

Advisory Opinion**MEAC 2012-010**

Mediator Ethics Advisory Committee

Florida DRC, Supreme Court Building Tallahassee, FL 32399

March 11, 2013

The Question:

A family law mediation was held through the court mediation program. Both parties were represented by counsel. A partial agreement was reached and the mediator prepared the mediation report and agreement. The attorneys, parties and mediator signed the Mediation Report that a partial agreement was reached and set forth the remaining issues to be adjudicated by the Judge. The parties and attorneys left the courthouse as it was after 5:00 p.m. The attorneys and parties had left the mediation with the understanding that they had signed the mediation report and mediation agreement. The mediator made copies of the report and agreement and discovered that one of the parties and their attorney had not signed the Agreement. All parties and their attorneys had initialed each page of the Mediation Agreement. The mediator called the attorney that had not signed the agreement and immediately took the agreement to the attorney for signatures. The attorney told the mediator that the client had already left town but would be back the next day to sign that it was not a problem it was only an oversight. The attorney signed the original mediated agreement. The mediator checked with the attorney the next week and found out that the client would not sign the agreement now, but just wanted a few minor changes and a letter was being sent to the other attorney regarding the changes.

Fast forward, the other attorney says the parties reached an agreement at mediation; no changes will be made and wants the mediator to file the original mediation report and agreement and let the attorneys argue the issue of enforceability before the Judge.

Questions:

1. If the mediator files the Mediation Report and Agreement with all but one party's signature, is the mediator breaching confidentiality?
2. Should the mediator file the original Mediation Report and Agreement?
 - a. If not, what should the mediator do with the original Mediation Report and agreement?
 - b. If not, what should the mediator file with the court?

Certified County, Family and Dependency Mediator
Northern Division

MEAC 2012-010

Authorities Referenced:

Rule 10.360(a), and Committee Notes to rule 10.310, Florida Rules for Certified and Court-Appointed Mediators

Rule 12.740(f)(1) & (3), Florida Family Law Rules of Procedure

§44.405(4)(a), Fla. Stat. (2012)

MEAC Opinion 2010-002

Summary:

Question one: Yes, it is a breach of confidentiality to file a mediation report and agreement when a party's signature is missing.

Question two: No, the mediator should not file the mediation report and agreement prepared at the mediation which was signed by only one party; it is not an agreement and therefore the terms are subject to the statute and rules regarding confidential mediation communications.

- a. If either party requests a copy of the draft agreement, the mediator should provide copies to all parties. If no request for a copy of the report or agreement is made, the mediator should follow his/her normal procedures for notes taken during a mediation in which no agreement was reached.
- b. In the absence of signatures from all parties on a drafted agreement, the mediator should file a report of "no agreement."

Opinion

Question one: Rule 10.360(a), Florida Rules for Certified and Court-Appointed Mediators, provides that information disclosed during mediation is confidential "except where disclosure is required or permitted by law or is agreed to by all parties." Additionally, according to subsection 44.405(4)(a), Florida Statutes (2012), an exception to confidentiality is for "a signed written agreement reached during a mediation, unless the parties agree otherwise."

The document described in this question, does not fit within the definition of a "signed written agreement." Florida Family Law Rule of Procedure 12.740(f)(1) is very specific: "the agreement shall be reduced to writing, signed by the parties and their counsel, if any and if present, and submitted to the court unless the parties agree otherwise." A document purporting to be a mediation agreement signed by only one party remains a confidential mediation communication.

Until a party has signed an agreement, the principle of self determination is paramount. The Florida Family Law Rules of Procedure state that until an agreement is both written and signed by all parties, it is not an agreement. The Committee Notes to Florida Rule for Certified and Court-Appointed Mediators 10.310 state, "it is critical that the parties' right to self-determination (a free and informed choice to agree or not to agree) is preserved during all phases of mediation."

Florida Family Law Rule of Procedure 12.740(f)(3) states, "if the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court without comment or recommendation."

Question two: For the reasons outlined in question one, the mediator should not file the original mediation agreement with the court and any mediation report should indicate "no agreement."

- a. If either party requests a copy of the agreement as drafted during the mediation, the mediator should provide copies to all parties. If no request for a copy of the report or agreement is made, the mediator should follow his/her normal procedures for notes taken during a mediation in which no agreement was reached. See MEAC 2010-002, in which the Committee stated that a mediator may give the parties each a copy of an unsigned draft agreement if either party requests a copy.
- b. As indicated above, the mediator should file a report indicating "no agreement" without comment or recommendation.

Mandel 11, 2013
Date


Beth Greenfield-Mandler, Committee Chair