

August 13, 2008

The Question

This letter poses a question regarding the ethics of using public information provided on a Clerk of Court website for the purpose of target marketing. As a family certified mediator, I have been reviewing the Clerk of Court website under domestic relations. Open dissolution of marriage cases provide respondent and petitioner addresses along with attorney and docket description information.

[A.] Is it ethical to market ones mediation services as a family mediator directly to the respondent, petitioner and/or attorney, by letter or other means, when the case first appears on the website?

[B.] Would it be ethical for one to actually provide the parties with a notice of proposed mediation by letter, including a prescheduled date and time of mediation, prior to their selection of a mediator or the court's assignment to mediation?

Submitted by
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Authorities Referenced

Rules 10.310(b), 10.330(a), 10.520, 10.610, 10.620, and 10.650, Florida Rules for Certified and Court-Appointed Mediators
Rules 12.740 and 12.741, Florida Family Law Rules of Procedure
Rule 4-7.4(b)(2), Rules Regulating The Florida Bar
MEAC Opinions 2001-006 and 2003-004

Summary

A. A mediator may ethically engage in unsolicited direct marketing to the parties and/or attorneys in dissolution of marriage cases using information posted online by court clerks, but may do so only in strict compliance with Rule 10.610 governing mediator advertising. Any mediator engaging in this practice must also bear in mind the

extent to which mishandling such communication may damage the reputation of individual mediators and community acceptance of the profession at large.

B. It is not ethical for a mediator to send out a notice of mediation directly to the parties in the manner suggested in the inquiry.

Opinion

A. A mediator will generally be permitted to market family mediation services directly to parties and/or attorneys in dissolution of marriage cases if, at a threshold, all information regarding services to be rendered is accurate and honest. Rule 10.610. See also MEAC 2001-006. Additionally, marketing practices of this sort may not contain misleading information. Rule 10.610. Neither may a mediator engage in any practice which would compromise his or her integrity or impartiality. Rule 10.620.

In order to assess whether a specific marketing practice is acceptable, one must also consider *how* the mediator communicates with prospective clients. For example, direct solicitation of prospective clients must not have the effect of coercing or improperly influencing any party to participate unwillingly in mediation. Rule 10.310(b). This would seem a particular concern in the ordinarily stressful circumstances surrounding dissolution of marriage cases in relation to which an unsolicited offer of mediation services may be the first point in time the parties are actually aware how publicly available their private matters have become. Similarly, Rule 10.330(a) provides a mediator “shall maintain impartiality *throughout the mediation process*” (emphasis added), thereby implicitly conditioning any unsolicited communication with prospective clients in a manner which will not later preclude the mediator from evenhandedly assisting all parties. Mediators who are also members of The Florida Bar should review similar limiting provisions in the Bar Rules relating to unsolicited direct contact with prospective clients, e.g., R. Regulating Fla. Bar 4-7.4(b)(2), as compliance is required with other ethical standards to which a mediator may be professionally bound. Rule 10.650.

The Mediator Ethics Advisory Committee cautions those who engage in direct marketing to do so not only in strict compliance with Rule 10.610 governing mediator advertising, but also bearing in mind the extent to which mishandling such communication may damage the reputation of individual mediators and community acceptance of the profession at large.

B. It is not ethical for a mediator to send out a notice of mediation directly to the parties in the manner suggested in the inquiry. Doing so would both preempt the court’s referral and may mislead the parties to think that the mediator has been selected for them and is authorized to unilaterally schedule the mediation. “A mediator shall comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.” Rule 10.520. Procedures governing mediation of

family law matters are prescribed by Rules 12.740 and 12.741 of the Florida Family Law Rules of Procedure. Specifically, Rule 12.740(c) provides family law cases may be referred to a mediator or mediation program which charges a fee *only upon a court's determination that the parties have the financial ability to pay*. Rule 12.741(b)(6) provides for selection of a mediator *within 10 days after the court enters an order of referral*. Providing a notice of proposed mediation to parties in an already filed dissolution of marriage proceeding prior to a court's ruling in these matters would be initiating the process without the required involvement of the court in violation of Rule 10.520. See MEAC 2003-004.

Date

Fran Tetunic, Committee Chair