January 17, 2005

The Question

I am an attorney admitted to practice in the States of Florida and Illinois, though not currently employed in a legal capacity. Within the past year I was also certified as a family mediator. At the outset of my work as a mediator I want to set appropriate parameters for the services to be provided. Below are several questions for which I seek your opinion -all of which relate to the subject of "Pro Se Divorce Mediation" and a seminar that I recently attended.

Because these questions raise issues of not only the proper role of a mediator but also the possibility of practicing law (potentially without a license for those mediators who are not members of the Bar) as well as the possible need for legal malpractice insurance in addition to any mediation coverage, I am also directing these questions to the Professional Ethics Committee of the Florida Bar.

A. Within the context of an otherwise properly conducted mediation, during which the mediator advises the parties that s/he cannot render legal advice, is it permissible for a mediator (be s/he an attorney or not) to draft any agreement of the parties in the form of a marital separation agreement suitable for the parties to file with the court (as opposed to preparing a memorandum of understanding or mediation agreement which the parties must then take to legal counsel for the drafting of the proper pleadings)?

B. Is it permissible for a mediator to also draft the Petition for Dissolution and/or the Answer as well as all other documents and pleadings that might be required for final judgment, noting at the bottom of each such form or pleading that they were completed by the mediator acting solely in his or her capacity as a mediator? Does this assistance without more constitute the practice of law?

C. A retired lawyer and the principal presenter at a recent seminar regarding Pro Se Divorce Mediation described his standard practice of preparing three (3) complete packets of all pleadings for each party to the mediation with instructions that one copy be filed with the clerk of court, one presented to the judge at final hearing, and one to be retained for the party's files. These documents are prepared as part of a final mediation package and time spent in preparation is billed at the mediator's normal rate. Is this permissible for a mediator or does this conduct run afoul of Rule 10.340(d)'s prohibition against using the mediation to supply any other services which do not directly relate to the conduct of the mediation itself?

D. The second presenter at the same seminar (a lawyer on active status)

indicated that he goes a step further and actually files the pleadings in court for, I believe, an additional fee. Is this permissible conduct for a mediator or does it run afoul of Rule 10.330(c)'s prohibition of soliciting or otherwise attempting to procure future professional services during the mediation process?

E. For an additional fee the second presenter will appear at the final hearing and elicit "basic information." He indicated that judges in his local area have agreed this activity stops short of practicing law since the parties themselves could do it. Does this service stop short of practicing law and, in any event, is it permissible conduct for the mediator of the settlement?

Authority Referenced

Rules 10.330(a); 10.340(d); 10.420(c); 10.620; 10.650, Florida Rules for Certified and Court-Appointed Mediators
Rule 12.740(f)(1), Florida Family Law Rules of Procedure
44.404(1), Florida Statutes
MEAC Opinions 94-003; 2000-009; and 2001-003

Summary

A. A mediator may record or memorialize the parties' agreement but, it is not the mediator's role to make substantive decisions for the parties. In recording the parties' agreement, a mediator must observe the ethical rules regarding impartiality, professional advice, and other professions' standards, such as the unauthorized practice of law.

B. While a mediator may assist the parties in completing authorized forms, a mediator should stop short of "drafting" the Petition for Dissolution, Answer, or other pleadings.

C. Drafting pleadings and providing advice on how to file them would be an inappropriate additional service not directly related to the mediation process.

D. It is inappropriate for a mediator to represent either party in a dissolution proceeding or in any matter arising out of the subject mediation.

E. The Committee declines to answer the question of whether appearing at a final hearing and eliciting "basic information" is the practice of law. However, such activity is inappropriate for a mediator.

Opinion

A. The ethical rules governing mediators state: "[t]he mediator shall cause the terms of any agreement to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement." Rule 10.420(c). The Committee Notes clarify by advising that "mediators have an obligation

to ensure [the Supreme Court] rules are complied with, but are not required to write the agreement themselves."

In MEAC 94-003, the Committee noted that the procedural rule governing family mediation, rule 12.740(f)(1), Florida Family Law Rules of Procedure requires that

> if agreement is reached as to any matter or issue, including legal or factual issues to be determined by the court, the agreement shall be reduced to writing... and submitted to the court ...

In both MEAC 2000-009 and 2001-003, the Committee opined that, although assisting pro se litigants with filling out forms approved by the Supreme Court of Florida after a mediation is not a per se violation of the mediator ethical standards, a mediator should exercise caution to ensure compliance with mediation standards relating to impartiality, professional advice, and fees and costs, as well as compliance with other professional standards and rules. Each of these opinions was premised on the facts presented in the question, including (1) an agreement was reached between the parties at mediation, (2) the parties understood the mediator did not represent either party, and (3) if the parties wanted legal advice, they were to seek an attorney.

The Committee notes that the distinction you raise, between a "marital settlement agreement suitable for the parties to file with the court" and a "memorandum of understanding" or other mediation agreement, may be a distinction without a difference, since there is no clear line demarcating what a judge will and will not accept as suitable for filing. The Committee emphasizes that, while the mediator may record or memorialize the parties' agreement, it is not the mediator's role to make substantive decisions for the parties. The Committee reiterates its caution that mediators must observe the ethical rules regarding impartiality, professional advice, and other professions' standards, such as the unauthorized practice of law.

B. Unlike the situation in MEAC 2000-009, which dealt with a mediator assisting the parties in completing Florida Supreme Court approved forms, you inquire if a mediator can go a step further and draft the pleadings. A mediator has an obligation to ensure that an agreement reached in mediation is reduced to writing. See rule 10.420(c). While a mediator may assist the parties in completing authorized forms, a mediator should stop short of "drafting" the Petition for Dissolution, Answer, or other pleadings. The Committee emphasizes that, while the mediator may record or memorialize the parties' agreement, it is not the mediator's role to draft legal pleadings. The Committee declines to answer whether this would constitute the practice of law because the Florida Bar would be the appropriate entity to address this matter.

C. "During a mediation, a mediator shall not provide any services that are not directly related to the mediation process." Rule 10.340(d). The Committee opines that preparing packets of pleadings with instructions on how to file may be ethically prohibited. According to section 44.404(1), Florida Statutes, a court-ordered mediation begins when an order is issued by the court and, if an agreement is reached, does not end until "a partial or complete settlement agreement, intended to resolve the dispute

and end the mediation is signed by the parties and, if required by law, approved by the court [emphasis added]." If there are minor children involved, the mediation agreement would require court approval and, therefore, the mediation would not be over until the court approved the agreement. Consequently, drafting pleadings and providing advice on how to file them would be an inappropriate additional service not directly related to the mediation process.

Even assuming no minor children are involved, if the mediator were a licensed attorney, there might be other professional rules violated, such as the prohibition against dual representation. Pursuant to rule 10.650, "other ethical standards to which a mediator may be professionally bound are not abrogated" by the Florida Rules for Certified and Court-Appointed Mediators. If the mediator is not an attorney or not a member of the Florida Bar, there may be other concerns related to the unauthorized practice of law.

D. The Committee reiterates its opinion from MEAC 94-003 in which it stated "... it is inappropriate for the mediator to represent either party in any dissolution proceeding or in any matter arising out of the subject mediation."

E. The Committee declines to answer the question of whether appearing at a final hearing and eliciting "basic information" is the practice of law; however, such activity is inappropriate for a mediator as a potential violation of 10.330(a), Impartiality, and 10.620, Integrity and Impartiality.

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Date Fran Tetunic, Committee Chair