Friedman Mediation
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The Ethical Neutral

By: Bruce A. Friedman

I have encountered some confusion among lawyers and mediators over conflict of interest and disclosure requirements applicable to mediators in California. Some say there are no requirements at all. Others say that there are rules requiring disclosure. Turns out, both sides are right. In court ordered mediations conducted by panel mediators, California Rules of Court, Rule 3.855 provides guidelines regarding conflicts of interest and disclosure. The same is true in the U.S. District Court Central District of California (under General Order No. 11-10) governing the referral of cases to the ADR Program with a neutral from the Court's mediation panel. Those that say there are no such requirements are correct with respect to mediations that are not conducted by panel mediators. However, in light of the recent closing of the LA Superior Court's mediation program (due to budgetary constraints), it is important to review and understand these rules and when they apply.

Rule 3.855 requires disclosure of matters that may reasonably raise a question about a mediator's ability to be impartial or subject a judge to disqualification under CCP Section 170.1. These matters include past, present and currently expected interests, relationships, and affiliations of a personal, financial, professional, or financial nature. The federal rules are similar. Under General Order No. 11-10, panel mediators are governed by the Rules of Professional Responsibility and must disclose anything that may cause a party to question the mediator's impartiality under 28 U.S.C. Section 455 (a). California Rules of Professional Responsibility, Rule 3-310 provides the conflict of interest and disclosure requirements in the context of the attorney-client relationship. Generally, the rules do not permit adverse representation of a client. In the mediation context, this would only be applicable to an attorney mediator that is practicing law and represents a party to the mediation in another matter. As to disclosure, the Rule is similar in nature to the Rule of Court in terms of disclosing relationships to parties and/or lawyers of a personal, professional, business or personal nature.

Lawyers and mediators must know and comply with the rules applicable to the each mediation. In California, cases may come from all of the federal courts and each may have its own twist on disclosure and conflict of interest rules. Mediators with a national practice must make sure that they comply with the rules of the state and court presiding over the case. Some states apply conflict of interest and disclosure requirements to all mediations.

In my opinion, the most prudent and best practice is to comply with these rules in all mediations in order to protect the integrity of the mediator and the mediation process. The rules boil down to disclosing to counsel for the parties anything that a mediator believes may impact a perception of neutrality and impartiality. It doesn't mean that a mediator needs to go as far as to meet arbitrator disclosure requirements, but certainly current representation of a party in mediation or past representation of a party with respect to a similar case should be disclosed. A financial interest in a party or personal relationship with a party or counsel should also be disclosed. While a mediator does not need to disclose past mediations with a party or counsel, if there is a personal friendship or financial interest that exceeds the professional relationship between a mediator and a lawyer, that should be disclosed.

Bruce A. Friedman is a mediator and arbitrator with an international practice. With years of litigation experience behind him, he understands the goals of the mediation process and will do his best to ensure that the needs of both parties are met, justly and efficiently. For more information on the mediation services that Bruce A. Friedman provides, check out his website at http://www.FriedmanMediation.com, his profile at ADRServices.org, or call him at (310) 201-0010.