

2022 DRC CONFERENCE

Sessions A1 and C1

Mediator Campfire Stories: Tales of Conflict of Interest

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Rule 340 Conflicts of Interest - summarized

- *A mediator **shall not** mediate when any relationship between a mediator and a mediation participant or the subject matter of the dispute compromises or appears to compromise a mediator's impartiality.
- *Disclosure **shall** be made by a mediator as soon as practical after becoming aware of the interest or relationship giving rise to the potential conflict.
- *After disclosure, a mediator **may** serve if all parties agree. However, if a conflict clearly impairs a mediator's impartiality, a mediator **shall** withdraw regardless of the express agreement of the parties.
- *During mediation, a mediator **shall not** provide any services that are not directly related to the mediation process.
- ~~-(e) Senior and Retired Judges. (Intentionally deleted)~~

RULE 340 Conflicts of Interest

(a) **GENERALLY.** A mediator shall not mediate a matter that presents a **clear or undisclosed** conflict of interest. A conflict of interest arises when any **relationship between the mediator** and the mediation **participants or the subject matter** of the dispute **compromises or appears to compromise** the mediator's impartiality.

CAMPFIRE STORY 1: Relative of Mediator marrying relative of attorney
representing a party in mediation
Opinion Number: 2018-003 (10/02/2018)

STORY: A and B, brothers, are both attorneys. Mediator's daughter is engaged to marry A. B is attorney for a mediation participant. The two families socialize occasionally.

MEAC: There is no immediate family member involved, but rather a potential family relationship once the mediator's daughter marries attorney B's brother, attorney A. Family gatherings are two or three times a year with an annual dinner party hosted by the father of attorneys A and B. Given these facts, MEAC did not find the relationship created a clear conflict of interest. But the relationship could appear to compromise the mediator's impartiality, so the inquirer acted appropriately in disclosing the information.

CAMPFIRE STORY 2:

All in the family – A niece and a daughter

Opinion Number 2004-008 (2/1/2005)

STORY: Mediator's niece is a paralegal for a multi-office law firm. Mediator's daughter is a paralegal for a different firm. Can the Mediator mediate cases for that law firm?

MEAC: Both scenarios pose potential conflicts of interest which, at a minimum, must be disclosed “as soon as practical.” The mediator must analyze each situation for any factors which would “clearly impair [the] mediator’s impartiality.” If there is a clear conflict, the mediator must withdraw from or not accept the mediation “regardless of the express agreement of the parties.” A case the daughter is personally handling would be a nonwaivable, clear conflict, while her firm’s case – if she were not involved -- may be waivable after disclosure, depending on the circumstances.

CAMPFIRE STORY 3:

How much is enough conflict checking?

MEAC 2021-007

STORY: Mediator used several databases of individuals named as parties in lawsuits as well as their attorneys. But what about the non-public businesses? Is the mediator doing enough by merely checking the names of the entities?

MEAC: A mediator may perform an in-depth conflict check by choice or if other rules of court require it, but a mediator is only required to perform a conflict check on all “mediation participants” as defined in Rule 340(a) and (b), and then to disclose any known potential conflicts. See MEAC Opinions 2018-003 and 2017-015.

RULE 340 Conflicts of Interest

(b) BURDEN OF DISCLOSURE. The burden of disclosure of any potential conflict of interest **rests on the mediator.**

Disclosure **shall** be made **as soon as practical** after the mediator becomes aware of the interest or relationship giving rise to the potential conflict of interest.

RULE 340 Conflicts of Interest – 2000 Note

While impartiality is not necessarily compromised, full disclosure and a reasonable opportunity for the parties to react are essential.

CAMPFIRE STORY 4:

Can mediator for A+B mediate for A+C?

MEAC 2021-006

FACTS: Mediator mediated a divorce between A and B.
A remarried and is now divorcing C.

Can the same mediator mediate this second divorce?
Does it matter if he doesn't remember the first
mediation?

MEAC: Mediator was made aware that he had mediated a matter previously for one of the two parties. This raises at least a possible conflict of interest or the appearance of a conflict of interest since the facts of the prior case may relate to the current case. The mediator should disclose the potential conflict to all parties as soon as practical after becoming aware of it. Then the mediator may continue to mediate the case only if all parties agree.

CAMPFIRE STORY 5:

Failure to disclose financial and family interest

MQB 2012-018 (04/23/2014)

FACTS: Mediator failed to disclose both financial and family interests in a mediation participant when he mediated over 100 cases for the participant.

MQB: Mediator violated Rules 340(a) and (b) by failing to disclose that his conflict of interest with the law firm representing plaintiffs because his sister-in-law was the mediation coordinator for the firm. At no time was the family relationship or the extent of the financial relationship disclosed (over 100 mediations). Mediator was suspended for 6 months and had various CME and related duties to perform before reinstatement.

CAMPFIRE STORY 6:
Failure to disclose prior representation
MQB 2015-003 (02/24/2016)

FACTS: Mediator for probate case failed to disclose that he had once represented the attorney for the brother in the attorney's divorce.

MQB: Mediator violated Rule 340 (and other rules) by failing to inform the parties prior to or at mediation that he had a past relationship with one of the attorneys. MEAC 2003-006 states that a mediator who was an advocate for a party has a clear conflict of interest in mediating with that participant and cannot ethically do so irrespective of the passage of time and waivers from all parties. It was “particularly egregious” that he tried to persuade one of the attorneys to support his false account of disclosure. Mediator was suspended for 3 months, etc.

CAMPFIRE STORY 7:

Mediating after party consulted with the law firm
MEAC 2017-009 (10/11/2017)

FACTS: Mediator works for a mediation company and a law firm. Is there a conflict for the mediator if a party had a consultation with another attorney at the firm and didn't retain him?

MEAC: In MEAC 2011-014, MEAC stated that the facts of a particular case determine whether a conflict can be waived by the parties. In this case, the law firm was not retained, and the mediator had no other contact with the party, so there is no clear conflict. However, the mediator must disclose the matter to the participants. The potential conflict is waivable if agreed to by the parties and the mediator can maintain impartiality.

RULE 340 Conflicts of Interest

(c) EFFECT OF DISCLOSURE. After appropriate disclosure, the mediator **may** serve **if all parties agree**.

However, if a conflict of interest **clearly impairs** a mediator's impartiality, the mediator **shall** withdraw **regardless of the express agreement of the parties**.

The "Gut check"!

RULE 340 Conflicts of Interest – 2000 Note

A conflict of interest which **clearly impairs** a mediator's impartiality is not resolved by mere disclosure to, or waiver by, the parties. Such conflicts occur when **circumstances or relationships** involving the mediator cannot be reasonably regarded as allowing the mediator to maintain impartiality.

THE "GUT CHECK"!

RULE 340 Conflicts of Interest – 2000 Note

A mediator who is a member of a law firm or other professional organization is **obliged to disclose** any past or present client relationship... with any party involved in a mediation. The duty ...includes information [about] **ongoing financial or professional relationship** with any of the parties, counsel, or related entities.

RULE 340 Conflicts of Interest – 2000 Note

Potential conflicts of interest which **require disclosure** include... a mediator's membership on a related board of directors, full or part time serviceas a representative, advocate, or consultant to a mediation participant, present stock or bond ownership...in a corporate mediation participant, or any other form of managerial, financial, or family interest...in any mediation participant...

RULE 340 Conflicts of Interest – 2000 Note

Mediators establish personal relationships with many representatives, attorneys, mediators, and other[s]... of various professional associations. There should be **no attempt to be secretive... but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.**

RULE 340 Conflicts of Interest

(d) CONFLICT DURING MEDIATION. A mediator shall not create a conflict of interest during the mediation.

During a mediation, a mediator **shall not** provide any **services that are not directly related to the mediation process.**

RULE 340 Conflicts of Interest – 2000 Note

Under subdivision (d),...a mediator would therefore be **prohibited** from providing accounting, psychiatric or legal services, psychological or social counseling, therapy, or business consultation of any sort during the mediation process.

CAMPFIRE STORY 8:

Restating info to assist a deaf participant
Opinion 2017-021 (06/13/2018)

FACTS: In this Small Claims case, a deaf defendant appeared in person with the Mediator, and plaintiff's attorney was on the phone. Defendant asked Mediator to restate what was said on the phone.

MEAC: MEAC 2017-002 explained that any question of a mediator serving in dual roles such as those of mediator and spoken language interpreter or translator should be filtered using rules 10.330(a), 10.340(d), and 10.410. Applying rules 10.330(a) and **10.340(d)**, a mediator is prohibited from serving in the dual roles of mediator and an oral interpreter for a deaf pro se defendant who reads lips.

CAMPFIRE STORY 9:
Offered mediation to benefit a defendant
QCC Case #2015-013 (07/20/2015)

FACTS: Solicitation letters were sent saying “We save you the time of the exhausting drawn out court process while also protecting you from monetary judgment.” and “We handle your entire case.”

QCC: An advertising campaign violated Rules including Rule 340(d) and created a conflict of interest by offering to provide services not directly related to mediation. The ad stated: “Before the court creates a negative mark on your record permanently, you need to call us. If you use our services, you won’t have to go to court or meet anyone in person. You can even take your family on vacation! We handle your entire case.” If a case isn’t resolved in mediation, a mediator cannot go to court for a party. Mediator could not apply for certification for at least 18 months and had to complete various CME hours on advertising, etc.

CAMPFIRE STORY 10:

Providing services not directly related to the mediation process

MQB 2012-005 (03/18/2013)

FACTS: A Family Mediator mediated a case, drafted post dissolution papers, and attempted to procure additional business.

MQB: Mediator violated rules including Rule 340(d) by providing services not directly related to the mediation process. Mediator owned a document preparation service for *pro se* litigants seeking assistance with preparation of bankruptcy petitions. While reviewing the parties' financial information during mediation, the mediator attempted to procure bankruptcy documentation preparation services. In addition, the mediator drafted dissolution documents not as part of the mediation but as an additional service.

CAMPFIRE STORY 11:

Soliciting business and laughing with party's attorney
MQB 2013-014 (consensual) (11/03/2014)

FACTS: Mediator failed to disclose that the husband's attorney had attended the Circuit mediation training the mediator provides and, during the mediation, asked the wife's attorney to attend the training, as well as laughing loudly with husband's attorney within hearing of the wife.

MQB: Mediator violated Rule 340(d). Soliciting business for the mediator's training program was not within the scope of the mediation and therefore violated the Rule.

CAMPFIRE STORY 12: Can you top this? MEAC 2019-007

FACTS: Mediator spent 30 years as a litigation attorney for one insurance company. He retired with a pension and went to work for a law firm that represented the same insurance company. Can he serve as mediator for cases where that insurance is a party?

MEAC: Mediators may not mediate matters that present a clear or undisclosed conflict of interest. Determining whether a conflict can be cured through disclosure depends on a variety of factors. Mediators have the obligation to disclose potential conflicts of interest which are waivable and may mediate the case if both parties agree after disclosure.

In other words: It depends!After hearing 11 other conflicts of interest stories, what do you think about this opinion?

RULE 340 Conflicts of Interest

(e) SENIOR AND RETIRED JUDGES. (Intentionally deleted)