

October 22, 2003

THE QUESTION

Subject: Statistical Form for Small Claims Volunteer Mediators as Violation of Florida Rules for Certified and Court-Appointed Mediators (“Rules”)

The undersigned are volunteer Small Claims Mediators in a [Southern Division] Circuit and are duly certified as County Civil Mediators.

We request an advisory opinion: Does the statistical sheet which all volunteer Small Claims Mediators in this circuit are required to complete for each case violate the confidentiality requirement of Rule 10.360(c)?

Rule 10.360(c) provides: “Record Keeping. A mediator shall maintain confidentiality in storage and disposal of records and shall not disclose any identifying information when materials are used for research, training, or statistical compilations.”

The stat form (Ex. A) requires disclosure of all information necessary to identify the parties by name, file number and division (part of the file number), and judge’s name “...for statistical purposes only.” Although this phrase has been removed from what is apparently the most recent revision, the use appears to be irrelevant. Indeed, this revision (Ex. B) has been circulated only within the last two weeks. Prior to 2000, the statistical form required only the total number of cases mediated, and the number settled.

We are not aware of any exceptions to Rule 10.360(c), statutory or regulatory, explicit or by implication, which authorize the routine collection of such information, and its use, for any purpose.

There are two questions:

1. Does the state form violate Rule 10.360(c)?
2. If yes, does a mediator who has knowledge of this dispute violate the Rule by signing or otherwise identifying him (her)self on the stat form?

An Advisory Opinion is respectfully requested.

Two Certified County Mediators
Southern Division

AUTHORITY REFERENCED

Rules 10.360(a) & (c), 10.510 and 10.520, Florida Rules for Certified and Court-Appointed Mediators
Rule 1.730(a) and (b), Florida Rules of Civil Procedure
Section 44.102(3), Florida Statutes

SUMMARY

There is no ethical violation for a mediator to complete either of the attached statistical forms so long as the mediator does not reveal any confidential communications from the mediation. It is not only permissible for a mediator to provide information relating to outcome, it is mandatory that the mediator do so. A mediator would not commit any ethical violation by signing or otherwise providing identifying information on a statistical form since a mediator has an ethical duty to assist the court in maintaining these types of records.

OPINION

The Committee opines that there is no ethical violation for a mediator to complete either of the attached statistical sheets. Specifically, the Committee believes that rule 10.360(c), Florida Rules for Certified and Court-Appointed Mediators, entitled "Record Keeping," refers to the external use of mediation information for research, training, or statistical compilations. In this case, the information is collected for the internal use of the court. The Committee notes that all of the "identifying" information sought on "Exhibit A," that is, the case numbers, the judge, and the style of the case, are public record portions of the court file. By definition, therefore, such data are not confidential communications made during a mediation proceeding, as contemplated by section 44.102(3), Florida Statutes.

While it is unclear to the Committee what the mediator is expected to include on the lines following "Plaintiff" and "Defendant" in "Exhibit B," the Committee believes that a mediator could complete such a form, so long as the mediator does not reveal any confidential communications. See Rule 10.360(a).

With regards to the "outcome" portions of both forms, the Committee notes that a mediator is obligated to file a report with the court identifying the outcome of the mediation "without comment or recommendation" if no agreement has been reached. See Rule 1.730(a), Florida Rules of Civil Procedure. If an agreement has been reached, it shall be reduced to writing and signed by the parties and their counsel, if any; and, the existence of the agreement must be reported by the mediator to the court. See Rule 1.730(b), Florida Rules of Civil Procedure. Thus, rule 10.520, which creates an ethical obligation for a mediator to "comply with all . . . court rules," would suggest that it is not only permissible for a mediator to provide information relating to outcome, but also mandatory that the mediator do so.

Finally, rule 10.510 requires a mediator to be “candid, accurate, and fully responsive to the court concerning . . . administrative matters.” Thus, the Committee believes that a mediator would not commit any ethical violation by signing the form and, in fact, has the ethical duty to assist the court in maintaining these types of records.

Date

Fran Tetunic, Committee Chair