court –
Appointed Mediators
MEAC Opinions 2003-006 and 2004-007

Summary

A mediator (who is also an attorney) engaged in an ongoing legal relationship with a third party administrator must not serve as a mediator in cases involving the third party administrator because it is a clear, nonwaivable conflict of interest. A mediator (who is also an attorney) may serve in cases involving a reinsurer, even if some of the mediator's legal clients utilize the same re-insurer, if the relationship is disclosed and the parties waive any potential conflict because such a relationship is not a clear conflict of interest.

Opinion

Typically, third party administrators in Workers' Compensation cases are delegated responsibility for processing claims, but are not directly responsible for overall claim costs. They advise employers as to whether a claim should be paid and for how much. Third party administrators represent a variety of clients, some insurance carriers and some self-insured employers. The third party administrator's responsibility and authority vary based on contractual terms. Significantly, some third party administrators are vested with full decision-making authority and hire counsel. In essence, the third party administrator, for mediator conflict of interest purposes, is the attorney's client.

Based on the facts presented in the question, the mediator has not only "represented" the third party administrator in the past, but remains in an ongoing relationship. A mediator "shall not accept any engagement, provide any service, or provide any act that would compromise the mediator's integrity or impartiality." Rule 10.620. In this circumstance, the integrity of the mediation would be compromised by the mediator serving in the dual capacity of attorney representing the third party administrator on one day, and on the next day serving as an "impartial" mediator. "Impartiality means freedom from favoritism or bias in... appearance..." Rule 10.330. Regardless of whether the mediator believes he or she can be impartial, the appearance of bias remains.

In MEAC 2003-006, the Committee opined that having once acted as an advocate for a party, it would be unethical for the mediator to subsequently conduct a mediation between the same parties in the same case regarding the same subject matter. The Committee clarified in MEAC 2004-007, in which the mediator asked about potential past relationships, that conflicts of interest determinations are to be made on a case-by-case basis if the factual situation provides a different subject matter or party. In this case, the Committee notes that the mediator still serves as an attorney. It is this ongoing attorney-client relationship with one of the parties to the proposed mediation which creates the clear, unwaivable conflict in relation to the third party administrator. Since the third party administrator can materially affect the outcome of the case, this ongoing relationship presents a clear conflict and the mediator must withdraw from the mediation, regardless of the express agreement of the parties. Rule 10.340(c).

In contrast, the Committee opines that the mediator/lawyer client's use of the same re-insurer as a participant in a mediation is not a clear conflict, but one which must be disclosed, if known, and the potential conflict may be waived by the parties. Rule 10.340. The difference between the re-insurer and the third party administrator is that the re-insurer is not a "party" to the case and does not have decision-making authority.

Date

Fran Tetunic, Committee Chair