

October 13, 2010

The Question

The actual **two** questions are related to mediated agreements relating to the specificity of parenting plans, and the requirement of notarized signatures for mediated agreements containing parenting plans. A number of us here in (*name omitted*) County have discussed this, and decided to ask for an opinion.

In one county, but not throughout the circuit, some mediated parenting agreements have been returned to mediation by the assigned judge because the parenting plan did not, for example, specifically identify which parent's address was to be used for purposes of school enrollment (even when the parents have agreed, for example, to maintain the status quo regarding where a child goes to school).

1 (a) When the parties do not raise such an issue, must the mediator do so?

1 (b) What shall the mediator do if the case is sent back to mediation?

1 (c) Should the Judge specifically identify issues to be mediated?

There seems to be a push/pull between the parties' right to self-determination and the very specific provisions of the shared parenting statute.

Second, some mediated agreements with parenting plans have been returned because the mediated agreement is not notarized. There is a requirement from one or more members of the bench that a mediated settlement agreement, if it contains a parenting plan, must be notarized.

2 (a) Would such a notary improperly make the mediator a witness, if the mediator were to notarize the agreement?

2 (b) Would a third party notary's participation at the conclusion of a mediation be proper and/or necessary for the agreement to be enforceable?

There seems to be a push/pull between a particular court's requirements and the parties' rights to confidentiality, as well as the enforceability of a non-notarized but otherwise complete (or even partial) mediated settlement agreement.

What might the Committee's opinion be regarding these two questions?

Certified Family Mediator
Central Division

Authorities Referenced

Rules 10.310, 10.320, 10.340(d), 10.500, 10.520 and 10.900, Florida Rules for Certified and Court-Appointed Mediators

Committee Notes to Rules 10.320, 10.340 and 10.370, Florida Rules for Certified and Court-Appointed Mediators

Rule 12.740(f)(2), Florida Family Law Rules of Procedure

MEAC Opinions 2004-004, 2004-006, 2006-002, 2007-005

Summary

Answer to Question 1A: Even if the parties do not raise the issue, a mediator may raise the issue of the parental address that will be included in the parenting plan for school enrollment.

Answer to Question 1B: A mediator is accountable to the referring court with ultimate authority over the case. Any interaction discharging this responsibility, however, shall be conducted in a manner consistent with these ethical rules.

Answer to Question 1C: The actions of a judicial officer are governed by the Rules of Judicial Administration and therefore outside of the jurisdiction of the MEAC.

Answer to Question 2A: A mediator is prohibited from taking on the dual role of mediator and notary.

Answer to Question 2B: Questions regarding the enforceability of mediated settlement agreements are legal questions and hence outside of the jurisdiction of the MEAC.

Opinion

Answer to Question 1A: Even if the parties do not raise the issue, a mediator may raise the issue of the parental address that will be included in the parenting plan for school enrollment. In this example, the parties were sent back to mediation by the assigned judge for discussion and consideration of the issue of the inclusion of the parental address for school enrollment. The mediator should inform the parties of the judge's request/instruction and allow them to make their own decision regarding the issue. If the parties still choose not to list a specific address, they should not be required to do so *by the mediator*. (Rules 10.310(a) and 10.370 with Committee Note).

In addition to honoring the parties' right to make their own decisions (Rule 10.310), a mediator has an obligation to "promote awareness by the parties of the interests of persons affected by actual or potential agreements who are not represented at mediation." (Rule 10.320). Further, the Committee Note to rule 10.320 includes, "*In family mediations, for example, a mediator should make the parents aware of the children's interest without interfering with self-determination or advocating a particular position.*" The parties' discussion of the parental

address for school enrollment may be prudent given the mediator's responsibility to adhere to rule 10.320, Florida Rules for Certified and Court-Appointed Mediators.

Answer to Question 1B: This question highlights the ethical obligations the mediator must balance in order to honor both the parties' right to self-determination and the mediator's responsibilities to the courts. (Rules 10.310, 10.500, and 10.520).

A mediator is accountable to the referring court with ultimate authority over the case. Any interaction discharging this responsibility, however, shall be conducted in a manner consistent with these ethical rules. (Rule 10.500). The procedures by which mediated agreements are ratified in family mediation contemplate the possibility of judicial involvement in approving agreements. (Rule 12.740(f)(2), Florida Family Law Rules of Procedure).

In MEAC opinion 2006-002, the Committee opined, *"Given the judge's intervention, the mediator must carefully monitor the parties' participation in the mediation to ascertain the parties' ability to exercise self-determination and must be prepared to terminate the mediation if any party is unable or unwilling to participate meaningfully in the process.....The Committee recognizes that the circumstance described may not compromise the parties' self-determination. Indeed, some parties may find that the additional information from the judge assists them in understanding their legal options and making their own decisions."* In the case currently before the Committee, the mediator could assist the parties in outlining the process in any agreement which is memorialized.

Answer to Question 1C: The actions of a judicial officer are governed by the Rules of Judicial Administration and therefore outside of the jurisdiction of the MEAC. (Rule 10.900). However, as a reminder, in MEAC Opinion 2004-006, the MEAC opined, *"If a mediator receives a court order in advance of a mediation, which contains provisions which are contrary to the mediator's role and requires the mediator to act in a manner that is inconsistent with the mediator's ethical rules, the mediator should decline participation in the mediation."*

Answer to Question 2A: Rule 10.340(d), Conflict during Mediation, the Rules for Certified and Court-Appointed Mediator states in part that *"During a mediation, a mediator shall not provide any services that are not directly related to the mediation process."* The Committee Note to Rule 10.340 continues in part, *"To maintain an appropriate level of impartiality and to avoid creating conflicts of interest, a mediator's professional input to a mediation proceeding must be confined to the services necessary to provide the parties a process to reach a self-determined agreement. Under subdivision (d), a mediator is accordingly prohibited from utilizing a mediation to supply any other services which do not directly relate to the conduct of the mediation itself. By way of example, a mediator would therefore be prohibited from providing accounting, psychiatric or legal services, psychological or social counseling, therapy, or business consultations of any sort during the mediation process."*

Given these rule requirements, a mediator is prohibited from taking on the dual role of mediator and notary. (See also MEAC Opinions 2004-004 and 2007-005).

Answer to Question 2B: The question regarding enforceability is beyond the jurisdiction of the MEAC which offers ethical guidance on the actions of mediators subject to the Rules for Certified and Court-Appointed Mediators. (See Rule 10.900); enforceability is a legal question.

With regard to whether it is “proper”, the court would be the appropriate body to determine appropriateness.

Date

Beth Greenfield-Mandler, Committee Chair