

March 11, 2013

The Question:

As [title omitted] for the [number omitted] Judicial Circuit, I am often faced with a dilemma which has led me to request a formal MEAC Opinion for the question:

Is it a breach of confidentiality for a certified mediator or the mediation unit to report to the court that a party, appearing telephonically or by some other electronic means pursuant to a Court order, who fully participated in the mediation which resulted in an agreement, but violated the order for telephonic appearance by failing to return a mediation agreement for which said party gave verbal consent to prepare and verbally agreed to sign?

Frequently, mediations occur with at least one party appearing telephonically or by other electronic means, and often the same parties repeatedly appear by telephone. Once the mediation is complete, and an agreement is reached and drafted, the Court mediation unit, not the mediator, transmits the agreement to the party attending by telephone. The Report to the Court is held until the executed agreement is returned, at which time both the agreement and report are filed. Sometimes, the mediated settlement agreement is not returned by the party appearing by telephone, nor is any further communication received from that party, which is in violation of the Court Order permitting the telephonic attendance, requiring the party appearing by telephone to promptly execute transmitted documents and return them to the mediation unit. Is the non-action of the party appearing by telephone a “mediation communication,” thus precluding the mediator/unit from reporting to the Court that the agreement was not returned? If so can the mediation unit report generally without identifying any specific case information that a party has repeatedly violated the order?

Because the mediation settlement agreement and the mediator’s report is not submitted to the court until the agreement is signed, the case is in a state of “limbo” while awaiting the signature of the party who appeared telephonically or by other electronic means. The court, not wanting to have such a case “fall through the cracks” has directed the unit to notify it of such outstanding cases. Is notification to the court that the mediator is “waiting for signatures” a breach of confidentiality?

A dilemma potentially is created when the mediator reports “no agreement” and the Court unknowingly allows the party to again appear telephonically or by other electronic means; thus setting the same scenario in motion.

Submitted by
Certified County and Family Mediator
Northern Division

Authorities Referenced:

Rules 10.310, 10.360(a), 10.420(a), Florida Rules for Certified and Court-Appointed Mediators
Rule 1.730(a) & (b), Florida Rules of Civil Procedure
MEAC Opinions 2004-006, 2010-007, 2010-012 and 2012-009
§44.403-405, Fla. Stat. (2012)

Summary:

Question one: Yes, it is a breach of confidentiality for a certified mediator to report to the court that a party who appears telephonically or by other electronic means pursuant to court order, failed to return the signed agreement after verbally agreeing to sign it.

Question two: Yes, if a party appearing by phone fails to sign and return an agreement after agreeing to do so, that is a confidential “mediation communication.”

Question three: No, the mediation unit cannot report to the court that a party has repeatedly not returned signed mediation agreements after agreeing to do so.

Question four: Yes, a notification to the court that the mediator is “waiting for signatures” for an agreement is a breach of confidentiality.

Opinion:

Questions one and two: It is a breach of confidentiality for a certified mediator to report to the court that a party who appears telephonically or by other electronic means pursuant to court order, failed to return the signed agreement after verbally agreeing to sign it. Florida Rule for Certified and Court-Appointed Mediators 10.360(a) 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.” The party’s failure to return the signed agreement is a “mediation communication” under section 44.403(1), Florida Statutes, because it is “nonverbal conduct intended to make an assertion” by a mediation participant made during the course of a mediation. The communication does not qualify as one of the exceptions to confidentiality delineated in section 44.405(4)(a), Florida Statutes.

Florida Rule of Civil Procedure 1.730(b) requires that an agreement be “reduced to writing and signed by the parties and their counsel, if any.” In instances where a party appears electronically or by telephone pursuant to court order, that requirement is not waived. To be an agreement a document must meet the requirements of the applicable rule of procedure. Mediators or mediation

units may develop procedures for obtaining the necessary signatures on an agreement when one party is appearing electronically or by telephone. However, if a party fails to follow that procedure or decides not to sign the agreement after verbally agreeing to do so, that is an exercise of a party's self-determination under rule 10.310, Florida Rules for Certified & Court-Appointed Mediators.

In situations like small claims court, in which telephonic appearance by a party is more commonplace, deadlines can be imposed to ensure a mediator's report can be timely filed with the court indicating either "agreement" (all signatures obtained) or "no agreement" without further comment or recommendation. In this way, if the party appearing telephonically does not return the signed agreement by the specified time, the mediator may report either an adjournment or "no agreement." This would eliminate the need to hold the report until a signed agreement was received. See MEAC Opinions 2010-007 and 2012-009, and Florida Rule of Civil Procedure 1.730(a).

As a best practice, during the mediator's orientation session under 10.420(a), Florida Rules for Certified and Court-Appointed Mediators, a description of the procedure for the formalization of any agreement reached when one party is appearing telephonically should be included. Additionally, all parties should be made to understand the time deadlines and consequences of not signing an agreement reached verbally. If the agreement is not signed and returned by the deadline, then "no agreement" is reported to the court, thus preventing the case from staying in "limbo."

Question three: For the reasons outlined above, it would be a breach of confidentiality for the mediation unit to report to the court that a party has repeatedly not returned signed mediation agreements after agreeing to do so. A mediation unit acts as an extension (representative) of the mediator and in that capacity is bound by the rules and statutes regulating the mediator. The unit could, however, gather statistical data on telephonic appearances and the percentage of times agreements are reached verbally and not finalized by return of a signed agreement provided any identifying data is eliminated.

Question four: A notification to the court that the mediator is "waiting for signatures" for an agreement is a breach of confidentiality. As stated above, an agreement without all required signatures is not an agreement and to report in this manner is a "comment" and would violate rule 1.730, Florida Rules of Civil Procedure.

The MEAC would direct the questioner to MEAC Opinions 2010-012 and 2004-006 for guidance when a mediator receives a request from the court to act in a manner inconsistent with his/her ethical responsibilities.

March 11, 2013
Date


Beth Greenfield-Mandler, Committee Chair