

November 6, 2001

THE QUESTION

Recently, I mediated a “community” mediation case (pre-suit) case that ended in an impasse. As one set of the parties were leaving it was discovered by them that some papers were missing. These papers had been on the table earlier and both parties had examined them. I looked at them briefly.

In addition, there was a threat made by one of the parties to another as parties were exiting.

Here is my dilemma – I did not see who took the papers and I believe they are confidential as part of the mediation by mediation process. It has been suggested that an affidavit be prepared by mediator to state that such papers are missing. However, I disagree with this suggestion as it circumvents the purpose of the 10.080, 10.520 and F.S. 44-102(3) and 90.501-510.

As to the threat, Opinion 96-005 covers that issue and no report of such should be made by a mediator as that is a protected communication.

My request for an opinion concerns the alleged “missing papers.”

I am of the opinion that such papers qualify as protected communications and as such I cannot testify to such nor prepare an affidavit attesting to such, as an affidavit would serve akin to testimony as to the papers, which are confidential.

As to the threat – under Rules 10.080(a) Florida Rules for Certified and Court-Appointed Mediators and Florida Statutes 44.102, it is clear that mediators should not voluntarily testify about such an incident concerning a threat, as well as in Advisory Opinion 96-005.

As to matters during a mediation, Opinion 99-012B clearly sets forth the rule that a mediator should not testify in court regarding information learned in a mediation. That if subpoenaed, the mediator should file either a motion for protective order or notify the judge in accordance with local proceedings, that the mediator is statutorily required to maintain the confidentiality of mediation proceedings. Only if the court (Judge) issues an order for mediator to testify then would a mediator testify.

Please advise as soon as possible as there is no rule on point regarding affidavits by mediators. 10.080 makes it abundantly clear that absent statutory or written authority, a mediator is precluded from disclosure. Do I wait until the suit is filed by the parties in small claims court and wait to see if the court will order my testimony regarding the missing papers or – file an affidavit with the court that states “papers missing” upon conclusion of mediation?

Thank you for your time and consideration.

Sincerely,

County Mediator
Central Division

AUTHORITY REFERENCED

Rules 10.330 and 10.360(a), Florida Rules for Certified and Court-Appointed Mediators
MQAP 96-005 and 99-012
MEAC 2001-002 and 2001-005
Sections 44.102(3) and 44.201(5), Florida Statutes

SUMMARY

A mediator should not voluntarily prepare an affidavit or voluntarily testify regarding the papers which were brought to mediation based on rules governing impartiality and confidentiality.

OPINION

Since you have researched the issue of threats and did not pose a question in that regard, this opinion will be limited to the issue of the “missing papers.” The Committee agrees that a mediator should not voluntarily prepare an affidavit or voluntarily testify regarding the papers which were brought to mediation based on rules governing impartiality and confidentiality. See rules 10.330 and 10.360(a), and opinions MQAP 96-005 and 99-012 and MEAC 2001-002 and 2001-005.

The Committee points out that since this was a pre-suit “community” mediation, it is not governed by the confidentiality provision of section 44.102(3), Florida Statutes, which governs mediations conducted pursuant to court order. If this is a Citizen Dispute Settlement Center mediation, it would be governed by section 44.201(5), Florida Statutes.¹

A mediator should always determine what, if any, statutory confidentiality provisions are applicable. In addition, a Florida Supreme Court certified mediator should be aware that the ethical standards found in the Florida Rules for Certified and Court-Appointed Mediators are applicable to all mediations conducted by the certified mediator.

Date

Charles M. Rieders, Committee Chair

¹ Any information relating to a dispute obtained by any person while performing any duties for the center from the files, reports, case summaries, mediator’s notes, or other communications or materials, oral or written, is privileged and confidential and shall not be publicly disclosed without the written consent of all parties to the dispute. Any research or evaluation effort directed at assessing program activities or performance shall protect the confidentiality of such information. Each party to a Citizen Dispute Settlement Center proceeding has a privilege during and after those proceedings to refuse to disclose and to prevent another from disclosing communications made during such proceedings, whether or not the dispute was successfully resolved. This subsection shall not be construed to prevent or inhibit the discovery or admissibility of any information which is otherwise subject to discovery or which is admissible under applicable law or rules of court, except that any conduct or statements made during such mediation sessions or in negotiations concerning such sessions shall be inadmissible in any judicial proceeding.