

January 4, 2008

The Question

In addition to performing family court mediation services, I prepare retirement orders (QDROs, COAPs, etc.) for a fee. Generally, one or both of the divorce attorneys contact me to perform this service. Occasionally, they have one of the clients engage my services instead. My role is to obtain the necessary information from them (details of the retirement plan, copy of the final judgment and settlement/mediation agreement, if any), contact the plan administrator to ascertain the necessary format for the order, prepare the order, obtain approval of the order from both attorneys (or parties if attorneys are not involved) and from the plan administrator. Finally, I forward the order to the court, obtain a certified copy and forward that to the plan administrator. In this capacity, I act as a neutral, not representing either party.

On a couple of occasions, after I have completed a mediation, I have been asked to prepare a retirement order for that case. To date I have indicated my concern that this would be a conflict and have not taken on this activity.

My question is whether it would be ethically proper for me to prepare the retirement orders for a case I have mediated so long as both parties waive any conflict which might exist.

Thank you for your assistance

Certified Family Mediator
Northern Division

Authority Referenced

Rules 10.340(d) and 10.620, Florida Rules for Certified and Court Appointed Mediators
MEAC Opinions 2004-004, and 2005-004

Summary

It is not ethically proper to prepare retirement orders after having served as mediator for the case regardless of whether the parties have waived any conflict of interest.

Answer

It is not ethically proper to prepare retirement orders after having served as mediator for the case regardless of whether the parties have waived any conflict of interest. Although rule 10.340(d), Conflict During Mediation, appears to limit a mediator from creating a conflict of interest *during* a mediation, MEAC 2004-004 set forth the proposition that it is “inappropriate for a mediator to represent either party in any dissolution proceeding or in any matter arising out of the subject mediation.” In addition, MEAC 2005-004 expanded the prohibition to provide that “a mediator may not represent both parties in any matter arising from the subject mediation.” Despite your assertion that you are acting as “a neutral” when preparing these retirement orders and not representing either party, The Florida Bar considers the preparation of a QDRO to be legal activity and has pursued unauthorized practice of law (UPL) actions against non-attorneys who prepare QDROs.

A mediator shall not provide any service that would compromise the mediator’s integrity and impartiality. Rule 10.620. Given this general prohibition and the previous opinions, the Committee must take the position that it would be ethically inappropriate for a mediator to prepare a QDRO for parties for whom the mediator has mediated even if the parties waive any conflict of interest.

Date

Fran Tetunic, Committee Chair