

11 May 2000

## THE QUESTION

As a certified family law mediator, I acted as a mediator for a married couple who were contemplating divorce. During the course of negotiations, the parties verbally agreed that they would file a petition in October of 1998, and for tax purposes only, the final judgment would be postponed until after January 1, 1999, but filed immediately thereafter. The Marital Settlement Agreement was completed and executed, and neither party exercised the right to cancel.

Within a couple of months, the parties reconciled, and neither party performed under the Agreement. More than a year later, one of the parties has now filed for divorce and is claiming that the original Marital Settlement Agreement and the property division contained therein are still in effect.

Having conducted the negotiations as the mediator, I have no doubt that the original Marital Settlement Agreement was only completed by both parties in contemplation of the divorce occurring in the fall of 1998, and was not in any way intended to be an ongoing agreement, to govern their affairs a year into the future. In other words, their divorce during the fall of 1998 was an underlying condition to the existence of the contract.

There are three questions that I would like to have answered:

- A. Am I permitted to disclose to the attorney of either party the information and opinion stated above?
- B. Am I permitted to testify in court regarding the information and opinion stated above?
- C. If the answer to question 2 is no, and I stated that to the Judge but he orders me to testify anyway, am I obliged to my mediator's responsibilities to refuse to testify?

Thank you for your attention to this matter.

Sincerely,

Certified County, Family & Circuit Mediator  
Southern Division

## AUTHORITY REFERENCED

Florida Rules for Certified and Court-Appointed Mediators: 10.330 [formerly 10.070(a)]; 10.520 [formerly 10.030(a)(2)(A)]; 10.360(a) [formerly 10.080(a)]; 10.360(b) [formerly 10.080(b)]\*

Florida Statutes: 44.102(3)

MQAP Opinion 96-005

*\*Since this question was submitted prior to April 1, 2000, the effective date of the latest revisions to the Florida Rules for Certified and Court Appointed Mediators, references to the former and current rules are provided.*

#### SUMMARY OF THE OPINION

A. Upon request from an attorney, a mediator may, under certain conditions, disclose to the party's attorney(s) the factual circumstances surrounding the mediation agreement. However, under no circumstances would it be appropriate for a mediator to offer his or her personal opinion about the case.

B. A mediator should not voluntarily testify in court regarding information learned in a mediation. However, if all parties waive their confidentiality privilege, a mediator may testify.

C. If the court issues an order for the mediator to testify, the mediator should follow the court order. In Florida, the parties have the privilege of confidentiality, not the mediator.

#### OPINION 99-012A

While the committee opines that upon request from an attorney you may disclose to the party's attorney(s) the factual circumstances surrounding the mediation agreement, under no circumstances would it be appropriate for a mediator to offer his or her personal opinion about the case. However, prior to disclosure, the mediator must assess whether the requested information was disclosed in joint session (therefore able to be shared with either or both parties or their attorneys) or obtained as a result of individual caucuses (and therefore confidential unless waived by the party and his/her attorney). See rules 10.360(a) and (b). Special care should be taken to protect any communication received in confidential caucus settings from disclosure to the opposing side.

## OPINION 99-012B

Absent an agreement by all parties to mediation, a mediator should not voluntarily testify in court regarding information learned in a mediation. See rules 10.330(a) and 10.360(a). Upon request of a party to testify, a mediator should only testify upon waiver of confidentiality by all parties. See section 44.102(3), Florida Statutes, and rules 10.520 and 10.360(a). If no such waiver is obtained, the committee directs your attention to MQAP 96-005, which states in pertinent part as follows:

if subpoenaed, [the mediator] should either file a motion for protective order, or notify the judge in accordance with local procedures, that the mediator is statutorily required to maintain the confidentiality of mediation proceedings.

## OPINION 99-012C

As also stated in MQAP 96-005, “if the [Judge], notwithstanding the statutory provision, issues an order for the mediator to testify, the committee believes that the better approach would be to follow the court order.”

The panel adds that in the event that the court, in the opinion of a party, has inappropriately obtained testimony from the mediator, the party may wish to obtain a review through the appellate courts which could strike such testimony from the record if it were later deemed confidential. In Florida, the parties, not the mediator, have the privilege of confidentiality. See section 44.102(3), Florida Statutes, and rule 10.360(a).

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Date

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Charles M. Rieders, Panel Chair