

July 24, 2006

The Question

1) Upon reaching an impasse, (but only because a litigant did NOT have full settlement authority, even though they were instructed to have such on the NOTICE TO APPEAR FOR PRETRIAL CONFERENCE/MEDIATION, *and*, told the Judge they had the FULL AUTHORITY), is it a breach of Confidentiality to state on the Stipulation in the open body, “Did not have FULL settlement authority”?

2) Doesn't any/all writings on the Stipulation negate Confidentiality since the parties involved sign same?

Submitted by a Certified County Mediator
Central Division

Authority Referenced

Rules 10.360 and 10.500, Florida Rules for Certified and Court-Appointed Mediators

Sections 44.401 – 44.406, Florida Statutes

Rules 1.720(b) and 1.730(a), Florida Rules of Civil Procedure

MEAC Opinions: 95-009, 99-002, 2001-010, and 2004-006

Summary

A) Yes, it would be an ethical violation to report to the court that a party did not have full settlement authority. Under the circumstances presented, the mediator is limited to reporting that no agreement was reached.

B) No, the parties' signatures on the stipulation form are insufficient to authorize a mediator to disclose otherwise confidential information.

Opinion

(A) The mediator's report (what you refer to as a stipulation) to the court when a mediation ends in an impasse is limited to stating the lack of an agreement without comment or recommendation. Rule 1.730(a), Florida Rules of Civil Procedure.

The mediator's inclusion of communications showing a lack of authority to settle in the mediator's report violates the prohibition against disclosure of confidential communications by the mediator. Rule 10.360 and sections 44.401 – 44.406, Florida Statutes.

In MEAC 95-009, the opinion states that

If the parties display a reluctance to participate in the orientation phase of the process, and the mediator is unable to persuade the parties to participate, the mediator is not permitted to require the parties to remain at mediation; however, *the mediator may report to the court the lack of appearance by the party or parties pursuant to rule 1.720(b)*. [emphasis added] See also MEAC 99-002(c) and 2001-010.

The MEAC notes that this opinion predates the adoption of the Florida Mediation Confidentiality and Privilege Act (2005), which lists specific exceptions to confidentiality and privilege for mediation communications. Section 44.405(4)(a), Florida Statutes. None of the listed exceptions would now authorize the mediator to make such a report. In addition, pursuant to section 44.404(1), Florida Statutes, a "court-ordered mediation begins when an order is issued by the court..." Thus, by the time you were to learn of the lack of authority the mediation would have already begun for purposes of confidentiality and privilege. In light of the foregoing, the MEAC is obligated to recede from the opinions offered in 95-009, 99-002, and 2001-010 relating specifically to the mediator's report to the court based on nonappearance. Specifically, under these circumstances, the mediator is limited to reporting that no agreement was reached. The mediator may report nonappearance in the event that a party does not physically appear at the mediation.

Your implication that the litigant (presumably a representative of the party since a party by definition would have full authority even if he or she does not choose to use the authority) may have intentionally deceived (or at least inadvertently misled) the judge causes the Committee concern. However, the Committee does not see any mechanism through which you can communicate to the judge that the person involved does not possess full

authority. While rule 10.500 requires the mediator to be accountable to the court, such act must be effectuated in a manner consistent with other ethical rules. See, MEAC 2004-006.

(B) In response to your second question, the parties' signatures on the stipulation form are insufficient, without more, to authorize you to disclose otherwise confidential information. This proposed method neither qualifies as a "signed written agreement" under section 44.405(4)(a) nor as an express (specifically stated) waiver of confidentiality under section 44.405(4)(a)1. Thus, the proposed disclosure of confidential mediation communications on either a stipulation form or a mediator's report, even if signed by the parties, would violate rule 10.360.

Date

Fran Tetunic, Committee Chair