

THE QUESTION: Occasionally, at the close of the mediation, a settlement is not reached but the mediator senses that the door has been slightly left open. My question is, absent a continuance of the mediation (which usually is resisted), may the mediator after mediation contact counsel by telephone in a further effort to resolve the matter, provided consent of counsel is obtained and provided further that confidentiality continues to be maintained.

Sincerely,

Certified County & Circuit Civil Mediator,
Southern Division

**SUMMARY OF
THE OPINION:**

It is the opinion of the panel that with consent of counsel and the parties [or the parties alone, if not represented by counsel] and a stipulation of confidentiality, a mediator may continue to help the parties reach a voluntary agreement after no agreement is reached at the initial mediation conferences.

AUTHORITY REFERENCED

Opinion: None.

Statute: Florida Statutes §44.102(3) and 90.408.

Administrative Order: None.

Court Rule: 10.020(a), 10.020(c), 10.080(a), Florida Rules for Certified and Court-Appointed Mediators.

Previous MQAP Opinion: None.

Other Authority: None.

OPINION: The mediator's role is stated in the preamble to the Standards of Professional Conduct Rule 10.020(c). "The role of the mediator includes but is not limited to assisting the parties in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives, and helping the parties reach a voluntary agreement (emphasis supplied)."

The first mediation is either by stipulation or court order. If by stipulation, confidentiality is provided by F.S. § 90.408 which states: "**Compromise and offers to compromise.** Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value."

Rule 10.020(a) in the fourth sentence states that: "These rules apply to all mediators who are certified or participate in court-sponsored mediation..." The mediator is required to maintain confidentiality under Rule 10.080(a) which states: A mediator shall preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information."

If the mediation is by Court Order it falls under the purview of F.S. § 44.102(3) first sentence, which says: "Each party involved in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding."

If after the mediation conference the parties consent to "leave the door open", they may, by agreement and a stipulation of confidentiality, commence a second mediation by telephone or ordinary conference. They would then have the confidentiality under F.S. § 90.408 and Rule 10.080(a) as in any other stipulated mediation.

Therefore, it is in the opinion of this Panel that with consent of counsel and the parties (or the parties alone, if not represented by counsel) and a stipulation of confidentiality, a mediator may continue to help the parties reach a voluntary agreement after no agreement is reached at the initial mediation conference.