

THE QUESTION: The following questions are presented to the panel for consideration:

During the course of a mediation, is it consistent with the rule of confidentiality for a party to communicate telephonically or otherwise, with an individual who is a non-participant to the mediation for the purpose of seeking advice or other information? What suggested procedures should a mediator follow with regard to this circumstance, either [at] the outset of the mediation or when it presents itself during the course of mediation?

From time to time, there have been instances where:

- (1) A divorcing spouse desires to call his or her mother, accountant, etc. . . . for advice approval, etc ;
- (2) A party to a commercial transaction indicates that he or she must call their spouse to discuss the settlement proposal;
- (3) An insurance representative or risk management's representative who is given authority to settle within a certain range, desires to call a superior to obtain approval for a higher amount or a different formula.

These are a few examples of situations where party participants in a mediation desire to resort to contacting or communicating with non-party participants. As a corollary to this problem, there have been instances where a governmental entity has sent a representative, i.e. city, county, etc. . . . , with full authority, however, any final settlement must [be] subject to the approval of the governing body. Hence, the party participant, will end up presenting the proposal to the governmental body, post mediation and invariably, references might be made to matters discussed during mediation. The same circumstance has occurred where representatives of condominium associations have been involved in mediation agreeing to settle subject to final approval post mediation.

This inquiry seems to involve more than one question, and is likely to elicit more than one answer. However, the issue of confidentiality is a major concern for the mediator and the panel's consideration and observations would be most helpful. Thank you.

Very truly yours,

Certified County, Family & Circuit Mediator

Southern Division

SUMMARY OF

THE OPINION:

In order to comply with the statutes and rules governing the confidentiality of the mediation process, the mediator should remind the party making the communication of the privilege provided by statute and that any communication about the specific content of the mediation shall remain confidential.

AUTHORITY REFERENCED:

Rules: Florida Rules for Certified and Court-Appointed Mediators - 10.030(a)(2)(A), 10.080(a).

Florida Rules of Civil Procedure - 1.720(b).

Statutes: Section 44.102(3), Florida Statutes.
Section 90.507, Florida Statutes.

OPINION:

During a court-ordered mediation, it might be necessary or desirable for the named party to contact another person (e.g. his or her accountant, spouse or another person) for advice or to determine the financial consequences regarding a proposed settlement. Normally, these conferences occur when the mediator is not present.

The Florida Statutes may provide some guidance in this area. Section 44.102(3) provides a privilege "for each party involved in a court-ordered mediation proceeding . . . to refuse to disclose and prevent any person present at the proceeding from disclosing communications made during such proceeding." Section 90.507 provides that "a person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if he . . . voluntarily discloses or makes the communication when he does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication. This section is not applicable when the disclosure is itself a privileged communication."

The mediator is charged with upholding the confidentiality provided by statute pursuant to rule 10.080(a), Florida Rules for Certified and Court-Appointed Mediators, which states that "a mediator shall preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information" and rule 10.030(a)(2)(A) which states that "a mediator shall maintain professional competence in mediation skills including . . . staying informed of and abiding by all statutes, rules, and administrative orders

relevant to the practice of court-ordered mediation."

With reference to the insurance or risk manager's representative having full authority to settle, it must be noted that under rule 1.720(b), Florida Rules of Civil Procedure, parties ordered to mediation in circuit court or county court (with the exception of small claims) are deemed to appear if the following persons are physically present:

- (1) The party or its representative having full authority to settle without further consultation.
- (2) The party's counsel of record, if any.
- (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

Parties, however, may stipulate or the court may order otherwise as to the presence of required persons. As a result, there may be instances where another person with greater authority must be contacted. Further, rule 1.720(b), Florida Rules of Civil Procedure, provides explicitly that parties who are public entities and are ordered to mediation may appear at mediation "by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity." Thus, it is expected that there will be discussion "in the sunshine" prior to final decision-making from a mediation involving public entities.

In order to comply with the statutes and rules governing the confidentiality of the mediation process, the mediator should remind the party making the communication of the privilege provided by statute and that any communication about the specific content of the mediation shall remain confidential.

Date

Charles Rieders, MQAP Chair