

January 17, 2005

### The Question

I was recently selected by the parties to mediate a case. The parties gave my contact information to the court, which issued the attached order. When I received the order, I was greatly concerned, as parts of the order appear to conflict significantly with the confidentiality provisions of the Florida Rules for Certified and Court-Appointed Mediators. The relevant portions of the order are as follows:

3. All parties shall proceed to mediation in good faith. Corporate party must send a corporate representative other than the attorney with full authority to settle the case. An insurance carrier must send a company representative, other than the attorney, who has full authority to resolve the matter for an amount which is the lesser of the policy limits or the most recent demand of the adverse party. Proceeding to mediation in the absence of good faith and/or with authority limited to a prior evaluation of the case is not acceptable and may be subject to sanctions.

5. Good Faith: In determining that this case is appropriate for mediation, the Court specifically finds that the possibility exists of resolving the case before trial. Therefore, offer[s], counter offers or negotiating postures which are clearly inappropriate, given the facts and issues of this case, and clearly interposed for the sole purpose of sham compliance with this order shall subject the party so acting to sanctions. Such conduct is deemed to be a fraud upon the court and shall not enjoy the status of privilege under 44.102(2) Florida Statutes. The mediator shall report such conduct to the court immediately.

6. Full Authority: The mediator shall report to the court non-compliance with this order by failure of a party to send a representative with full authority to settle the case as described in paragraph three. Such conduct shall not enjoy the status of privilege under 44.102(2) Florida Statutes.

9. The mediator shall be compensated at the rate of \$125 an hour. Any mediation rate that exceeds \$125 per hour shall be agreed upon by the parties prior to the execution of this Order of Referral. This cost shall be borne equally by the parties, with payment due at the conclusion of the mediation session. Payment shall be made directly to the mediator. The mediator shall inquire before the mediation begins whether the parties are ready and willing to pay at the conclusion of the session. The mediator shall report to the court by affidavit any manifestation by a party or an attorney that they are unprepared to pay for the cost of mediation in violation of this Order.

Such report will be procedural in nature and the information will not enjoy the status of privilege under 44.102(3) Florida Statutes. . .

[Emphasis added].

I do not ask the MEAC whether the Court is certainly in its rights to order the parties to negotiate in good faith. Instead, I would like guidance as to what a mediator should do in relation to paragraphs 5 and 6 (I am less concerned about the language 9, since it states “The mediator shall inquire *before* the mediation begins. . . [emphasis added]”)? In paragraphs 5 and 6, I perceive a clash between Rule 10.360 and 10.510-.520. Must I withdraw? If I go forward and mediate, and, at some point, reach a conclusion that a party is not negotiating in good faith (by virtue of unreasonable offers) – of course, how do I *know*? – must I report this to the Court? Help!

Certified County and Circuit Civil Mediator  
Central Division

### Authority Referenced

Rules 10.200, 10.220, 10.310, 10.360, 10.500, 10.510, and 10.520, Florida Rules for Certified and Court-Appointed Mediators  
Sections 44.401 – 44.406, Florida Statutes  
MEAC Opinions 95-009; 96-005; 99-012; 2001-004  
Rule 1.730(a), Florida Rules of Civil Procedure  
Rule 8.290(o)(2), Florida Rules of Juvenile Procedure  
Rule 12.740(f)(3), Florida Family Law Rules of Procedure  
*Avril v. Civilmar*, 605 So 2d 988 (Fla. 4<sup>th</sup> DCA 1992)  
*Evans v. State*, 603 So 2d 15 (Fla. 5<sup>th</sup> DCA 1992)  
*Chabotte v. Chabotte*, 707 So 2d 923 (Fla. 4<sup>th</sup> DCA 1998)

### Summary

When a mediator receives a court order in advance of a mediation, which contains provisions which are contrary to the mediator’s role and requires the mediator to act in a manner that is inconsistent with the mediator’s ethical rules, the mediator should decline participation in the mediation.

### Opinion

The Committee opines that the mediator is not able to comply with both the Florida Rules for Certified and Court-Appointed Mediators and a court order to report a party who fails to mediate in good faith. Mediators have a duty to comply with the Florida Rules for Certified and Court-Appointed Mediators, and are subject to sanctions

for noncompliance.<sup>1</sup> Rule 10.360(a) requires mediators to keep confidential the content of mediation communications “except where disclosure is required by law”. The newly-enacted Mediation and Confidentiality Act<sup>2</sup> provides that all mediation communications shall be confidential unless the Act provides otherwise.<sup>3</sup> Mediation communications include oral or written statements, as well as nonverbal conduct intended to make an assertion.<sup>4</sup> While the Act does delineate some exceptions to confidentiality, reporting parties’ failure to mediate in good faith is not among them.<sup>5</sup> The Act underscores the importance and breadth of mediation confidentiality. For the first time, Florida statutory law provides a civil remedy when a mediation participant “knowingly and willfully discloses” confidential mediation communications.<sup>6</sup>

The Committee notes the distinction between this order and the orders in MEAC Opinions 96-005 and 99-012, which recognize that “where a court, notwithstanding the statutory provision, issues an order for the mediator to testify,” the mediator could ethically follow the court’s order. In those circumstances, the court was ordering the mediator to testify after the fact. The party had the right to object to the testimony and also retained the right “to obtain a review through the appellate courts which could strike such testimony from the record if it were later deemed to be confidential.” MEAC 99-012. However, when the mediator is informed by the court in advance of the mediation that the confidentiality of the session would not be honored, the mediator should decline participation.

There are no statutes, rules, or common law governing court-ordered mediation that require the parties to negotiate in good faith. *See Avril v. Civilmar*, 605 So. 2d 988, 989-90 (Fla. 4th DCA 1992) (quashing order imposing sanctions for failure to negotiate in good faith at mediation as a departure from essential requirements of law and stating that “[t]here is no requirement that a party even make an offer at mediation, let alone offer what the opposition wants to settle.”) See also MEAC Opinion 2001-004.

Florida mediators have an ethical obligation “to comply with statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation”. Rule 10.520. Florida Rules of Civil Procedure are consistent with the mediators’ ethical rules and statutory law. “If the parties do not reach an agreement as to any matter as a result

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<sup>1</sup> The Rules apply to certified and court-appointed mediators. Complaints may be filed against mediators who allegedly violate the rules, and sanctions imposed on mediators for actual violations.

<sup>2</sup> The Act became effective on July 1, 2004 and is codified at sections 44.401- 406, Florida Statutes. While the Committee realizes that the referenced court order was likely written prior to the effective date of the Act, we respond to this question based on current law and rules.

<sup>3</sup> § 44.405(1), Fla. Stat. (2004).

<sup>4</sup> § 44.403(1), Fla. Stat. (2004).

<sup>5</sup> § 44.405(4), Fla. Stat. (2004).

<sup>6</sup> § 44.406, Fla. Stat. (2004).

of mediation, the mediator shall report the lack of agreement to the court without comment or recommendation.” Rule 1.730(a), Florida Rule of Civil Procedure. See also, rule 8.290(o)(2), Florida Rules of Juvenile Procedure, and rule 12.740(f)(3), Florida Family Law Rules of Procedure.

The 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.

The Florida Rules for Certified and Court-Appointed Mediators define and limit the mediator’s role to reducing “obstacles to communication, assist[ing] in the identification of issues and exploration of alternatives, and otherwise [facilitating] voluntary agreements resolving disputes. The ultimate decision-making authority, however, rests solely with the parties.” Rule 10.220.

The mediator’s role contrasts sharply with the judge’s role. Two cases highlight this distinction. In *Evans v. State*, 603 So. 2d 15,17 (Fla. 5th DCA 1992) the court advised that mediators should do the mediating and judges the judging. Similarly, in *Chabotte v. Chabotte*, 707 So. 2d 923,924 (Fla. 4th DCA 1998), the court determined that mediation does not displace a judge’s statutory obligation to rule on claims.

Whether the parties choose to resolve their dispute is secondary to whether the mediator conducts the mediation in accordance with the ethical rules. Rule 10.200. The mediator has responsibilities to the parties, the mediation process, the profession, and the courts. The mediator’s obligations to the court include accountability to the referring court with discharge of this responsibility in a manner consistent with the ethical rules, rule 10.500; being candid, accurate, and responsive concerning the mediator’s availability, rule 10.510; and complying with pertinent statutes, court rules, local rules, and administrative orders, rule 10.520. Consequently, the mediator should communicate to the court the unavailability to mediate the case in question pursuant to the applicable court order. Since the mediator is unable to stay in the role of mediator, comply with the ethical rules, and follow the court order to report a party’s failure to mediate in good faith, the Committee advises the mediator to withdraw from this case.

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Date

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Fran Tetunic, Committee Chair