

May 22, 2003

THE QUESTION

There has been an on-going concern about the completeness in the opening statement made by the mediator as to the representation that all proceedings are confidential. The precise issue relates to the extent to which the mediator is required to delineate each and every exception to confidentiality. We know that there are statutes that require disclosure where child abuse has occurred and where there may be information relating to the commission of a crime or the potentiality for the commission of a crime.

Accordingly, I would pose the following questions for your consideration:

1. Is it sufficient for the mediator, in the opening statement, in making reference to the fact that all proceedings are confidential, to further state, "there are certain exceptions to this confidentiality which are governed by certain statutes and you may wish to confer with your attorneys to what these precise exceptions are." Would this type of statement satisfy the requirement to inform the parties and their attorneys about the matter of confidentiality?
2. If the foregoing statement is too general, what are the specific exceptions that a mediator is required to inform the attorneys and parties about in the opening statement?
3. As a corollary to the foregoing, what kinds of activities occurring during a mediation that may be deemed to fall within the exception to confidentiality is a mediator required to report? In this regard, if there is a mandatory requirement, it would be helpful if the committee specifically delineated applicable statutes or circumstances that give rise to the mediator's reporting obligation.
4. To complicate the situation further, if specific statutes or circumstances are going to be delineated to parties and their counsel, would such disclosures be tantamount to the "giving of legal advice" since it would, in effect, be informing the parties as to how to comport themselves during the course of the mediation (meaning what they say and not say), which is really a subject matter within the responsibility of counsel for the parties?

Thank you for giving these troubling questions your review and analysis.

Sincerely,

Certified County and Circuit Mediator
Southern Division

AUTHORITY REFERENCED

Rules 10.370(a) and 10.420(a)(3), Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinion 2000-010

SUMMARY

There is no requirement that a mediator go into detail as to any specific statutory provisions.

OPINION

The questions you raise were addressed in MEAC 2000-010 in which the Committee concluded (within the context of a question regarding the requirement to discuss confidentiality during the orientation process) that the issue of specific exceptions to confidentiality was of a legal rather than ethical nature, and therefore, beyond the jurisdiction of the Committee. In addition, the Committee noted that “rule 10.420(a)(3) merely requires you to inform mediation participants that mediation communications are confidential, except where disclosure is required by law. There is no requirement that you go into detail as to any specific statutory provisions.” MEAC 2000-010.

Rule 10.370(a) allows the mediator to “provide information that the mediator is qualified by training or experience to provide” if it can be done consistent with the standards of impartiality and preserving party self-determination. Even if the mediator is a Florida attorney, there could be a question of the accuracy of any delineation of statutory confidentiality exceptions in light of the various possible interpretations of the relevant law.

Date

Fran Tetunic, Committee Chair