

June 22, 2009

The Question

I have been a certified circuit civil mediator for nearly two decades, and for many years I have employed a scheduling assistant. A majority of cases that I am asked to mediate are worker's compensation cases.

Recently I was contacted in writing (a copy of which is attached) and by telephone by an entity which purports to schedule exclusively for at least one insurance carrier. (Note for the purposes of this discussion that according to Section 440.25(3)(b), Florida Statutes 2008, any worker's compensation private mediation is always at the carrier's expense.) This exclusive arrangement was explained to me by the scheduling entity's representative, and is corroborated by the second document attached.

I was also informed that in exchange for this purportedly exclusive service, I must agree to accept for my mediation services 20% less than the customary hourly charge of worker's compensation mediators in the area. I declined.

On my behalf and on behalf of other mediators similarly situated, I respectfully request an advisory opinion as to the following issues:

- 1) Is a certified mediator's impartiality compromised and a conflict of interest created by agreeing to serve as a "preferred" network provider for a scheduling service that purports to be exclusive to an insurance carrier, and by agreeing in exchange to accept a reduced fee for mediations scheduled through this entity? (Reference Rules 10.330; 10.340 and 10.380(e), Florida Rules for Certified and Court-Appointed Mediators)
- 2) If I had agreed to the terms described above and mediated cases scheduled through this entity, would I have accepted an engagement, provided a service, or performed an act that would have compromised my integrity or impartiality? (Reference Rule 10.620, Florida Rules for Certified and Court-Appointed Mediators.) Would my actions have constituted a lack of respect for the professional relationships of other mediators? (Reference rule 10.660, Florida Rules for Certified and Court-Appointed Mediators.)

Sincerely,
Certified Family and Circuit Civil Mediator
Central Division

Authorities Referenced

Fla. Stat. § 440.25(3)(b) (2008)

Rules 10.330, 10.340, 10.380(a) and (e), 10.620, and 10.660, Florida Rules for Certified and Court-Appointed Mediators

MEAC Opinions 96-001 and 98-006

Summary

1. A mediator's impartiality is not necessarily compromised nor is a conflict created simply because a mediator agrees to serve for a reduced fee as a "preferred" provider; however, any mediator who has an ongoing relationship for the provision of mediation services needs to determine whether that relationship affects impartiality or creates a conflict of interest.

2. Agreeing to the terms described and mediating cases scheduled as a result of that agreement does not appear to compromise a mediator's integrity or impartiality nor violate the requirement that mediators respect the professional relationships of other mediators.

Opinion

1. A mediator's impartiality is not necessarily compromised nor is a conflict created simply because a mediator agrees to serve for a reduced fee as a "preferred" provider. The administrative arrangement of serving as a network provider who agrees to accept a reduced mediator's fee for scheduling services does not create a conflict of interest or compromise the mediator's integrity. However, in this scenario and all other similar circumstances, any mediator who has an ongoing relationship for the provision of mediation services needs to determine whether that relationship affects impartiality or creates a conflict of interest. See Florida Rules for Certified and Court-Appointed Mediators 10.330 and 10.340. The mediator would necessarily have to consider the amount of work referred by a particular source, and whether this expectation of work, or possibly reliance on work, affects the mediator's ability to abide by the ethical rules.

Your question involves a worker's compensation mediation. For these cases, mediations are an expense of the carrier. Fla. Stat. § 440.25(3)(b) (2008). This is so whether the mediator mediates one case or many for a particular carrier. However, any prior relationship between the carrier and mediator is potentially a concern in terms of the appearance of partiality and potential conflict of interest. Significantly, the carrier's list of preferred providers does not dictate an exclusive relationship.

The statute speaks to the issue of self-determination by providing the parties must agree upon a mediator within 10 days after the date of the order or the judge will appoint a mediator. Fla. Stat. § 440.25(3)(b) (2008). The statute thereby preserves party self-determination as it relates to selection of a mediator, allowing both parties to choose the mediator. Cf. MEAC 98-006 (raising concerns for a business agreement naming a specific individual as an exclusive provider). A mediator selected from a list of preferred providers must, in any event, fully

disclose the relationship with the carrier and must do so as soon as practical after selection. See rule 10.340(b).

While rule 10.380(e) prohibits “commissions, rebates, or similar remuneration” given by a mediator for referrals, a previous opinion recognizes “the use and acceptability of administrative fees which mediation associations or companies charge” in similar circumstances. MEAC 96-001. Mediators are free to set rates as they choose if “reasonable and consistent with the nature of the case.” Rule 10.380(a). In this instance, fees “20% less than the customary hourly charge of worker’s compensation mediators in the area” appear both reasonable and consistent with higher fees in comparable cases if the expense of scheduling mediations, notifying parties, collecting fees, and related administrative costs are assumed by another.

2. Agreeing to the terms described and mediating cases scheduled as a result of that agreement does not appear to compromise a mediator’s integrity or impartiality. See rule 10.620. Neither would such an agreement and subsequent mediation appear to violate rule 10.660 which requires mediators to respect the professional relationships of other mediators.

In relation to engagements, services, or actions in this instance potentially compromising integrity or impartiality, neither Florida law nor the Florida Rules for Certified and Court-Appointed Mediators prohibits mediators from entering into contracts for services. Under rule 10.380(a), mediators are free to set rates as they choose if “reasonable and consistent with the nature of the case.” Party self-determination as it relates to selection is protected by the workers’ compensation statute and required disclosure of the relationship between a preferred provider and carrier further affords parties the opportunity to make judgments for themselves regarding a mediator’s integrity and impartiality.

The instant circumstances may be distinguished from those underlying prior opinions which may otherwise appear to support a contrary response to this question. Notably, there is a critical distinction between administrative fees and referral fees. MEAC 96-001 is premised on the latter, whereas the Committee finds the reduction in fee in this instance is more akin to an administrative fee. MEAC 98-006 speaks to an agreement naming a specified individual as an exclusive provider, impermissibly limiting party self-determination in the selection of a mediator, whereas the Committee in this instance finds no limitation of this sort.

The arrangement does not appear to violate the rule requiring mediators to respect the professional relationships of other mediators. No specific individual from the list of preferred providers is guaranteed selection. Consequently, the process is nonexclusive and, though affording participating providers obvious advantages, does not, by itself, violate rule 10.660.

Date

Fran Tetunic, Committee Chair