

## THE QUESTION:

Would you please render an Ethics Opinion on the following:

Our circuit's mediation program has a \$50,000 eligibility cap. We send out a general information questionnaire to all parties prior to a scheduled mediation which includes a line asking for the party's Gross Annual Income. Recently, after scheduling a mediation, we received a completed questionnaire from a Husband that listed his gross annual income as \$70,000. We proceeded to call both attorneys in the case to let them know the mediation was canceled due to income ineligibility as set forth on their questionnaires. Since the Wife had no income, her attorney correctly inferred that the Husband's income exceeded \$50,000. The Wife's attorney called our office to ask the amount of the income that the Husband had stated and requested a copy of the Husband's questionnaire. Apparently, the Husband had testified in a recent deposition that his income was \$25,000. [sic] and the Wife's attorney wanted to use his questionnaire for income proof and impeachment purposes. We refused to give the Attorney a copy of the questionnaire or tell her the amount the Husband had listed. The attorney said she was going to subpoena the questionnaire and the Mediation Program Assistant who had received it.

1. Is information obtained prior to the commencement of mediation covered under Rule 10.080 Confidentiality?
2. How could the Program Assistant have canceled the mediation without giving the Wife's attorney knowledge about the Husband's income?
3. What if the attorney subpoenas the questionnaire and/or the Program Assistant?

Thank you for your response to these questions.

Sincerely,

Certified County, Family & Dependency Mediator  
Northern Division

## Authority References

Florida Rules for Certified and Court-Appointed Mediators -10.020(d)(4), 10.080.  
Florida Statutes Section 44.102(3).  
MQAP Opinion 96-005.  
Black's Law Dictionary, Fifth Edition.

## Summary of the Opinion

Information obtained from the parties prior to the commencement of mediation which would be confidential if obtained during the mediation session is subject to statutory and rule confidentiality provisions. In order to protect such confidentiality, eligibility for mediation should be denied without a reason provided to the parties. Any mediator should defend the confidentiality privilege within the confines of applicable law and judicial procedures.

## Opinion

In response to your first question, the panel believes that a general questionnaire sent to all parties prior to a scheduled mediation is part of a mediation proceeding and should therefore be treated as a confidential document.

The general rule provision on confidentiality is rule 10.080(a), which provides that a “mediator shall preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information.” The panel assumes that your court-run mediation program is a “mediator” for purposes of this rule in that the requirement that a mediator maintain confidentiality extends to any administrative matter which may have been handled by program staff.

The relevant statutory provision referred to in rule 10.080(a) is section 44.102(3), Florida Statutes, which provides as follows:

(3) 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. All oral or written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of Chapter 119 and shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise.

In light of the foregoing it would appear that the answer to your first question might be found in the definitions of “proceedings” and “communications,” which definitions are not contained in the law. According to Black’s Law Dictionary, Fifth Edition, a proceeding (apparently within the judicial context) is defined as the “form and manner of conducting judicial business before a court or judicial officer” and the “[Regular] and orderly process in form of law, including all possible steps in an action from its commencement to the execution of judgment.” Communication is defined in Black’s as a “deliberate interchange of thoughts or opinions between two or more persons...”

The panel believes that a form required to be filled out by the parties pursuant to a court-ordered mediation which has already been scheduled is a part of the mediation process. In addition, the information contained in the application, if obtained in the actual mediation session, would be subject to the limitations on disclosure contained in the confidentiality provision. See rule 10.080 and section 44.102(3), Florida Statutes.

The panel is of the opinion that its conclusion is buttressed by rule 10.020(d)(4), which includes confidentiality as one of the emphasized general principles of mediation. The panel believes that this provision requires that any doubt be resolved in favor of maintaining confidentiality.

In response to the second question, the panel concludes that you should not have informed the wife as to why the application was denied. However, the panel recommends that in the future your form should state in large letters that eligibility is dependent on not exceeding the specified income cap. A party who is not eligible would have the option of choosing an alternative forum and thereby avoid filling out your form. Assuming that the form is completed and indicates ineligibility based on excessive income, the program should refuse the mediation without giving a reason.

As to the third question, the panel refers the mediator to MQAP Opinion 96-005, wherein the panel stated that the mediator should resist providing such confidential material until ordered by a court and that the mediator may wish to seek a protective order under applicable court rules.

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Date

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Charles Rieders, Panel Chair