

April 9, 2007

The Question:

I would appreciate guidance from the MEAC on the following scenario that I observed during a small claims mediation.

In XXX county, small claims mediation is conducted in the courthouse at the time of the pre-trial conference.

Parties A & B were referred by the judge to mediation. When the mediator and the parties reached the doorway of the mediation room, the mediator inquired of the 4 people following him, who they were. The parties each identified themselves and introduced the non-party family member they brought with them to the mediation. Upon this introduction, the mediator replied "I only mediate with the named parties so the non-parties [he referred to them by name] will need to wait outside". Both parties objected to their non-parties being "left outside" the mediation room and neither party offered an objection as to the other parties' non-party coming into the mediation room. The mediator replied to their objections by stating that "mediation is confidential so they [non parties] are not allowed in the mediation room, however, if at any time you need to come outside and talk with them, you can do so". To this reply, the parties appeared somewhat more at ease and entered the mediation room.

My questions are:

- A. Is it permissible for a mediator to dictate, over the parties objections, who attends mediation?
- B. Is it appropriate for the mediator to instruct nonparties they can not participate in mediation because the mediation is confidential?
- C. Is it a violation of confidentiality for a mediator to direct a party or parties that s/he can discuss mediation communications with someone who does not attend the mediation without consent of all parties?

Submitted by a Certified County Mediator
Northern Division

Authority Referenced

Rules 10.230, 10.310(a), 10.360(a), and 10.520, Florida Rules for Certified and Court-Appointed Mediators
Sections 44.403(1) and (2), 44.405(1) and 44.405(4)(a), Florida Statutes

Summary

A. No, while a mediator may facilitate discussion on the subject between the parties, the mediator may not “dictate” to the parties who attends their mediation.

B. No, the appropriate procedure would be for the nonparty participants to be told that they are also bound by the confidentiality requirements in statute and rule.

C. Although a mediator would not commit a direct violation of confidentiality by suggesting that a party, without the consent of all parties, discuss mediation communications with someone who does not attend the mediation, it is nonetheless unethical to do so because it could lead to a breach of confidentiality by another.

Opinion

A. It is not permissible for a mediator to dictate, over the parties’ objections, who attends mediation. While a mediator may facilitate discussion on the subject between the parties, the mediator may not “dictate” to the parties who attends their mediation. “Decisions made during a mediation are to be made by the parties.” Rule 10.310(a). In the scenario you describe, if the parties seem to be agreeing on having non-parties participate in their mediation, the mediator must confirm that the parties agree as to each nonparty participant. This is consistent with the fundamental concepts of mediation listed in rule 10.230, which include an emphasis on “the needs and interest of the parties” and “procedural flexibility.”

B. Since the attendance of a “nonparty” does not impact the confidentiality or privileged nature of mediation communications pursuant to section 44.405, Florida Statutes, the mediator’s giving that statute as the reason for excluding the nonparties would be improper. The appropriate procedure would be for the nonparty participants to be told that they are also bound by the confidentiality requirements in statute and rule.

C. Although a mediator would not commit a direct violation of confidentiality by suggesting that a party, without the consent of all parties,

discuss mediation communications with someone who does not attend the mediation, it is nonetheless unethical to do so because it could lead to a breach of confidentiality. Rule 10.520 and section 44.405(1), Florida Statutes. A mediator is required by rule 10.360(a) to “maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties.” The word “maintain” is defined by Merriam-Webster Online as “sustain against opposition or danger; uphold and defend.” The Committee would interpret the meaning of “maintain” within the context of the rule as requiring the mediator to refrain from taking any affirmative action to undermine the confidentiality of mediation, such as suggesting that a party violate the statutory confidentiality requirements. The Committee notes that this, however, does not place the mediator in the position of having to ensure others’ compliance with the law.

In the question you pose, the mediator would be “directing” a mediation participant¹ to disclose a mediation communication² to a person other than another mediation participant or participant's counsel. A party who followed the mediator's direction would violate mediation confidentiality, and thus the mediator would be in violation of the requirement in rule 10.360(a) that the mediator maintain confidentiality, unless one of the exceptions listed in section 44.405(4)(a) applies.

Date

Fran Tetunic, Committee Chair

¹ A mediation participant is defined in section 44.403(2) as a party or “a person who attends a mediation in person or by telephone, video conference, or other electronic means.”

² A mediation communication is defined in section 44.403(1) as “an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant during the course of a mediation, or prior to mediation if made in furtherance of a mediation...”