

THE QUESTION

I am a Certified Family Law Mediator. At the conclusion of a recent mediation, the parties requested that I suspend the mediation to allow them time to confer with their clients regarding a rescheduling of the mediation or declaring an impasse. The mediation was tentatively rescheduled until such time as one of the parties notified this Mediator that their client did not wish to continue the mediation, at which time, this Mediator declared an impasse.

At the conclusion of the mediation, one of the parties' attorney requested that I supply her with a copy of all of my notes generated during the mediation. I informed that attorney that I would have to review my notes to determine if there was any confidential information which would have to be removed from the notes. I further advised the attorney that the attorney would not understand my notes as they were in my own "scribble or code".

After considering the attorney's request, I did not feel comfortable with providing the attorney with the requested notes. I contacted the Dispute Resolution Center and was asked to submit this question.

The question is, can a Mediator provide copies of the Mediator's notes generated during the mediation to one or both of the attorneys? If one attorney requests a copy of the notes, can the other attorney object to the production of the notes, thereby preventing the distribution of the notes?

I thank you for your attention to this matter and look forward to your response.

Very truly yours,

Certified Family Mediator
Northern Division

AUTHORITY REFERENCES:

Florida Rules for Certified and Court-Appointed Mediators: 10.070(a)

SUMMARY OF THE OPINION:

The panel believes that in the absence of any rule specifically dealing with the subject, you have the discretion as to whether you make your notes available to the parties. However, a mediator should carefully weigh the benefits and perils of sharing this information, and should proceed with the utmost caution before agreeing to do so.

OPINION:

The panel believes that in the absence of any rule specifically dealing with the subject, you have the discretion as to whether you make your notes available to one or more parties. Specifically, you may categorically refuse to do so either as a matter of policy or in any particular case, or you may provide your notes to the parties. However, the panel would point out that if you choose to make your notes available, such action should be taken in such a manner as to not violate any ethical rules, most notably rules dealing with confidentiality and impartiality.

In making the determination as to whether to release your notes, the panel believes you should also consider that your main purpose as a mediator is to aid the parties. Thus, although your function as a mediator may have terminated, you may wish to consider whether the providing of notes will assist in resolving the matter, even though an impasse has been declared. For example, if you have in your notes the only copy of a partial agreement upon which the parties may wish to build after termination of the mediation process, you may decide to release your notes. If the mediator were to provide notes, the mediator must do so in an impartial manner, that is, by acting in such a way as to demonstrate a "commitment to aid all parties, as opposed to an individual party, in moving toward an agreement." Rule 10.070(a).

The panel emphasizes that the mediator's notes belong to the mediator. The panel believes that such notes are comparable to an attorney's work product and thus are not subject to mandatory disclosure at the request of the parties.

In conclusion, the panel believes that the voluntary disclosure of a mediator's notes by the mediator is fraught with potential risks and hazards. A mediator should carefully weigh the benefits and perils of sharing this information, and should proceed with the utmost caution before agreeing to do so. If a mediator does disclose his/her notes, the mediator should be mindful of the potential adverse consequences of such a disclosure.

Date

Charles Rieders, Panel Chair

