

September 21, 2006

**The Question**

I have been recently involved in a mediation and during the mediation it was learned that there was an expenditure from funds held in escrow by one of the attorneys representing a party to the litigation.

The information about the expenditure from the escrow was made by the attorney responsible for preserving the escrowed funds while in private session with the mediator.

The mediator, in private session with the other party explained that certain monies were paid from the escrowed funds. It is not anticipated that either party will complain about the mediator.

The question is whether the confidentiality required during mediation prohibits a grievance being filed with the Bar relating to the attorney who released the funds from escrow. An additional question is because the party to the litigation is a lawyer who may have authorized the release of the funds from escrow, does confidentiality preclude a statement to the Florida Bar about the attorney litigant.

Submitted by a Certified Family Mediator  
Central Division

**Authority Referenced**

Rules 10.330, 10.360, 10.400, 10.600, Florida Rules for Certified and Court-Appointed Mediators:

Sections 44.403(1) and 44.405(4)(a) Mediation and Confidentiality and Privilege Act, Chapter 44, Florida Statutes

Rules Regulating The Florida Bar 4-8.3 and Comments to 4-1.12

## Summary

Based on the facts of the question, the filing of a grievance with The Florida Bar does not appear to be prohibited by the statutory and rule confidentiality requirements. Whether the reporting of the attorney litigant's action is prohibited is beyond the scope of the Committee's function since it would involve an interpretation of the attorney ethics code.

## Opinion

To answer your question, one must first determine whether the communication in question is a "mediation communication" pursuant to Florida Statutes. A mediation communication means "an oral or written statement ... by or to a mediation participant made during the course of a mediation..." Section 44.403(1), Florida Statutes. The communication you describe clearly fits this definition. Having determined that the statement was a mediation communication, one must next determine whether it fits within any of the listed statutory exceptions to confidentiality. One of the listed statutory exceptions to the confidentiality of mediation communications is a communication "offered to report, prove or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct." Section 44.405(4)(a) 6. *If* the communication to which you refer is offered in this manner and for this limited purpose, it would appear to qualify as an exception, and thus, *may* be reported.

The Committee notes that while the statutory exceptions to confidentiality apply to all mediation participants, mediators are additionally governed by the Florida Rules for Certified and Court-Appointed Mediators. Accordingly, mediators have the obligation to maintain confidentiality (rule 10.360) and impartiality (rule 10.330), along with their more general obligations to the process (rule 10.400) and profession (rule 10.600). The Committee emphasizes that mediators are not *obligated* to report statutory exceptions by virtue of either the Mediation Confidentiality and Privilege Act, section 44.405(4)(a), Florida Statutes, or the Florida Rules for Certified and Court-Appointed Mediators. The only statutory exception requiring reporting is abuse and neglect of children and vulnerable adults, which exists by virtue of separate mandatory reporting statutes. Section 44.405(4)(a)3, Florida Statutes. Mediators subject to other ethical codes, must, of course, guide themselves based on their concurrent codes of conduct.

As to the question of whether the referenced communication is *required* to be reported to The Florida Bar by an attorney mediator, the Committee must defer to The Florida Bar and the provisions of rule 4-8.3, Rules Regulating the Florida Bar, which deals with the requirement of reporting such matters. While rule 10.650 provides that in the course of providing mediation services, mediation rules control over conflicting ethical standards,<sup>1</sup> the rule also specifically states that other ethical standards to which the mediator is subject are not abrogated. Therefore, as seems to be the case in your situation, concurrent non-conflicting rules would be operative. Your second question, whether an attorney litigant's action is prohibited is beyond the scope of the Committee's function since it would involve an interpretation of the attorney ethics code. If the alleged violation is reported by the mediator, it should be accompanied by a reference to section 44.405(4)(a)6 to provide notice to the recipient of its statutory responsibility to maintain the confidentiality of the communication.

Finally, the Committee cautions that a mediator is prohibited from revealing information obtained during caucus without the consent of the disclosing party. Doing so would violate rule 10.360(b) on confidentiality and may also be an impartiality violation under rule 10.330(a).

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Date

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Fran Tetunic, Committee Chair

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<sup>1</sup> See also 4-1.12 Comments, Rules Regulating The Florida Bar, "A Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators."