

Advisory Opinion

MEAC 2011-003

Mediator Ethics Advisory Committee

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

March 14, 2011

The Question:

When counsel for a party acts in an outrageous and excessively rude and aggressive manner with respect to opposing counsel, opposing party and the mediator, inflicting emotional distress on one of the opposing parties, *is there a way to report the attorney's misconduct without violating ethical duties?*

In this instance, the matter was a RMFM. The counsel constantly interrupted opposing party, opposing party's counsel, as well as the mediator, going to the length of refusing to permit the others to talk and demanding termination with an impasse prior to permitting any effort to share information or mediate. She caused the female opposing party, an elderly person, to become agitated and disturbed (defendant identified herself at the commencement of mediation as not being well and needing restroom breaks frequently.) The counsel was verbally abusive to the mediator after the the opposing party and opposing party counsel left the room. A no agreement was noted on the report and the mediation was terminated. The program manager was asked to step in and speak with counsel after the mediation was terminated. She was also disrespectful to the program manager. She has threatened to file grievances. Opposing counsel intends to file a grievance against her with the Bar.

Please feel free to have MEAC contact me for more information. I feel that there needs to be a way to address outrageous attorney misconduct in the mediation process. Such conduct may not be reflective of the client's wishes nor the firm litigating, especially in the RMFM arena where lender's counsel is often a contract lawyer or mediation only lawyer.

FSC Certified Circuit Court Mediator
Central Division

Authorities Cited:

Sections 405(4)(a) and 4(a)(6), Chapter 44, Florida Statutes
Rules 10.360(a) and 10.650, Florida Rules for Certified and Court-Appointed Mediators
Rule 4-8.3, Rules Regulating The Florida Bar

Summary

Yes, a certified mediator may report an attorney's misconduct, solely for the internal use of the body conducting the investigation of the conduct, without violating ethical duties.

Opinion

Sections 405 (4)(a) and 4(a)(6), Chapter 44, Florida Statutes, The Mediation Confidentiality and Privilege Act, allows for permissive reporting of professional misconduct in mediations by any or all parties and participants. The statute specifically states “there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.” Since the mediation referred to above is covered by the confidentiality provisions of Chapter 44 and the mediation was conducted by a certified mediator, the mediator could choose whether to report the behavior to the appropriate body. In addition, rule 10.360(a), Rules for Certified and Court-Appointed Mediators, allows certified mediators to disclose mediation communications permitted by law.

In addition, it is worth noting that attorneys bound by the Rules Regulating The Florida Bar have a mandatory requirement to report attorney misconduct under Rule 4-8.3, Reporting Professional Misconduct. If the certified mediator conducting the mediation is also a member of The Florida Bar and therefore bound by the Rules Regulating The Florida Bar the mediator would be required to report any perceived misconduct by an attorney participating in the mediation either as a party or representative. The Rules for Certified and Court-Appointed Mediators reinforces this obligation under rule 10.650, Concurrent Standards, which states “other ethical standards to which a mediator may be professionally bound are not abrogated by these rules.....”

The confidentiality of mediation is not intended to cloak or provide protection for the professional misconduct of any party or participant during the mediation process. Chapter 44 and rule 10.360(a), Florida Rules for Certified and Court-Appointed Mediators, were amended in 2004, in part, to address concerns regarding professional misconduct in the mediation process and to allow for the reporting of such without violating mediation confidentiality.

Date

Beth Greenfield-Mandler, Committee Chair