

Advisory Opinion**MEAC 2012-007**Mediator Ethics Advisory Committee c/o Florida DRC, Supreme Court Building, 500 S. Duval Street, Tallahassee, FL 32399

February 22, 2013

The Question:

In my circuit, there are a number of mediation parties being certified as indigent and therefore not obligated to pay mediation session fees. Their indigent declaration is a sworn document.

Question One: If it is determined by information either obtained or verified in mediation that the information of the sworn indigent form is false and a crime is being committed [perjury], do I have a mandatory obligation to report that information to the court?

Question Two: If it is discovered during mediation that a person either committed a crime or is going to commit a crime [perjury], is that information confidential?

Question Three: If the answer to Question Two is no, then may the mediator share the information with the court or other enforcement agencies?

Question Four: If it is determined that a mediator is required or may take some action, should that cause the mediator to terminate mediation?

Certified Family, Dependency, Circuit and Appellate Mediator
Southern Division

Authorities Referenced:

Rules 10.330 (a) & (b), 10.360, 10.420 (b) and 10.650, Florida Rules for Certified and Court-Appointed Mediators

Sections 401- 406, Chapter 44, Florida Statutes

MEAC Opinion 2012 – 001

Summary:

One: The facts in this example may constitute an exception to confidentiality under section 44.405(4)(a)(2), Florida Statutes (2012), nevertheless, there is no mandatory obligation for a mediator to report that a sworn indigent form is false or that the crime of perjury is being committed.

Two: Section 44.405(4)(a)(2), provides an exception to confidentiality if a mediator learns through a mediation communication information “that is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threatens violence.” This section of the Florida Statute is silent with respect to past crimes.

Three: The mediator may disclose to an appropriate authority a “mediation communication that is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.” Id.

Four: If a mediator decides, during the mediation process, that s/he will report a party’s mediation communications to an appropriate authority, the mediator must withdraw. Pursuant to rule 10.420(b), Florida Rules for Certified and Court-Appointed Mediators, whether termination or adjournment is appropriate depends on the circumstances of the individual case.

Opinion:

Answer to Question One: No, there is no mandatory obligation for a mediator to report the crime of perjury. Rule 10.360, Florida Rules for Certified and Court-Appointed Mediators, states, “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.” There are only two mandatory reporting obligations which are exceptions to mediation confidentiality: one for child abuse, abandonment, or neglect and the second for the abuse, neglect, or exploitation of vulnerable adults. § 44.405(4)(a)(3), Florida Statutes (2012). In this instance, neither of the mandatory reporting prerequisites is present. Section 44.405(4)(a)(2), Florida Statutes (2012), while excepting from confidentiality mediation communications “used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence” does not mandate the reporting of such information.

Answer to Question Two: While a mediation communication that is “willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence” is exempt from confidentiality, [See Id.] there is no exception to confidentiality for a mediation communication that alleges past crimes, including criminal activity and threatened violence. The MEAC would direct the questioner to MEAC Opinion

2012-001.

Answer to Question Three: The mediator may disclose a “mediation communication that is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.” *Id.* The fact that a party reveals facts during the mediation that indicate the party is committing perjury or will commit perjury brings these communications under the exceptions in section 44.405(4)(a)(2). The MEAC notes that because this section of the statute does not address where such information could or should be reported, in exercising a mediator’s option to report, a mediator should use caution in determining whether or to whom the information is reported.

Answer to Question Four: If a mediator decides, during the mediation process, to report a party’s mediation communications to an appropriate body, the mediator must thereafter withdraw from the mediation to avoid the appearance of bias and/or partiality. The severity or nature of the communication will determine whether adjournment or termination is appropriate. The facts of each case must be evaluated individually.

Rule 10.330, Florida Rules for Certified and Court-Appointed Mediators, states, (a) “A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual. (b) A mediator shall withdraw from mediation if the mediator is no longer impartial.”

By reporting a mediation communication of a party to an appropriate authority, the mediator has exhibited the appearance of partiality and must withdraw from the mediation.

See also rule 10.650, Florida Rules for Certified and Court-Appointed Mediators, Concurrent Standards, which may obligate the mediator to other standards that must be considered.

February 22, 2013
Date


Beth Greenfield-Mandler, Committee Chair