

10 December 1999

THE QUESTION

To Whom it May Concern:

Is there a requirement that a family mediator's personal notes taken during family mediation be included in the family mediation file kept at the courthouse or in the family mediation file kept by the family mediation program director?

This has become a serious dispute in (Central Division) County.

My training stressed that the mediator's notes were to be destroyed or kept confidential by the mediator and that the mediator has the duty to ensure the confidentiality of the mediator's notes. I have typically destroyed any notes that I make.

I spoke with Sharon Press and she stated that she is not aware of a requirement that the mediator's notes be a part of the file. The program director insists he has an opinion or some legal authority that requires the mediator's notes to be put in the file. The program director told me, upon my refusal to surrender my personal notes, that I was violating this 'requirement' and that he would file a complaint or grievance against me and that I could no longer participate as a volunteer in the family mediation program so long as he remains the director.

I have an extremely high regard for the law and for ethics and I do not want to violate any rules or legal authority but all that I have read and all that I have learned during my training is to the contrary of the program director's statements to me. On the suggestion of Sharon Press, I have retained my notes pending determination of this issue by the Mediators' Panel and I shall follow the Panel's dictate. Thank you for your attention in this matter.

Sincerely,

Certified County, Family, Circuit & Dependency Mediator
Central Division

AUTHORITY REFERENCED

Florida Rules for Certified and Court-Appointed Mediators: 10.080

MQAP Opinion: 99-003

Florida Statutes: section 44.201(3); Chapter 119

Florida Family Law Rules of Procedure: 12.740(f)(3)
Florida Rules of Judicial Administration: 2.051(c)(7)

SUMMARY OF THE OPINION

There is no statutory or rule requirement that a mediator's notes taken during a family mediation be kept in the mediation file. Further, any mediator notes which relate to confidential information cannot be part of a file which is open to the public. Finally, mediator notes are not subject to disclosure under chapter 119, Florida Statutes, since they are judicial records pursuant to rule 2.051, Florida Rules of Judicial Administration.

OPINION

There is no statutory or rule requirement that a mediator's notes taken during a family mediation be kept in the mediation file. The panel initially refers you to its recent opinion in MQAP 99-003, wherein the panel concluded that the mediator's notes belong to that mediator and need not be provided to the parties. However, that opinion does not necessarily dispose of your question, since the issue you present is whether notes should be preserved as part of the record of the proceedings.

Your question involves interpretations of statutes and rules regarding confidentiality. Specifically, rule 10.080 requires a mediator to "preserve and maintain the confidentiality of all mediation proceedings except where required by law" and to "maintain confidentiality in the storage and disposal of records." The statutory requirement of confidentiality is found in section 44.102(3), Florida Statutes, which provides, in relevant part, that "[All] oral or written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119 and shall be confidential. . . ."

The panel opines that any mediator notes which relate to confidential information cannot be part of a file which is open to the public. However, written references to administrative or other non-confidential matters contained in mediator notes can be part of the file if their contents do not violate other rules, such as the prohibition against reporting more than the fact of an impasse to a judge. See rule 12.740(f)(3), Florida Family Law Rules of Procedure. For example, a mediator's reference to a party's failure to appear could be included in a public file, while a mediator's statement as to a party's lack of cooperation should not be included in the court file.

Finally, the panel points out that mediator notes are not subject to disclosure under chapter 119, Florida Statutes, since they are judicial records pursuant to rule 2.051, Florida Rules of Judicial Administration, which defines that term as follows:

... documents, exhibits in the custody of the clerk, papers, letters, maps, books, tapes, photographs, films, recordings, data processing software or other material created by any entity within the judicial branch, regardless of physical form, characteristics, or means of transmission, that are made or received pursuant to court rule, law or ordinance, or in connection with the transaction of official business by any court or court agency. (emphasis added)

Rule 2.051 also lists a number of exemptions from the rule. Of particular relevance are rule 2.051(c)(7), which refers to records made confidential under state law, and rule 2.051(c)(8), which deals with records made confidential by court rule. In light of the foregoing exemptions, the panel finds it unnecessary to decide which records retention schedule applies to mediation files, since in any case confidential material would be excluded from the file.

Date

Charles M. Rieders, Panel Chair