

July 31, 2003

THE QUESTION

I am a certified county and circuit mediator, and I have a question relating to confidentiality of communications in caucus.

Rule 10.360(b) provides for confidentiality of all communications in caucus, prohibiting the mediator from disclosing such communications without the party's consent. May a mediator, either as part of the opening statement or during the course of a mediation, tell the parties that, although everything discussed in caucus is confidential, the mediator may choose to reveal items of caucus discussion, unless the party (or counsel) specifically directs the mediator not to reveal the item(s)? Or, must a mediator receive specific permission to reveal any item discussed during caucus?

I look forward to receiving answers to these questions.

Certified County and Circuit Mediator
Central Division

AUTHORITY REFERENCED

Rules 10.360(a), 10.360(b) and 10.420(a)(3), Florida Rules for Certified and Court-Appointed Mediators

SUMMARY

There is no ethical violation so long as the participants are informed of confidentiality and then expressly consent to any disclosure. A mediator may establish a ground rule for the mediation that nothing in caucus will be deemed confidential unless a party specifically indicates that it should be confidential, if the party has expressly consented to such a procedure.

OPINION

Rule 10.360(b) provides that “[Information] obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party.” As you indicate in your question, the crucial issue is whether consent has been obtained for the disclosure.

Neither rule 10.360(b) nor rule 10.420(a)(3), which requires that the orientation session

inform mediation participants that communications are confidential, mandates a procedure by which a party may waive the right to confidentiality. Therefore, the Committee believes that, as long as parties are informed of confidentiality and thereafter consent to any disclosure, there is no ethical violation. Thus, a mediator may establish as a ground rule for the mediation that nothing in caucus will be deemed confidential unless a party specifically indicates that it be confidential, *if the party has consented to such a procedure*. Such consent, however, must be express (verbal or nonverbal) and may not be implied from a lack of an objection or by the party sitting mute. While the Committee acknowledges that better practice may be to obtain consent as to particular communications, it does not believe such is required by rule 10.360(a), which merely requires consent and does not specify the method by which it is obtained.

Date

Fran Tetunic, Committee Chair