

## ***Advisory Opinion***

**MEAC 2010-002**

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Mediator Ethics Advisory Committee c/o Florida DRC, Supreme Court Building, 500 S. Duval Street, Tallahassee, FL 32399

August 3, 2010

### **The Question**

Dear Committee Members,

Parties to a family case were referred to the court mediation program. The husband was represented by counsel and the wife was pro se. The mediation session was conducted and the mediator prepared a mediation agreement for the parties to review and sign if it met their approval. The parties were in caucus and reading the agreement separately.

After reading the agreement, the wife stated that she would like to take the agreement to have it reviewed by an attorney. The husband's counsel stated that if she did not sign the agreement that day, there would be no agreement reached in mediation. The mediation was declared an impasse and the wife asked if she could take a copy of the agreement, which was not signed by either party, with her for her own records. The husband's counsel objected and so the mediator did not permit either party to take a copy of the unsigned agreement.

Did the mediator act appropriately by not permitting either party to take a copy with them or could either party have taken a copy of the unsigned agreement with them, even at the objection of the other party?

Sincerely, Certified Family Mediator  
Southern Division

### **Authorities Referenced**

Rules 10.310(a), 10.360(b), 10.370(b), Florida Rules for Certified and Court-Appointed Mediators

Rule 12.40(f), Florida Family Law Rules of Procedure

Sections 403-406, Florida Statutes

### **Summary**

Yes, the mediator could have given both parties a copy of the unsigned document, even over the objection of one of the parties.

### **Opinion**

A mediator should not deny a party access to a mediation communication. Under these facts the writing was a confidential mediation communication. "Mediation communication" means 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,” Florida Statute 44.403(1). The communication is confidential because it does not fit within one of the delineated exceptions to confidentiality identified in the Mediation Confidentiality and Privilege Act, Florida Statute 44.405(4)(a).

Mediators do have the ethical obligation to maintain confidentiality of information revealed during mediation. However, there are times disclosure is required or permitted by law. Rule 10.360(a). Statutory law specifically provides for disclosure to mediation participants and their counsel.

A mediation participant is permitted to disclose mediation communications to participant’s counsel. "A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or participant's counsel." Florida Statute 44.405(1).

The writing was not a mediated agreement as it was not agreed to and signed by the parties. Therefore there was no obligation for the mediator to mail a copy of this document to counsel for the wife (should she retain counsel later) under Rule 12.740(f) Family Law Rules of Procedure.

Here the husband’s attorney objected to the wife taking a copy of this document with her after the case was impasse. “A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.” Florida Statute 44.405(2). A mediation party does not have the right to restrict another party from access to mediation communications as they belong equally to both parties. (Matters told in confidence to the mediator in caucus represent an exception to this general rule. Rule 10.360(b). Additionally, parties would not be entitled to the personal notes of other mediation participants.) Each party of a mediation has the responsibility not to disclose a mediation communication in violation of the Mediation Confidentiality and Privilege Act. One who knowingly and willingly did so would be in violation of that Act and subject to remedies. Florida Statute 44.406(1).

Decisions made during mediation are made by the parties. Rule 10.310(a). Therefore, the mediator would do well to have the parties determine how they will handle the described situation. A mediator is ethically obligated to advise a party of his/her right to seek the advice of counsel when the mediator believes the party does not understand how an agreement may adversely affect legal rights and obligations. Rule 10.370(b). Here, the party was looking to exercise that right. The parties could have discussed various options, including the wife making notes which she would take to her attorney, husband’s counsel clearly noting on the writing that no agreement was reached, and/or that it did not reflect a proposed agreement or offer.

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Date

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Beth Greenfield-Mandler, Committee Chair