

September 15, 2008

The Question

I am a certified family law mediator and have the following questions:

[A] May a mediator allow a third party, unrelated to the litigation (such as a friend or other family member), sit in during “caucus” if the other side objects?

[B] Does this violate the confidentiality provisions?

Submitted by
Certified Family Mediator
Southern Division

Authorities Referenced

Rules 10.310(a) and 10.420, Florida Rules for Certified and Court-Appointed Mediators
Sections 44.403(2) and 44.405(1), Florida Statutes
MEAC Opinion 2006-007

Summary

A. It is not permissible for a mediator to dictate, over the parties’ objections, who participates in a mediation caucus.

B. If someone participates in a mediation, either a full session or just a caucus, that person is a mediation participant subject to the confidentiality requirements under Florida’s Mediation Confidentiality and Privilege Act. Under the statute, there is no violation of confidentiality associated with disclosing mediation communications to another mediation participant.

Opinion

A. As stated in a previous MEAC opinion, it is not permissible for a mediator to dictate, over the parties’ objections, who attends mediation. MEAC 2006-007. This prohibition extends to all portions of a mediation, including the caucus. The Committee understands that there are times when it may be appropriate to have a non-party participate in a caucus and the other party’s objection may appear to be ill-advised.

Thus, a mediator may engage in a discussion with the parties about the advisability of non-party participation and help them to understand each other's perspectives so they may decide whether they want to include a non-party in their mediation. The guiding principle remains: "Decisions made during a mediation are to be made by the parties." Rule 10.310(a). Therefore, if the parties are not in agreement regarding a non-party's participation, the mediator may not allow that person to participate. Note that this does not mean that the party wishing the participation of another is forced to continue mediation without the assistance of the non-party. If a party decides not to participate in a mediation without the involvement of a non-party or a mediator believes that the party will be unable to participate meaningfully in the process, the mediation must be adjourned or terminated. Rule 10.420. When faced with these options, oftentimes, the parties will reach an agreement acceptable to both regarding non-party participation. While this may take more time, it is consistent with the requirements of the ethical standards.

B. A "mediation participant" is defined in the confidentiality statute as "a mediation party or a person who attends a mediation in person or by telephone, video conference, or other electronic means." § 44.403(2), Fla. Stat. (2007). Thus, by definition, if someone participates in a mediation, either a full session or just a caucus, that person is a mediation participant and subject to the confidentiality requirement under section 44.405(1), Florida Statutes, which states, "A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or participant's counsel." The plain language of the statute suggests that there is no violation of confidentiality associated with disclosing mediation communications to another mediation participant.

Date

Fran Tetunic, Committee Chair