

May 2, 2001

THE QUESTION

Dear Committee Members:

Re: Ethic Question

Recently I was contacted by an attorney who was grieved to the Florida Bar by a client relative to a case in which I had served as a mediator. The client in her complaint alleged that the attorney failed to advise her of her rights relative to the negotiated settlement of the case. The client in her complaint alleged that the attorney, instead of advising her, spent too much time speaking with me, the mediator, about "old times." Having been a witness to the attorney's interaction with the client during several caucuses held in the mediation process, I have personal knowledge which would tend to vindicate the attorney.

Does the filing of the complaint with the Florida Bar against her own attorney, specifically alleging incompetence during the mediation process, with citation to specific occurrences during the mediation, vitiate the mediator's obligation to keep confidential any personal knowledge, which if shared with the Florida Bar would tend to vindicate the attorney.

Thank you for your consideration of this question.

Very truly yours,

Certified County and Family Mediator
Northern Division

AUTHORITY REFERENCED

Section 44.102(3) and (4), Florida Statutes
Rule 10.360(a), Florida Rules for Certified and Court-Appointed Mediators
MQAP Opinions 96-005 and 99-012

SUMMARY

A mediator should not voluntarily agree to testify in a bar grievance proceeding in order to preserve the statutory and court rule confidentiality provisions, unless ordered by a court to do so.

OPINION

The Committee opines that you should not voluntarily agree to testify in this grievance proceeding in light of rule 10.360(a), Florida Rules for Certified and Court-Appointed Mediators, and section 44.102(3), Florida Statutes. The rule requires mediators to maintain the “confidentiality of all information revealed during mediation except where disclosure is required by law.” The statute gives each party involved in a court-ordered mediation the privilege to refuse to disclose and prevent any person present from disclosing “communications made during such proceeding.” Subsection (3) exempts all “oral and written communications in a mediation proceeding” from public disclosure and declares them confidential and inadmissible as evidence unless all parties agree otherwise. Subsection (4) excepts such confidentiality, but only with respect to *mediator* disciplinary proceedings.

Thus, the Committee opines that your voluntary testimony in a Bar grievance proceeding violates both a court rule and statutes. However, if you are ordered to testify, you should only testify after a motion for a protective order has been filed (or other appropriate action taken) and denied. See MQAP Opinions 96-005 and 99-012.

Date

Charles M. Rieders, Panel Chair