

FLORIDA SUPREME COURT
Mediator Ethics Advisory Committee

Opinion Number: 2013-006
Date of Issue: January 21, 2014

The Question

I have another ethical dilemma which has almost universal application in mediation; that is whether to raise an issue. While my request is in the family arena, it has across the board application.

I recently received an email from one of my General Masters which states in part,

"I have had two cases in the past few weeks where the custodial parent asked me to set retro because it was not (allegedly) addressed at the mediation. The other side did not necessarily disagree, but I have held it waived if not addressed because the mediated agreement will normally recite that it settles "all issues" existing between the parties (if it is not a partial agreement), and "all" means "all" to me.

They have argued that it was simply not addressed and that they (he or she, rather) only thought about it afterwards. We are talking about pro se folks here, not folks with attorneys representing them.

It might better to have the agreements say something about it, one way or another, if they are otherwise silent on it for whatever reason.

That is simply my opinion, nothing more or less.

How does the mediator, not being an advocate for one side or the other, address issues with pro se litigants? If he/she doesn't or does raise an issue, it makes the mediator somewhat of an advocate, doesn't it?"

I am not troubled by the fact that Full Agreement means resolution of "all issues" because I feel certain that if all issues brought before the mediator are resolved, that, by definition, is a full agreement. Please note, our agreements do recite that "all issues are resolved" if the mediator asks the parties if there are any other issues and the answer is no.

What troubles me is whether to raise issues not brought up by the parties. In making this decision I consider many factors.

First, was the issue pleaded in the petition or counter-petition?

Secondly is it a core concept? I believe there are some core issues which must be addressed in a family mediation for it to be meaningful, some of which are parental responsibility, timesharing and child support.

Next, I apply the help/hurt test; that is does me raising the issue help or hurt either party? If the answer is in the affirmative, I do not raise the issue because I don't think it is possible to be biased by not raising an issue, and it is possible to be biased by raising one.

Then, I consider whether raising it would it would be consistent with the standards of impartiality and preserve the parties' right to self-determination?

Would the discussion it invokes be information that I am qualified by training or experience to give, or is it opinion; and if so is it intended to coerce the parties, unduly influence the parties or direct a resolution of that issue, or is it advice? If it passes these inquiries, and helps the overall process, does not benefit one party over another, and all the other tests are met, I feel comfortable raising it.

Retroactive/Arrearages in child support under my normal test would be helping one party and hurting the other. That is, it would result in one party being required to pay money (and sometimes significant amounts of money) to the other party. I do not believe it is a core issue because the custodian can waive it except in limited circumstances. So it fails test to raise it, and I don't.

In the academic discussion that ensued after the above email was sent to all the magistrates and IV-D hearing offices, a point was made that caused this inquiry. It is not the parties' right to child support, it is the children's right. I would assume that would be the case with funds owed as a result of non-payment of child support (frankly the custodian's ability to waive retroactive/ arrearages in child support causes me some concern with that interpretation). Additionally, the best interest of children is of paramount concern of the Court. Finally Rule 10.320 states that "a mediator shall promote awareness by the parties of the interests of persons affected by actual or potential agreements who are not represented at mediation." It seems to me, children are the prime example of the intended results of this clause.

The following are my questions.

1. Is my test valid as to whether or not to raise an issue?
2. Are there core issues such as those set forth above, that must be raised by the mediator if the parties do not discuss them for mediation to be productive, and can the mediator raise them?
3. If all the issues raised are resolved and some issues are not discussed by the parties at mediation, is that a still a full agreement?

4. Should I specifically raise the issue of arrearages/retroactive child support if the parties do not bring up the issue?
5. Should I raise the issue of Alimony which is relevant if the parties ask for me to compute child support since it is an element of the equation?

Submitted by a Certified County, Family, Circuit, Dependency and Appellate Mediator
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Authorities Referenced

Sections 44.1011(2) and 44.403(4), Florida Statutes
Rule 10.220, 10.320, 10.370(c), 10.620, Florida Rules for Certified and Court-Appointed Mediators
Rule 12.740(f)(1) and (3), Florida Family Law Rules of Procedure
MEAC Opinions 2012-009 and 2010-004

Summary

This opinion focuses on several questions related to the appropriateness of a mediator raising issues during mediation. In this case the questions pertain to a family mediation setting but the MEAC responses are not limited to family mediation unless so stated.

Opinion

Question One:

Is my test valid as to whether or not to raise an issue?

Answer Question One:

Given the importance of the specific circumstances surrounding the use of any given mediator technique, the MEAC is unwilling to endorse a particular technique as per se appropriate and ethical. However, whatever technique or "test" that a mediator employs to self-evaluate the appropriateness of the mediator action contemplated needs to be done consistent with the mediator's role of an impartial and neutral third person who is "committed to assisting all parties, as opposed to any one individual." See rules 10.300 and 10.330, Florida Rules for Certified and Court-Appointed Mediators.

Question Two:

Are there core issues such as those set forth above, that must be raised by the mediator if the parties do not discuss them for mediation to be productive, and can the mediator raise them?

Answer to Question Two:

The MEAC declines to categorize any subject or issue under the definition of a “core issue.” The importance of any issue will vary depending on a number of factors, including but not limited to, the interests and needs of the parties involved. Whether or not an issue is “core” is for the parties to decide, not the mediator.

Question Three:

If all the issues raised are resolved and some issues are not discussed by the parties at mediation, is that a still a full agreement?

Answer to Question Three:

The inquirer’s use of the term “full” in describing an agreement in the question posed is not clear in context. If the inquirer is asking if s/he should report a “full” agreement to the court, the answer is no. Inserting the word “full” to describe any mediated agreement in the mediator’s report is considered a “comment” and is, therefore, an inappropriate communication to the court. See MEAC 2012-009.

If, rather, the inquirer is asking if an agreement which contains the resolution of all issues brought to the attention of the mediator during the mediation is a complete agreement, then it could be said that all issues raised by the parties and brought to the mediator’s attention have been resolved. There is no way for a mediator to know if all issues have been resolved and, therefore, referring to any agreement reached in mediation as a “full” agreement is potentially incorrect and misleading. In the context of mediation, a mediator would never know if any agreement was a “full” agreement.

Question Four:

Should I specifically raise the issue of arrearages/retroactive child support if the parties do not bring up the issue?

Question Five:

Should I raise the issue of Alimony which is relevant if the parties ask for me to compute child support since it is an element of the equation?

Answers to Questions Four and Five Combined:

Questions Four and Five center on whether raising issues related to the financial support of minor children is appropriate. As these questions are interrelated, the MEAC has chosen to answer these questions in a joint response.

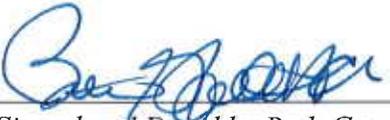
Mediation ethical standards contemplate that a mediator may assist parties with issue identification. The role of a mediator is defined in sections 44.1011(2) and 44.403(4), Florida Statutes, and rule 10.220, Florida Rules for Certified and Court-Appointed Mediators. Of the four functions described consistently in these references, one is the role of the mediator to ***“assist in the identification of issues and exploration of alternatives.”***

(Emphasis added.) This role however, needs to be considered within the context of all of a mediator's ethical responsibilities and how information is elicited by a mediator.

Issue identification can be accomplished using a multitude of techniques, some appropriate to mediation, others not. One effective method mediators should use is the art of creative open questioning. This will prompt parties to consider whether the discussions at mediation have addressed all of their concerns. In this way, the mediator is able to elicit issues from parties without having to prescribe what those issues are. Mediators can generally inquire as to whether all of the issues in court pleadings have been covered without identifying any specific issue.

Question Five specifically asks about alimony as an element in the computation of child support. In this specific instance, and not in general, if the parties have requested the mediator to calculate child support according to promulgated guidelines and alimony is one of those elements, the mediator could simply go through every element of computing the child support with the parties.

The MEAC reminds mediators that ethical guidelines are crossed when a mediator offers a personal or profession opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or ***direct a resolution of any issue*** and prompts mediators to use caution in accomplishing this task. (Emphasis added.) See rule 10.370, Florida Rules for Certified and Court-Appointed Mediators.

 January 21, 2014
Signed and Dated by Beth Greenfield-Mandler, MEAC Committee Chair