April 30, 2012

Question:

This question for MEAC concerns a Disbarred Attorney.

Mediation was scheduled regarding a foreclosure. The defendant was on time, and I, as the mediator, and the bank attorney also arrived promptly. The mediation was scheduled to start at 3 pm. The defendant indicated that she had an attorney who would be arriving shortly. In fact, the attorney called ahead of time to indicate that he would be fifteen minutes late. We waited until 3:15 pm and then asked the defendant to call the attorney to ensure that he was coming. The Attorney indicated to the defendant that he was parking and would be up shortly. In fact, twenty (20) minutes later, the attorney had still not arrived so we started without him. The Attorney arrived almost forty (40) minutes late, so we brought him up to speed and continued on. Throughout, the Attorney represented and signed that he was the Attorney of record, even signing the mandatory attendance form in the Attorney location. After the mediation ended, I saw that the Attorney knew one of the other attorneys within the office, and after everyone left, I asked the office based attorney if she knew the attorney involved in the mediation. She responded by going to the Bar website where we entered his name. It showed that he was disbarred in 2010. Therein lies my ethical/moral question.

1. Do I tell the defendant that her attorney, who really didn’t do a good job for her, was not in fact a licensed attorney?
2. Since I found this out after the mediation was over, am I still under a confidentiality requirement?
3. Further, do I have to notify anyone concerning this?
4. Since I am not an attorney, do I have any responsibilities to notify the legal caretakers of this occurrence? If this were not a mediation, I would notify the defendant that her legal representative wasn’t what she thought and that he did a poor job representing her.
5. How can we assist her or should we?

Submitted by Certified Family and Circuit Mediator
Southern Division
 Authorities Referenced
Rules 10.330 and 10.370, Florida Rules for Certified and Court-Appointed Mediators
Section 44.405(a)(2), Chapter 44, Florida Statutes

Summary

While mediation communications of a disbarred attorney representing himself as an attorney currently a member of The Florida Bar are not confidential, there is no mandatory requirement that the mediator or mediation participants report the actions of the disbarred attorney.

Opinion

The questions posed highlight the parameters of confidential mediation communications and permitted disclosures in light of issues concerning a sanctioned lawyer and the unlicensed practice of law (UPL).

The unlicensed practice of law (UPL) can occur in a variety of circumstances and within a broad spectrum of activities. In Florida, UPL is a third degree felony and is determined by The Florida Bar with assistance from its Standing Committee on Unlicensed Practice of Law. Mediation communications undertaken while committing UPL are not confidential under the Mediation Confidentiality and Privilege Act, Section 44.405(4)(a)(2), Chapter 44, which states:

“Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during mediation, unless the parties agree otherwise, or for any mediation communication:

(2) That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence; ....”

While mediation communications of a disbarred attorney representing himself as an attorney currently a member of The Florida Bar are not confidential, there is no requirement that the mediator or mediation participants report the actions of the disbarred attorney. The Mediation Confidentiality and Privilege Act allows for the permissive disclosure of these type of mediation communications but does not require a mandatory report to anyone, including law enforcement.

Answers to one through five:

One: A mediator is permitted to share the information learned regarding the attorney’s membership status but is not required to do so. The mediator should refrain from offering a personal or professional opinion on the attorney’s performance in the mediation. [See Rule 10.370 (c), Advice, Opinions or Information]
Two: The Mediation Confidentiality and Privilege Act does not extend to mediation communications which are “willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.” [See Mediation Confidentiality and Privilege Act, Section 44.405(4)(a)(2), Chapter 44] As the unlicensed practice of law is a crime, confidentiality does not attach.

Three: Under the Mediation and Confidentiality and Privilege Act, there is no mandatory reporting requirement for this activity although it is permitted as outlined above. There are only two types of mandatory reports required for certified mediators: child abuse and vulnerable adult abuse.

Four: Mediators are not required to report the actions of an individual committing UPL but, rather, have the option of doing so. [See Mediation Confidentiality and Privilege Act, Section 44.405(4)(a)(2), Chapter 44]

Five: As mediators are required to be impartial throughout the mediation process, it would be inappropriate for a mediator to attempt to assist one party. Mediator impartiality includes the “commitment to assist all parties, as opposed to any one individual.” [See Rule 10.330, Impartiality]

Date       Beth Greenfield-Mandler, Committee Chair