

March 29, 2007

The Question:

Dear MEAC:

I am the [title omitted], and I have an ethical dilemma with which I hope you can assist me.

The dilemma was created by your recent Advisory Opinion No. 2006-03 which I interpret to stand for the proposition that a mediator may not disclose a non-appearance due to lack of full authority to settle when the information was disclosed during the mediation, and, even more critically, during caucus. This proposition is based upon the theory that strict construction of Fla. Stat. §§ 44.401-406, the Mediation Confidentiality and Privilege Act, requires this information if obtained during mediation to be kept confidential as it is not an enumerated exception to the statute.

My dilemma and concern is whether a mediator can disclose **any** non-appearance at any stage of the mediation.

My analysis is that a mediator can not. This, of course, conflicts with your opinion 2005-007 which states that a mediator may report a non-appearance if due notice is given to the non-appearing party and good cause is not shown for rescheduling (which while it predates the opinion of 2006-03 it was after the enactment of the Confidentiality and Privilege Act). It also conflicts with *Areizaga vs. Board of County Commissioners of Hillsborough County*, 935 So. 2d 640 (Fla. 2d DCA 2006) and Rule 10.510 which requires a mediator to be candid with the Court, along with various Rules of Procedure which provide for sanctions for non-appearances.

My analysis is as follows:

Before the enactment of the Mediation Confidentiality and Privilege Act, the mediation commenced when the orientation was delivered by the mediator. With the enactment of Fla. Stat. 44.404, mediation begins when the Order of Referral is signed. My understanding of this provision is that the confidentiality attaches when the order is signed, while the remainder of the process begins after orientation.

This provision, when coupled with MEAC Opinion 2006-03 seems to stand for the proposition that since a non-appearance is not an enumerated exception to confidentiality it is confidential.

If this is the case, and I hope it is not, I have difficulty with the concept that a mediator may not disclose that a party violated the Order of Referral to Mediation by failing to appear at the mediation, especially when a number of other sources infer that he/she can disclose that information.

Please help me out with this. Thank you for your kind attention.

Submitted by a Certified County, Family, Circuit and Dependency Mediator
Northern Division

Authority Referenced

Rules 10.360 and 10.510, Florida Rules for Certified and Court-Appointed Mediators
Section 44.403(1), Florida Statutes
Merriam-Webster Online
MEAC 2005-007
Areizaga v. Board of County Commissioners of Hillsborough County, 935 So. 2d 640 (Fla. 2nd DCA 2006)

Summary

A mediator may report a party's failure to appear at mediation so long as it is based on the physical fact of a failure to appear and not on a mediation communication or assertion.

Opinion

A mediator has the ethical obligation to maintain mediation confidentiality. Rule 10.360. Confidentiality applies to a "mediation communication," defined as "an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation." Section 44.403(1), Florida Statutes. The Committee does not view someone's failure to appear at a mediation as an "assertion" as the term is used in section 44.403(1), Florida Statutes. Therefore, the failure to appear would not be a mediation communication subject to confidentiality requirements.

The term “assert” is defined in Merriam-Webster Online as to “state or declare positively and often forcefully or aggressively.” While such assertions would normally be in the written or oral mode, they may also be nonverbal. The Committee believes that the type of nonverbal assertion referenced does not extend to the act of not being present for a mediation, but is rather intended to include nonverbal actions such as a nod or shrug of the shoulders when intended to convey information.

The situation you describe is distinguished from that in MEAC 2005-007 because the latter involved communicative assertions (mediation communications) that formed the basis for a mediator reaching the determination that a party lacked the full authority to settle at mediation. The *Areizaga* opinion you reference does not conflict with MEAC 2005-007 because *Areizaga* does not involve mediation communications, but rather the physical fact of a failure to appear. Finally, the Committee notes that the candidness requirement in rule 10.510 is irrelevant since it is limited to the mediator’s candor to the court regarding the mediator’s qualifications, availability, and other administrative matters.

Date

Fran Tetunic, Committee Chair