

## FLORIDA SUPREME COURT Mediator Ethics Advisory Committee

Opinion Number: 2014-010  
Date of Issue: April 10, 2015

### The Question

In MEAC 2012-005, the Committee opined that, in a federal bankruptcy action pending in a particular federal bankruptcy court, a mediator “who discloses that ‘a party failed to negotiate in good faith’ or ‘willfully failed to appear at mediation’ does not violate the mediator’s ethical responsibilities to mediation confidentiality as such disclosure is required by the local rules of that court.” With respect, I urge you to clarify this opinion in light of the following two concerns: whether The Florida Mediation Confidentiality and Privilege Act applies to this particular federal bankruptcy court proceeding; and, if it does not, the significant question about loss of mediator impartiality and party self-determination by the mediator making such a report.

First, the United States Supreme Court, in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), began a long line of cases in which it set forth the terms under which federal courts, sitting in diversity jurisdiction (state law claims brought by citizens of one state against citizens of another) and when applying its jurisdiction over pendent state law claims (federal question jurisdiction invoked, but state law claims between the same parties and involving the same alleged events, heard by the federal court). The Court has also recognized the application of the *Erie* doctrine to proceedings in federal bankruptcy court to determine substantive state law rights. *Marshall v. Marshall*, 547 U.S. 293, 313 – 314 (2006).

The Florida Mediation Confidentiality and Privilege Act is a substantive pronouncement by the Florida Legislature and the Act creates rights that are enforceable in court. Fla. Stat. § 44.406. Such laws, even though they may have procedural implications, are entitled to due deference by the federal courts. *Cf.*, *Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 79 (Fla. 2012) (holding that offer of judgment statute combines substantive and procedural components but was “properly enacted by the Legislature because it is ‘clear that the circumstances under which a party is entitled to costs and attorney’s fees is substantive. (citing *Timmons v. Combs*, 608 So. 2d 1, 2–3 (Fla. 1992)). The Act applies, among other times, to a mediation that is conducted by a certified mediator. Fla. Stat. § 44.402(1)(c). Thus, there are *Erie* implications in a federal court not applying the Act’s substantive rights. *Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 632 F.3d 1195, 1197 (11th Cir. 2011).

At a minimum, it is fair to say that determining whether the Act applies in the context of a federal court bankruptcy action is no simple matter, and should not be quickly dismissed, as appears to have occurred in MEAC 2012-005: “Therefore, the mediator may report to the federal court in which the mediator is conducting the mediation ‘the willful failure to attend the mediation conference or to participate in the mediation process in good faith’ which is required

by Local Rule 9019-2(d)(2), Bankr. S.D. Fla. *and such a report does not violate the Florida Mediation Confidentiality and Privilege Act, Section 44.405, Chapter 44, Florida Statutes* [emphasis supplied].” Given the complexity of applying state substantive law in federal bankruptcy court, the critical question is: how can a mediator (or MEAC for that matter) assume that the Act doesn’t apply in a federal case when it might; there has been no legislative or judicial determination thereof. Consequently, since the Act may (and, in this writer’s humble opinion, does) apply, a certified mediator may not make the report required by rule, and must withdraw from or decline appointment as mediator. MEAC 2004-006. The Committee should be careful not to encourage reporting bad faith when there is no certainty as to whether the Act applies.

Second, the MEAC opinion fails to address the significant impartiality and self-determination concerns raised by the mediator deciding whether a party has committed a “willful failure to participate in the mediation process in good faith.” These concerns are discussed at length in MEAC 2004-006 and apply with equal force here, yet the Committee does not address the concerns in MEAC 2012-005. As made clear in MEAC 2004-006, “[t]he Committee has advised mediators that they may not report to a court that a party has failed to negotiate in good faith for the principal reasons that the mediator’s report would: (1) constitute a breach of confidentiality; (2) impair parties’ right to self-determination; and (3) destroy mediator impartiality, in appearance and in reality. MEAC Opinions 95-009 and 2001-004. See also, rule 10.360, requiring the mediator to maintain confidentiality, rule 10.310 protecting party self-determination, and rule 10.330, mandating mediator impartiality.”

Allowing mediators to report bad faith can compromise self-determination if the mediator appears to use the threat of possible self-report as a means to intimidate parties into reaching an agreement. This was alleged to occur years ago in California in circuits where mediators were allowed to make reports to the court. In fact, since certified mediators are required to disclose possible conflicts of interest (i.e., potential impairment of mediator impartiality) as soon as they are aware of them, is the mediator not required to disclose that potential conflict – to both parties – immediately upon reaching a conclusion that a party is not negotiating in good faith? For that matter, MEAC and the courts have noted that there is no across-the-board definition of “bad faith” or “good faith” negotiation. As discussed in *Avril v. Civilmar*, 605 So.2d 988 (Fla. 4th DCA 1992), parties need not settle at mediation, or even make an offer. The Committee recognized and discussed this concern at length in MEAC 2004-006.

For all these reasons, I urge you to reconsider and clarify MEAC 2012-005, and opine that a certified mediator may not ethically mediate a case – and is therefore required to decline appointment or withdraw if appointed – where there is a court-imposed obligation for the mediator to determine and report whether a party is mediating in good faith.

Alternatively, MEAC has a long-standing practice of answering just the question answered and nothing more. Practice requirements before various levels of federal court, even between federal courts at the same level, vary significantly. For example, the United States Bankruptcy Court for the **Middle** District of Florida, has promulgated a Local Rule on Mediation that is much more in keeping with Florida certified mediators’ ethical obligations; among other things, all mediators before the court are required to comport themselves according to the Fla. R. Med., and no report, such as the one required by the Southern District, is mandated. Local Rule

9019-2(d), (g), comment. Bankr. M.D. Fla. Thus, if all other concerns herein were addressed and the Committee still opined that a Florida certified mediator may make the report required by Local Rule 9019-2(d)(2), Bankr. S.D. Fla., the Committee is urged to emphasize the opinion is limited solely to practice before that court.

### **Authorities Referenced**

Rules 10.500, 10.520, Florida Rules for Certified and Court-Appointed Mediators  
Section 44.405, Florida Statutes  
Local Rule 9019-2(C)(4), U.S. Bankruptcy Court for the Southern District of Florida  
MEAC Opinion 2012-005

### **Summary**

If a mediator mediates a case pursuant to or governed by local rule 9019-2(C)(4)<sup>1</sup> of the U.S. Bankruptcy Court for the Southern District of Florida, the mediator is accountable to the court in a manner consistent with the Florida Rules for Certified and Court-Appointed Mediators (see rules 10.500 and 10.520). If the parties wish to proceed after having being advised by the mediator in the orientation session of this federal court's requirements regarding mediator disclosure to the court, there is no violation of mediator ethics.

### **Opinion**

In Opinion 2012-005, MEAC opined that a mediator who highlights during his or her opening statement that the local federal bankruptcy rule in the Middle District of Florida [rule 9019-2(d)(2)] requires the mediator to report to the court willful failure to attend the mediation conference or to participate in the mediation process in good faith [which failure may result in the imposition of sanctions by the court] may mediate the case pursuant to this local federal bankruptcy rule and may make a report as required by this rule.

We have been asked the same question with regard to the reporting requirement in local rule 9019-2(C)(4), U.S. Bankruptcy Court for the Southern District of Florida. The question posed states that "the critical question is: how can a mediator (or MEAC for that matter) assume that the Act [section 44.405, Florida Statutes] doesn't apply in a federal case when it might; there has been no legislative or judicial determination thereof." We decline to respond as MEAC's function is limited to ethical questions.

When mediating cases referred by a court with ultimate authority over a case, the mediator is accountable to the court in a manner consistent with the Florida Rules for Certified

---

<sup>1</sup> Although the requester appears to have inadvertently referenced local rule 9019-2(d)(2), U.S. Bankruptcy Court for the Southern District of Florida, the applicable rule is 9019-2(C)(4).

Mediators and Court-Appointed Mediators (rules 10.500 and 10.520). 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. Therefore, if the parties wish to proceed after being informed of this federal court's requirements for mediator disclosure in the mediator's orientation session, there is no violation of mediator's ethics.

 April 10, 2015

---

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