

March 22, 2002

THE QUESTION

Re: Advisory Opinion Question 2001-005
Published in Volume 16, Number 3 of *The Resolution Report*

I read with interest your Committee's opinion as referenced above. The opinion concerned whether a certified mediator is required to disclose to The Florida Bar the unethical conduct of a lawyer committed during the course of a mediation or whether the mediator is required to maintain the confidentiality of the mediation process. Although I agree with the Committee's opinion that the mediator may not report the unethical conduct to The Florida Bar, I believe the Committee should consider whether the mediator is bound to complete confidentiality on this issue given the facts upon which the opinion was based.

I call the Committee's attention to Florida Statute § 44.102(3). An exception to confidentiality is information regarding the commission of an act in furtherance of a crime or fraud or a plan to commit a crime or fraud, all of which must be reported to the appropriate criminal authorities by the mediator, particularly if the mediator is a Florida licensed attorney. Based upon the facts presented in the subject question, the lawyer's conduct may have arisen to a commission of a felony or the plan to commit a felony in violation of Florida's extortion statute, which states:

Whoever, either verbally or by a written or printed communication, maliciously *threatens to accuse another of any crime* or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, *with intent thereby to extort money or any pecuniary advantage whatsoever*, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his or her will, shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. § 836.05 (emphasis added).

Florida's extortion statute means that the threat of criminal prosecution to compel the payment a civil claim constitutes a second degree felony. I believe the Committee should revisit whether the mediator would have an obligation to report the attorney's conduct to the appropriate criminal authorities, provided it was clear that the attorney's intent fell within the above-statute.

In light of the foregoing, I suggest that the Committee carefully review its current opinion and determine whether an amended opinion should be issued.

Sincerely yours,
Certified Circuit Mediator, Central Division

AUTHORITY REFERENCED

Rules 10.360(a), Florida Rules for Certified and Court-Appointed Mediators
Section 44.102(3), Florida Statutes
Chapter 90-188, Laws of Florida
MEAC Opinion 2001-005

SUMMARY

The Committee retains confidence in the continuing correctness of MEAC 2001-005.

OPINION

Your question asks for the reconsideration of the Committee's Advisory Opinion in MEAC 2001-005, in which the Committee concluded that a non-attorney certified mediator may not disclose communications made during a Florida Bar Grievance Mediation even if such testimony may be relevant in a subsequent disciplinary proceeding. You base your request on the fact that the statutory confidentiality provision, section 44.102(3), Florida Statutes, contains an exception relating to information regarding the commission of an act in furtherance of a crime or fraud or plan to commit a crime or fraud.

While the Committee does not dispute that the facts in MEAC 2001-005 may be sufficient to allege the possibility of fraud, it must decline to reconsider its previous Opinion since the statutory language to which reference is made no longer exists. Specifically, chapter 90-188, Laws of Florida, deleted the statutory reference to "communications made in furtherance of the commission of a crime or fraud." The interpretation of statutes is generally not within the Committee's function. However, given that rule 10.360(a) requires a mediator to "maintain confidentiality of all information revealed during mediation except where disclosure is required by law," the Committee believes it is appropriate to ascertain the scope of such confidentiality. The present confidentiality provision states that "all oral or written communications in a mediation proceeding, other than an executed settlement agreement, shall be . . . confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise." This would include the communications made in relation to MEAC 2001-005. Thus, in light of the absence of any exception to the statutory confidentiality, the Committee retains confidence in the correctness of MEAC 2001-005.

Date

Charles M. Rieders, Committee Chair