

THE QUESTION:

A question has recently arisen regarding the confidentiality of communications in a mediation setting which our Program Director, suggested I refer to you.

During a program mediation (in a dissolution of marriage) I determined that one of the parties might not understand the law and potential outcomes regarding assessment of attorney's fees and costs. I suggested to him that we take a break to allow him to call his attorney. Following his phone call, but before we resumed mediation (the other party was not yet present), he told me that he had been unable to contact the attorney, but that he had spoken to her assistant (the secretary) and had received advice that he would not have to pay any attorney's fees and the attorney for the other party was well known to "rape" his clients financially [his words]. I am disturbed that a) the party apparently received legal advice from a non-lawyer; b) that the party received questionable information which I feel was prejudicial to the mediation process; and c) that a non-lawyer in an attorney's office may be making slanderous remarks without the knowledge of the attorney. I do not know what actually transpired during the phone call, but only what the party reported to me.

95-010A

1. To what extent, if any, may I express my concerns regarding this incident to the attorney in question?

95-010B

2. May I refer to the client by name in relating the incident?

95-010C

3. May I relate the incident without revealing the client's name?

95-010D

4. May I allude to a problem and suggest that she monitor her staff more closely?

95-010E

5. May I do any of the above?

Please be kind enough to favor me with a response with regard to the foregoing. Thank you.

Family Certified Mediator
Northern Division

SUMMARY OF THE OPINION:

All five questions posed by the mediator are related to the same central issue, that is, to what extent may a mediator reveal communications related during a mediation. Rule 10.080(a) requires a mediator to preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information. Section 44.102(3), Florida Statutes, provides that each party involved in a court-ordered proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing communications made during such proceedings, and that all oral or written communications in a mediation proceeding are confidential and inadmissible as evidence in any subsequent legal proceeding unless all parties agree otherwise. Therefore, the panel answers all five questions with the same answer, that is, the mediator may not disclose the communication.

AUTHORITY REFERENCED:

Rules: Florida Rules for Certified and Court-Appointed Mediators -
10.080(a), 10.090(b).

Chapter 44 - Florida Statutes -
44.102(3)

OPINION:

All five questions posed by the mediator are related to the same central issue, that is, to what extent may a mediator reveal communications related during a mediation. Rule 10.080(a) requires a mediator to preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information. Section 44.102(3), Florida Statutes, provides that each party involved in a court-ordered proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing communications made during such proceedings, and that all oral or written communications in a mediation proceeding are confidential and inadmissible as evidence in any subsequent legal proceeding unless all parties agree otherwise. Therefore, the panel answers all five questions with the same answer, that is, the mediator may not disclose the communication.

Having thus disposed of the legal issue, the panel believes that a brief further discussion may prove helpful on a practical level. Specifically, the panel believes that the mediator may have two options other than revelation of the communication, depending on the facts of a given situation. First, pursuant to rule 10.090(b), if a mediator believes that a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator is required to advise the party to seek independent legal advice. Under the facts of the hypothetical, if the mediator believes such misunderstanding exists, the mediator may inform the party that he or she may wish to speak with his/her attorney, rather than a member of the attorney's staff. In so doing, the party who was wrongfully informed by the staff member would presumably have an opportunity to obtain advice from the attorney and may at that time inform the attorney of the advice given by the staff

assistant.

The second option for a mediator would be to merely advise the party to contact his/her attorney to inform the attorney of what was being said by staff. This option differs in that such communication between the mediator and the party would not be pursuant to rule 10.090(b), and therefore not subject to the requirements of that rule, but merely generally in furtherance of the mediation. Between the two options, the panel would recommend the first be utilized since it can arguably be performed with rule authority.

Date

Charles Rieders, MQAP Chair