

April 18, 2005

The Question

During a recent Mediation, opposing Legal Counsel, who is a Certified Mediator, presented a document and in an attempt to make my clients settle the matter being mediated indicated that in the document there was information that was damaging to my clients. He referenced the document to a litigation in which one of my clients was involved. We subsequently discovered that opposing Legal Counsel was the Mediator in the case to which he had referenced and that the case was settled through Mediation.

It is my understanding that any information that is obtained in Mediation is to be maintained by all parties, including the Mediator, in strictest confidence.

A. Did opposing Legal Counsel violate the Ethical Rules to which Certified Mediators are subject by referring to information in our Mediation that was obtained during another Mediation?

B. If there was a violation of the Ethical Rules, should opposing Legal Counsel withdraw as Legal Counsel in our case?

Submitted by a Certified County and Circuit Civil Mediator
Central Division

Authority Referenced

Rules 10.360, 10.520, and 10.620, Florida Rules for Certified and Court-Appointed Mediators
Sections 44.401-44.406, Florida Statutes
MQB 2003-002

Summary

A. Absent either waiver by the parties or a requirement to report imposed by law, a certified or court-appointed mediator shall not reveal information communicated during a mediation. Thus, the mediator in your question has violated at least Rule 10.360.

B. The Florida Bar would be the appropriate body to provide guidance in relation to attorney ethical questions. With regards to the mediator standards, Rule 10.620 states that a mediator “shall not ... perform any act that would compromise the mediator’s integrity or impartiality,” both of which appear to be brought into question in the scenario described.

Opinion

A. A mediator is ethically required to maintain confidentiality of “all information revealed during mediation except where disclosure is required by law.” Rule 10.360(a). Confidentiality is one of the most fundamental precepts of mediator ethics. A mediator’s obligation of confidentiality survives the completion of a mediation. Absent either waiver by the parties or a requirement to report imposed by law, a certified or court-appointed mediator shall not reveal information communicated during a mediation. Thus, taking the assertions in your question as true and complete (that is, that the document was not obtained independently through discovery in the current action), the Committee opines that the mediator in your question has violated at least Rule 10.360.

The Committee notes that in 2003, a grievance was filed against a mediator for reasons similar to those you describe. In that case, the mediator repeated information which he learned in one mediation in a second mediation in which he was acting in the role of attorney. After convening a meeting between the mediator and the complainant, the Mediator Qualifications Board found probable cause to believe that the mediator had violated the ethical standards, but decided not to pursue the case because “the violation, which was of an isolated nature, was recognized and understood by the mediator, and the mediator had already incorporated into his practice as a mediator a heightened concern for confidentiality for mediation proceedings.” MQB 2003-002. Similarly, in answer to your first question, the Committee is of the opinion that the mediator ethical standards may have been violated.

This conclusion is bolstered by the recently adopted Florida Mediation Confidentiality and Privilege Act, sections 44.401-406, Florida Statutes. As you are aware, a certified or court-appointed mediator must comply with all statutes relevant to the practice of mediation. Rule 10.520. Since, as you indicate, the mediator/opposing counsel is a certified mediator, the Act would attach to any mediation facilitated (on or after the effective date of the Act, July 1, 2004), regardless of whether it was conducted pursuant to court order.

The Act defines a “mediation communication” as an “oral or written statement ... by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of mediation...” Section 44.403(1). If the

document in question was obtained during the course of the mediation, and was not otherwise excluded from confidentiality pursuant to section 44.405(4)(a), the reference to the information would violate not only Rule 10.360(a), but also Rule 10.520. If any of the enumerated exceptions applied, or if the document were otherwise discoverable and was, in fact, discovered independent of the mediation, it *might not* technically violate Rule 10.360(a), but would still likely be a violation of Rule 10.620, which specifically states that a mediator “shall not accept any engagement, provide any service, or perform any act that would compromise the mediator’s integrity or impartiality.”

B. Your second question raises issues of both attorney and mediator ethics. In relation to attorney ethical questions, the Committee refers you to The Florida Bar for guidance. With regards to the mediator standards, while there is no direct reference to withdrawal as an attorney in a future case, the Committee directs you to the discussion above, with specific reference to Rule 10.620.

Date

Fran Tetunic, Committee Chair