MEDIATOR ETHICS: GONNA MAKE YOU SWEAT
AGENDA

Intro

Case Study Problems

- Small Group Discussions
- Reporting Back (Large Group Discussion)

Q&A
PROBLEM 1 (PART 1)

- You mediate in a county in the fictional 21st Judicial Circuit of Florida, which has an Administrative Order (“AO”) concerning actions referred to mediation. Among other things, the AO requires the parties referred to “undertake mediation in a serious manner, and to negotiate in good faith, on penalty of court sanction for failure to do so.”

- You are assigned as mediator of Smith v. Jones, an action pending in the 21st Judicial Circuit. During the course of your first caucus with Mr. Jones, he tells you, “This case is worthless. I’m not going to put a penny down. I’m only here because the court says I have to be.”

What action, if any, does this statement by Mr. Jones in caucus require of the mediator ethically?
PROBLEM 1 (PART 1) – “ANSWER” (THINGS TO CONSIDER)

Rules (Fla. R. Med.)
- 10.420(b)(3)
- 10.360(a), (b)
- 10.310(a), (b)
If the AO also requires the mediator to report to the court, in the event of an impasse, whether the parties negotiated in good faith and if not, which party did not and why....

May the mediator ethically complete that form?
PROBLEM 1 (PART 2) – “ANSWER” (THINGS TO CONSIDER)

Rules (Fla. R. Med.)
- 10.520
- 10.510
- 10.420(b)(3)
- 10.360(a), (b)
- 10.310(a), (b)

MEAC Opinions
- NO: 2004-006
- Maybe?
  - 2012-005
  - 2014-010
Assume you convey Mr. Jones’ offer of “Zero” to Mr. Smith, who grows so irate, he asks you to declare impasse, which you do. Now, Mr. Smith has filed a motion in court for sanctions against Mr. Jones for failure to mediate in good faith.

At a hearing on that motion, which Mr. Jones does not attend, you are called by Mr. Smith to testify as to what, if anything, Mr. Jones told you in caucus.

How may you ethically respond?
PROBLEM 1 (PART 3) – “ANSWER” (THINGS TO CONSIDER)

**Rules (Fla. R. Med.)**
- 10.520
- 10.510
- 10.500
- 10.360(a)

**MEAC Opinions**
- 2001-008 (not voluntarily)

**Florida Statutes**
- § 44.405(2), (4)(a)
Your HOA has decided to embrace alternative dispute resolution to address citations issued for noncompliance. Since you, a mediator certified by the Supreme Court, are famous in your neighborhood as a peacemaker, you have been asked to serve as Association “Resolutionist”. Now, before citations are issued by the Association, the complaining person has to bring his/her concerns before you, and the accused homeowner has a chance to explain his/her side of things.

In a particular case you are handling, one side gets so upset about a dog barking that he says to the neighbor, “I’ve had enough of this [insert colorful metaphor]! If he doesn’t make it stop so my infant can get some sleep, I am just going to shoot that [insert another colorful metaphor] dog.”

As a mediator, are you required to keep these discussions confidential?
PROBLEM 2 – “ANSWER” (THINGS TO CONSIDER)

Is this mediation?

MEAC Opinions
- 2004-003

If so…

Rules (Fla. R. Med.)
- 10.360(a)

Florida Statutes
- § 44.405(1), (4)(a)1, (a)2
At a CME seminar, a colleague told you about three practices that have gotten you thinking. First, she says that, either as part of the opening statement or during the course of a mediation, she tells the parties that, although everything discussed in caucus is confidential, she may choose to reveal items of caucus discussion, unless the party (or counsel) specifically directs her not to reveal the item(s).

May this mediator ethically engage in this conduct?
PROBLEM 3 (PART 1) – “ANSWER” (THINGS TO CONSIDER)

Rules (Fla. R. Med.)
- 10.360 (b)
- 10.420 (a) (3)
- 10.310(a), (b)?

MEAC Opinions
- 2003-005
PROBLEM 3 (PART 2)

The mediator also tells you that she has told parties that, while she is not ethically allowed to tell them how the judge might rule in their case, she has seen this judge rule on this issue in other, similar cases – and then states how the judge has ruled in those other cases. She also states she regularly tells parties that she has tried this type of case many times as an attorney, and, 9 times out of 10, the Defendant lost.

May this mediator ethically engage in this conduct (assume that the statements are truthful)?
PROBLEM 3 (PART 2) – “ANSWER” (THINGS TO CONSIDER)

Rules (Fla. R. Med.)
- 10.310 Self-Determination
- 10.370 Professional Advice or Opinions

MEAC Opinions
- 2009-007
CONCLUSION

Three things to remember:

- Neutrality/Impartiality
- They decide
- Confidentiality

www.flcourts.org/resources-and-services/alternative-dispute-resolution/meac-opinions.stml