

June 27, 2013

The Question:

This letter is a request for a formal advisory opinion from the Mediator Ethics Advisory Committee (“MEAC”). The issues presented are (1) whether it is a breach of confidentiality for mediators to disclose that a party failed to negotiate in good faith or willfully failed to appear at a mediation conference when such disclosure is required by the local rules of the Florida federal courts, and (2) if so, whether the mediator should withdraw from all mediations in the federal courts that require such disclosure.

According to the Mediation Confidentiality and Privilege Act, “all mediation communications shall be confidential.” Fla. Stat. § 44.405(1) (2011). Importantly, there is no requirement that parties to court-ordered mediation participate in good faith. *Avril v. Civilmar*, 605 So. 2d 988, 989-990 (Fla. 4th DCA 1992). In an advisory opinion dated January 17, 2005, the MEAC addressed the issue of a court-ordered mediation requiring the mediator to monitor and report violations of good faith by the participating parties. MEAC Opinion 006 (2004). In this opinion, the MEAC recommended the mediator withdraw from the mediation because of the conflict between the court order and the rules of ethics. *Id.* In its response, the MEAC stated, “[a] mediator is not able to comply with both the Florida Rules for Certified and Court-Appointed Mediators and a court order to report a party who fails to mediate in good faith.” *Id.*

In another advisory opinion, on July 24, 2006, the MEAC addressed whether it was an ethical violation for a mediator to report to the court that a party did not have full settlement authority. MEAC Opinion 003 (2006). The MEAC confirmed that barring special circumstances, a mediator is “limited to reporting that no agreement was reached” and concluded that such disclosure would be an ethical violation. *Id.*

Additionally, the Florida Rules for Certified and Court Appointed Mediators provide that “[a] mediator shall comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.” R. 10.520, Fla. Rules for Certified and Court-Appointed Mediators.

A conflict arises when one attempts to reconcile the local rules of United States Bankruptcy Court for the Middle District of Florida with the Mediation Confidentiality and Privilege Act. Regarding mediation conferences, the local rules state that “[t]he mediator shall report to the Court “the willful failure to attend the mediation conference or to participate in the mediation process in good faith, which failure may result in the imposition of sanctions by the

Court.” Local Rule 9019-2(d)(2), Bankr. M.D. Fla. A similar requirement appears in the Rule 9019-2(C)(4) of the local rules of the Bankruptcy Court for the Southern District of Florida and in the local rules of other federal courts in Florida. These requirements appear to be in direct conflict with the mandates of the Mediation Confidentiality and Privilege Act.

It should be noted that the present issue is distinguishable from the issue in MEAC Opinion 2004-006 because the apparent violation of confidentiality stems not from a court order, but from the local rules of the federal courts, applicable to all, and not just some, mediations in the federal courts. Such a systemic conflict would not be addressed by merely withdrawing from the mediation, which is the solution proposed by MEAC Opinion 2004-006 when a mediator is confronted with the decision between maintaining confidentiality or obeying a court order. This framework forces mediators to decide between protecting confidentiality, as required by the Mediation Confidentiality and Privilege Act, and therefore withdrawing from all mediations in the Florida federal courts, or violating local rules of the federal courts requiring them to disclose a failure by the parties to “willfully” attend mediation or “participate in good faith.”

I am hoping for clarification on how a mediator should act when operating under these local rules, and I request the MEAC deliver an advisory opinion on this matter.

Submitted by a Certified Circuit Mediator
Central Division

Authorities Referenced:

Rules 10.360, 10.420(a)(3), 10.500, 10.520, Florida Rules for Certified and Court-Appointed Mediators

Rule 9019-2(d)(2) of the local rules of the Bankruptcy Court for the Middle District of Florida Sections 401-405, Chapter 44, Florida Statutes

MEAC Opinions 2004-006 and 2006-003

Summary:

In accordance with Rule 10.520, a certified mediator conducting a mediation in U.S. Bankruptcy Court for the Middle District of Florida who discloses that “a party failed to negotiate in good faith” or “willfully failed to appear at mediation” does not violate the mediator’s ethical responsibilities to mediation confidentiality as such disclosure is required by the local rules of that court.

Opinion:

Your inquiry concerns a local procedural rule of the federal bankruptcy court. Complying with local court rules falls under Rule 10.360 which creates an exception: “A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties.” [emphasis added] Further, Rule 10.520 states “A mediator shall comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.” Pursuant to Rule 10.520, when a mediator is conducting a court-ordered mediation in federal court, the mediator is required to comply with the local court rules. Therefore, the mediator may report to the federal court in which the mediator is conducting the mediation “the willful failure to attend the mediation conference or to participate in the mediation process in good faith” which is required by Local Rule 9019-2(d)(2), Bankr. M.D. Fla. and such a report does not violate the Florida Mediation Confidentiality and Privilege Act, Section 44.405, Chapter 44, Florida Statutes.

The MEAC distinguishes this scenario from the one set forth in MEAC 2004-006. In that opinion, a court order required the mediator to report violations of good faith in the state trial court. This obligation to report was in conflict with the procedural rules which limit communication by the mediator to notifying the court of agreement or no agreement “without comment or recommendation” (See Florida Rule of Civil Procedure 1.730). The MEAC also distinguishes MEAC Opinion 2006-003; that case centered on a mediator’s desire to report a lack of settlement authority for which there is no exception to confidentiality (See Sections 401- 405, Chapter 44, Florida Statutes).

In conclusion, Rule 10.420(a)(3) requires the mediator to explain the mediation process, the role of the mediator, and inform the mediation participants that “communications made during the process are confidential, except where disclosure is required or permitted by law.” Rule 10.500 states “A mediator is accountable to the referring court with ultimate authority over the case. Any interaction discharging this responsibility, however, shall be conducted in a manner consistent with these ethical rules.” As explained above, the mediator in this scenario is acting appropriately under the Florida Rules for Certified and Court-Appointed Mediators in making the report to the referring federal court.

In the scenario presented, the MEAC advises the mediator should highlight, during opening statement, the federal bankruptcy court’s requirement for the mediator to report “willful failure to attend the mediation conference or to participate in the mediation process in good faith” as an exception to the parameters of mediation confidentiality found in state court rules.

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Date



Beth Greenfield-Mandler, Committee Chair