

March 4, 2006

The Question

I am the [name and title stricken] of a court alternate dispute resolution unit.

It is our procedure that all cases are assigned to the unit and subsequently assigned to a specific mediator.

I received a letter of complaint from a party about one of my certified family mediators in a family mediation. That letter contained numerous “mediation communications”; a copy of the letter was sent to the Chief Judge of the circuit. Our employment, incidentally, is with the State of Florida, Court Administration Division, and is “at the pleasure of the Chief Judge”.

The case did not have a specific order of referral, but there is, in effect, an Administrative Order executed by the, then, Chief Judge, that states, “Any party who seeks to schedule a final hearing (modifications) or trial (original actions)...shall first participate in mediation through the family mediation services provided by the court or a private mediator...The mediator shall certify that mediation is completed prior to either party scheduling a final hearing or trial.”

It is the normal circuit wide procedure that in cases such as these, when a complaint is made to the Chief Judge, a letter of response is sent to the complainant, and a copy of the complaint is placed in the court file.

During the mediation, the complainant advised the mediator that she was a friend of another mediator who does contractual work for our unit.

The case ultimately ended in an impasse being declared.

In the letter, the complainant advised that she had filed a motion for the matter to be “resumed” by a new mediator, which motion was, in fact filed.

This scenario presents many issues, which I request you analyze and advise me of your collective opinion. They are as follows:

1. Does the definition of “mediator” as provided in Fla. Stat. s. 44.403, while it specifically states “a neutral, impartial third **person** (emphasis added)

who facilitates the mediation process...” encompass the mediation unit for the purposes of confidentiality. If not, does it apply to more than one person in co-mediation situations. More specifically, was the letter from the party to me a breach of confidentiality of the of mediation communications as set forth in Fla. Stat. s. 44.405?

2. Am I “the body” conducting the investigation of the misconduct as set forth in subsection (6) of that statute create an exception to confidentiality so that the mediator may defend himself/herself and reveal mediation communications to me which would otherwise be a breach of the confidentiality?

3. Is the Chief Judge of the Circuit “the body” conducting the investigation of the misconduct which would allow the complainant to reveal mediation communications to him/her and, again, allow the mediator to defend himself/herself to that judge?

4. If the unit’s director has no authority to enforce deviation from the normal procedures of the circuit, i.e., placing the letter in the court file, can it be prohibited from doing so (which would be a clear breach of the confidentiality), and if so, by whom?

5. When the mediator was informed that the party was a friend of another mediator in the unit, should he/she have terminated the mediation due to a conflict of interest under Florida Rules for Certified and Court Appointed Mediators, Rule 10.340 Conflict of Interest?

6. If the Court orders the parties to return to mediation can another mediator from the Court Unit conduct it under Rule 10.340 Conflict of Interest?

7. Can the Court order the mediation to “resume” under the terms of under Fla. Stat. s. 44.404(1) Mediation; duration the mediation ends when: (b) The mediator declares an impasse by reporting to the court or the parties lack of an agreement? I recognize, the Court always has the power to re-refer the case to mediation but the specific motion involved in this case is “**MOTION TO RESUME** (emphasis added) **MEDIATION BEFORE A NEW MEDIATOR**”.

8. Does the ADR unit have a duty to disclose the complaint to the other party to the mediation, and send him/her a copy of the complaining letter, any responses, results of the investigations, and other documents or communications pertaining to this matter, under Rules 10.230(f) Mediation Concepts (full disclosure), 10.300 Mediator’s Responsibility to the Parties, 10.330 Impartiality and 10.410 Balanced Process?

9. Does the mediator have judicial immunity under Fla. Stat. s. 44.107 under the purview of the Administrative Order supra? I ask this question because Fla. Stat. s. 44.402(1)(a), a portion of the Mediation Confidentiality and Privilege Act, states that the act applies to “any mediation...(a) Required by statute, court rule, agency rule or order, oral or written case-specific court order or court **administrative order** (emphasis added);” while Fla. Stat. s. 44.107 gives the judicial immunity to “mediators serving under s. 44.102(1) states “Court-ordered” and s. 44.102(2) in each section uses the phrase “refer to mediation”, which I believe infers that there must be a case-specific order.

I realize that these are extensive and complicated issues, however, due to this being an active case, and proceedings must be timely held in which these issues will be presented, I would appreciate it if you could expedite your deliberations and your response to this letter.

Thank you kindly for your assistance in this matter.

Submitted by County, Family, Dependency and Circuit Mediator
Northern Division

Authority Referenced

Rules 10.230(f), 10.300, 10.330, 10.340(b) and (c), 10.410, 10.810(b) and (c), 10.900(a), Florida Rules for Certified and Court-Appointed Mediators
Committee Notes to Rule 10.340, Florida Rules for Certified and Court-Appointed Mediators
Sections 44.401 – 44.406, Florida Statutes

Summary

1. While a mediation unit is not a mediator per se, many of the communications made to the mediation unit would be included under the umbrella of confidentiality. Each co-mediator is to be treated as a mediator subject to the Florida Mediation Confidentiality and Privilege Act. The Committee declines to answer the question whether the party breached confidentiality as being beyond its jurisdiction.

2 and 3. Assuming the party has affirmatively requested that the complaint be handled at the trial court level, the mediator may reveal mediation communications to the mediation office charged with investigating the conduct.

4. Revelations made by a mediator in furtherance of a grievance investigation should be kept in a separate file independent from the court file.

5. The relationship described in the question would not necessarily be a “clear conflict” requiring the withdrawal of the mediator regardless of the express agreement of the parties. However, if the mediator is no longer impartial or the parties request that the mediator no longer continue, the mediator is required to withdraw from the mediation.

6. A different mediator within the mediation unit may mediate if all parties, being aware of the relationship, are agreeable to proceeding.

7, 8, and 9. The Committee declines to answer these questions because they are outside the Committee’s jurisdiction.

Opinion

The Mediator Ethics Advisory Committee was created to provide written advisory opinions to ethical questions arising from the Standards of Professional Conduct submitted by mediators subject to these rules. Rule 10.900(a). Some of the questions which you pose do not seek advice for mediators, but rather relate to responsibilities of the chief judge, the trial judge, or the parties. The intent of the committee in writing this opinion is not to instruct a judge or an ADR unit on how to conduct administrative affairs. Given that the jurisdiction of the Committee is to provide advice on ethical matters to mediators, this opinion should be read as limited to such matters. Thus, the Committee will provide answers to those questions that are within its jurisdiction and declines to answer the others.

As a preliminary matter, the Committee notes that the Rules provide that formal complaints against Florida Supreme Court certified mediators which are to be considered by the Mediator Qualifications Board (MQB) may either be filed directly with the Dispute Resolution Center (DRC) or in the office of the court administrator in the circuit in which the case originated (in which situation the complaint must be referred to the DRC within five days of filing. Rule 10.810(b) and (c). The Committee recognizes that a grievant may, in the alternative, wish to have a complaint handled informally at the local level and not initiate the formal grievance process through the Mediator Qualifications Board. In such case, the complaint filed with a program need not be forwarded to the MQB; however, it is incumbent on the program and court administrator to inform the grievant of the option to pursue a formal grievance through the MQB and to determine if the complainant intended the complaint to be handled at the local or state level. For purposes of answering these questions, the MEAC will

assume that the grievant expressed a clear intent to have the complaint considered locally.

Question 1. Although the mediation unit is not a mediator per se, many of the communications made to the mediation unit by a mediation participant would be included under the umbrella of confidentiality because a mediation communication is defined as “an oral or written statement, or nonverbal conduct intended to make an assertion, by ... a mediation participant made during the course of a mediation, or prior to mediation *if made in furtherance of a mediation.*” (Emphasis added) Section 44.403(1), Florida Statutes. In relation to the second part of Question 1, each co-mediator is to be treated as a mediator subject to the provisions of the Florida Mediation Confidentiality and Privilege Act. Sections 44.401 – 44.406, Florida Statutes.

With regards to the final part of Question 1, that is whether the party may have breached confidentiality, the Committee declines to answer the question because parties are not regulated by the Florida Rules for Certified and Court-Appointed Mediators.

Questions 2, 3 and 4. While these questions do not directly request advice relating to the ethical responsibilities of mediators, to the extent that an investigation were undertaken by the mediation unit or chief judge, the Committee offers the following guidance to a mediator who may be the subject of such an investigation. Assuming the party has affirmatively requested that the complaint be handled at the trial court level, the mediation office charged with investigating the conduct could be construed as a “body” contemplated under section 44.405(4)(a)(6), Florida Statutes, and the mediator may reveal mediation communications to the mediation office during the investigatory process. While unlikely, in some circumstances it may happen that the Chief Judge, and not the ADR director or mediation unit, conducts the investigation into mediator misconduct. In such cases, the Chief Judge could also be construed as a “body” contemplated under section 44.405(4)(a)(6), Florida Statutes. In either case, revelations made by the mediator in furtherance of an investigation should be “solely for the internal use of the body conducting the investigation of the conduct.” Section 44.405(4)(a)(6), Florida Statutes. Consequently, the Committee would suggest that such information be kept in a separate file independent from the court file.

Question 5. In the scenario presented, it appears that, prior to the start of the mediation, the mediator was not aware of any relationship between the complainant and one of the contract mediators in the mediation unit. If the mediator was unaware of that relationship, the mediator could not have disclosed this prior to the commencement of the mediation.

The Committee Notes to rule 10.340 provide, in relevant part, the following advice:

Disclosure of relationships or circumstances which would create the potential for a conflict of interest should be made at the earliest possible opportunity and under circumstances which will allow the parties to freely exercise their right of self-determination as to both the selection of the mediator and participation in the process.

Thus, upon learning of this information, the mediator should address it immediately with both parties. If the mediator truly was unaware of the relationship, the mediator should so state, assert his/her impartiality (assuming s/he still is impartial), and allow both parties to decide whether to continue with that mediator or to request that the mediation be concluded. Rule 10.340(b) and (c). The Committee believes that the relationship between the party and another mediator, as described in the question, would not necessarily be a “clear conflict” requiring the withdrawal of the mediator regardless of the express agreement of the parties. Rule 10.340(c). However, if the mediator is no longer impartial or if the parties request that the mediator no longer continue, the mediator is required to withdraw from the mediation. Rules 10.330(b) and 10.340(c).

Question 6. Since the Committee does not believe that the relationship between the party and a contract mediator with the unit necessarily creates a “clear conflict” pursuant to rule 10.340(c), a different mediator within the mediation unit may mediate if all parties, being aware of this relationship, are agreeable to proceeding.

Question 7. The Committee declines to answer this question because it asks what a judge is permitted to do, a matter outside the Committee’s jurisdiction. Rule 10.900(a).

Question 8. The rules you cited, rule 10.230(f), 10.300, 10.330, and 10.410, do not address obligations of an ADR unit. The Committee thus declines to answer this question which is outside of its jurisdiction.

Question 9. The Committee declines to answer this question since it calls for an interpretation of statutes.

Date

Fran Tetunic, Committee Chair