

March 10, 2008

The Question

I have been recently involved in a mediation and during the mediation it was learned that there was an expenditure from funds held in escrow by one of the attorneys representing a party to the litigation.

The information about the expenditure from the escrow was made by the attorney responsible for preserving the escrowed funds while in private session with the mediator.

The mediator, in private session with the other party explained that certain monies were paid from the escrowed funds. It is not anticipated that either party will complain about the mediator.

The question is whether the confidentiality required during mediation prohibits a grievance being filed with the Bar relating to the attorney who released the funds from escrow. An additional question is because the party to the litigation is a lawyer who may have authorized the release of the funds from escrow, does confidentiality preclude a statement to the Florida Bar about the attorney litigant.

Submitted by a Certified Family Mediator
Central Division

Authority Referenced

Rules 10.330, 10.360, 10.400, 10.600, Florida Rules for Certified and Court-Appointed Mediators

Sections 44.403(1) and 44.405(4)(a) Mediation Confidentiality and Privilege Act, Chapter 44, Florida Statutes

Rules Regulating The Florida Bar 4-8.3 and Comments to 4-1.12

Summary

The filing of a grievance with The Florida Bar is not necessarily precluded by statutory and rule confidentiality requirements. However, based on the facts of this question, the filing of a grievance with The Florida Bar is prohibited. Whether any other persons may report the attorney litigant's action to The Florida Bar is beyond the scope of the Committee's function since it would involve an interpretation of the attorney ethics code.

Opinion

To answer your question, one must first determine whether the communication regarding the escrow funds¹ is a "mediation communication" pursuant to Florida Statutes. A mediation communication means "an oral or written statement ... by or to a mediation participant made during the course of a mediation..." Section 44.403(1), Florida Statutes. The communication you describe clearly fits this definition. Having determined that the statement was a mediation communication, one must next determine whether it fits within any of the listed statutory exceptions to confidentiality. One of the listed statutory exceptions to the confidentiality of mediation communications is a communication "offered to report, prove or disprove **professional misconduct occurring during the mediation**, solely for the internal use of the body conducting the investigation of the conduct." Section 44.405(4)(a)6. Emphasis added. Since the misconduct which would be the subject of the report, the escrow violation, did not occur during the mediation, the misconduct statutory exception does not apply².

The Committee notes that while the statutory exceptions to confidentiality apply to all mediation participants, mediators are additionally governed by the Florida Rules for Certified and Court-Appointed Mediators. Accordingly, mediators have the obligation to maintain confidentiality (rule 10.360) and impartiality (rule 10.330), along with their more general obligations to the process (rule 10.400) and profession (rule 10.600). The Committee emphasizes that mediators are not *obligated* to report statutory exceptions by virtue of either the Mediation Confidentiality and Privilege Act, section 44.405(4)(a), Florida Statutes, or the Florida Rules for Certified and Court-Appointed Mediators. The only statutory exception requiring reporting is abuse and neglect of children and vulnerable adults, which exists by virtue of separate mandatory reporting statutes. Section 44.405(4)(a)3, Florida

¹ For purposes of this discussion, we assume that the expenditure from escrow funds was improper.

² If that information were to be "discovered" outside of the mediation, the fact that it was disclosed at mediation does not render it protected from discovery or admissibility. Section 44.405(5), Florida Statutes.

Statutes. Mediators subject to other ethical codes, must, of course, guide themselves based on their concurrent codes of conduct.

As to the issue of whether the referenced communication is *required* to be reported to The Florida Bar by an attorney mediator, the Committee notes that rule 10.650 provides that in the course of providing mediation services, mediation rules control over conflicting ethical standards.³ Given that the mediation communication does not appear to fit into any of the specified exceptions, the attorney mediator would be prohibited from making the disclosure to The Florida Bar. Your second question, whether an attorney litigant's action is prohibited is beyond the scope of the Committee's function since it would involve an interpretation of the attorney ethics code.

Finally, the Committee cautions that a mediator is prohibited from revealing information obtained during caucus without the consent of the disclosing party. Doing so would be an ethical violation of confidentiality under rule 10.360(b) and may also be a violation of impartiality under rule 10.330(a).

Date

Fran Tetunic, Committee Chair

³ See also 4-1.12 Comments, Rules Regulating The Florida Bar, "A Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators."