

FLORIDA SUPREME COURT Mediator Ethics Advisory Committee

Opinion Number: 2013-007
Date of Issue: January 21, 2014

The Question

Facts:

Mediation was held between Mother and Father. Mother attended with her attorney, and Father was pro se. The parties entered into a Partial Mediated Settlement Agreement (PMSA) that reads in pertinent part:

“Parties met at a mediation conference on [DATE], and agreed upon the following issues:”

“2. The Husband represented at mediation that he only has two (2) bank accounts. He shall provide all monthly statements from 2011, 2012, and 2013 for the [BANK NAME] account and [BANK NAME] account within 21 days.”

Each page was initialed and the final page signed by both parties.

Issue:

On one hand, the first sentence in Paragraph 2 (i.e. The Husband represented...) appears to be a confidential communication made during the course of the mediation. It does not appear to be an “agreement”. Furthermore, the sentence appears to be information that should be handled under the Rules of Discovery (e.g. Request for Admissions, Interrogatories, etc.) – not mediation. On the other hand, the first paragraph of the PMSA states that the parties, “...agreed upon the following issues” which suggests that the sentence may have been intended as an agreement between the parties, and as such included in the PMSA.

Subsection “(a) Scope” of *Rule 10.360 Confidentiality* 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.”

Also, the Committee Notes found under *Rule 10.420 Conduct of Mediation* state, “Florida Rule of Civil Procedure 1.730(b), Florida Rule of Juvenile Procedure 8.290(o), and Florida Family Law Rule of Procedure 12.740(f) require that any mediated agreement be reduced to writing. *Mediators have an obligation to ensure these rules are complied with*, but are not required to write the agreement themselves” (emphasis added).

It is understood that self-determination is key in mediation, and as such if the parties say they want the sentence included then the mediator must include it. However, there was no

mention of waiver of confidentiality in the PMSA. There was also nothing indicating that the parties entered into the agreement freely and voluntarily, or that they understood the agreement or the rules of confidentiality.

Questions:

1. Is the first sentence in Paragraph 2 considered a confidential communication that is subject to the rules of Confidentiality even though it was reduced to writing and the PMSA states that the parties "...agreed upon the following issues?"
2. If the sentence is determined to be a confidential communication, does the sentence become non-confidential through the act of reducing it to writing?
3. If the sentence is determined to be a confidential communication, does the mediator have an obligation to prevent the inclusion of the sentence into the PMSA absent both parties' actual decision that it be included?
4. Since there is no written waiver of confidentiality in the PMSA, does the fact that each page was initialed and the final page signed by both parties create an *implication* that the parties waived confidentiality regarding the information contained in the writing?

Submitted by a Certified Family Mediator
Central Division

Authority Referenced

Section 44.405 (4)(a), Florida Statutes (2013)

Summary

Unless the parties have agreed otherwise, written communications included in a mediated agreement that has been signed by all parties and counsel are not confidential.

Opinion

Question One:

Is the first sentence in paragraph 2 considered a confidential communication that is subject to the rules of confidentiality even though it was reduced to writing and the PMSA states that the parties "...agreed upon the following issues?"

Answer to Question One:

Unless the parties have agreed otherwise, written communications included in a mediated agreement that has been signed by all parties and counsel are not confidential. Section 44.405 (4)(a), Florida Statutes (2013), states, "there is no confidentiality or privilege attached to a signed written agreement reached during a mediation unless the parties

agree otherwise.”

Question Two:

If the sentence is determined to be a confidential communication, does the sentence become non-confidential through the act of reducing it to writing?

Answer to Question Two:

This question is moot given the answer to question one.

Question Three:

If the sentence is determined to be a confidential communication, does the mediator have an obligation to prevent the inclusion of the sentence into the PMSA absent both parties' actual decision that it be included?

Answer to Question Three:

This question is moot given the answer to question one.

Question Four:

Since there is no written waiver of confidentiality in the PMSA, does the fact that each page was initialed and the final page signed by both parties create an *implication* that the parties waived confidentiality regarding the information contained in the writing?

Answer to Question Four:

The act of reducing the agreement to writing without the inclusion of a confidentiality provision means it is not a confidential mediation communication under Chapter 44, Florida Statutes (2013). There is no need to ponder the implications as the statute and rules are clear. In support of this conclusion, rule 12.740(f)(1), Florida Family Law Rules of Procedure, requires an agreement reached in a family mediation to “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.”

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