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Supreme Court of Florida  
Dispute Resolution Center

FLORIDA SUPREME COURT  
Mediator Ethics Advisory Committee

Opinion Number: 2013-003

Date of Issue: November 1, 2013

**The Question**

If a person during a caucus session tells the mediator that he committed a crime which had nothing to do with the case in mediation and someone else is going to be wrongfully punished for that crime does the mediator "A": say anything to the authorities or "B": let the innocent person go to jail.

The mediator did tell both parties in his opening statement that everything they discussed was confidential. That statement makes me think in the future the mediator should say "Anything we discuss pertaining to (this case) is confidential".

The person that made the unsettling statement which was made off-hand, appeared sound and rational.

The mediator felt uncomfortable with what he just heard, was somewhat flummoxed and said something to the effect that that issue had nothing to do with the present small claims case they were discussing and continued to caucus.

The case settled, everyone shook hands and that was that.

The mediator left the courtroom wondering what he should do or not do with the unsettling information.

What should the mediator have done or said at the time he heard the admission of the crime and/or after he left the court?

Submitted by a Certified County  
Southern Division

**Authorities Referenced**

Rules 10.360, 10.420(a) and 10.650, Florida Rules for Certified and Court-Appointed Mediators  
Sections 44.403 & 44.405, Florida Statutes (2012)  
MEAC Opinion 2012-007

## Summary

Unless a crime disclosed to the mediator in caucus falls under one of the exceptions to confidentiality for mediation communications in section 44.405, Florida Statutes (2012), the mediator should not report it. If a mediator decides, during the course of the mediation, that the mediator will make such a report, the mediator must withdraw from the mediation.

## Opinion

When deciding whether to report a past crime revealed during caucus, the mediator must ask him/herself several questions. First, is the statement a “mediation communication?” As defined in section 44.403, Florida Statutes (2012), a “mediation communication” is “an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation.”

Second, as a mediation communication, does the statement qualify as one of the exceptions to mediation confidentiality under section 44.405(4)(a)1.- 6., Florida Statutes (2012)? The ethical requirement for mediator disclosure of communications under rule 10.360(a), Florida Rules for Certified and Court-Appointed Mediators, dictates that mediation communications are confidential “except where disclosure is required or permitted by law or is agreed to by all parties.” (Emphasis added.) If the communication requires a mandatory report pursuant to chapter 39 (child abuse, abandonment, or neglect) or chapter 415 (abuse, neglect, or exploitation of vulnerable adults) of the Florida Statutes, the mediator has an ethical obligation to report it. Section 44.405(4)(a)3., Florida Statutes (2012). If the communication does not fall under the mandatory reporting exceptions, then the mediator must ask if it falls under any of the other exceptions to confidentiality. If the communication does fit within the definition of an exception, the mediator has the discretion to report.

There is an exception for mediation communications related to crimes. It states the communication must indicate the act was “willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.” Section 44.405(4)(a)2., Fla. Stat. (2012). In the instant case, the inquirer did not specify the type of crime committed. Nevertheless, the facts, as reported, support a presumption by the mediator that the communication was a reference to a past crime and did not rise to the standard for an exception under section 44.405(4)(a)2. The MEAC continues to have confidence in its previous opinion MEAC 2012-007, in which the exception to confidentiality for a mediation communication regarding a past crime was discussed.

Further, once a mediator makes the discretionary decision to report a mediation communication, the mediator must withdraw from the mediation immediately. 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.” The mere act of reporting the mediation communication indicates a bias on the part of the mediator and, at a minimum, gives the appearance of partiality.

Additionally, based upon the information provided, the MEAC would point out that the mediator’s obligation to explain confidentiality in the opening statement requires the parties be informed that communications made during the process are confidential, *except where disclosure is required or permitted by law*.

The MEAC would finally direct the inquirer to rule 10.650, Concurrent Standards, Florida Rules for Certified and Court-Appointed Mediators, which may obligate the mediator to other professional standards that may require consideration.



November 1, 2013

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Signed and Dated by Beth Greenfield-Mandler, MEAC Committee Chair