

## FLORIDA SUPREME COURT Mediator Ethics Advisory Committee

Opinion Number: 2014-008

Date of Issue: November 12, 2014

### The Question

A court-ordered mediation begins when an order is issued by the court. See Fla. Stat. §44.404(1). All other mediations begin when the parties agree to mediate or as required by agency rule, agency order, or statute, whichever occurs earlier. See Fla. Stat. §44.404(2).

Rule 10.420 states that a mediator must provide an opening statement “upon commencement of the mediation session.”

Suppose the clerk of court issues a NOTICE TO APPEAR FOR PRETRIAL CONFERENCE/MEDIATION which is attached to the Complaint and effectively serves as the Summons. The Notice to Appear includes the following statement:

Mediation may take place at the pretrial conference. Whoever appears for a party must have full authority to settle. Failure to have full authority to settle at this pretrial conference may result in the imposition of costs and attorney fees incurred by the opposing party.

When the parties arrive for their pre-trial conference, they are directed to wait in the lobby for a mediator. While the parties are waiting for the mediator to call them into a mediation room, the parties discuss their case and reach a verbal agreement. A short time later, the mediator calls the parties into the mediation room and, before delivering an opening statement, learns that the parties have already reached a deal. The mediator then asks them some questions to determine the elements of the deal, fills in the blanks on a form mediation settlement agreement, reviews the written agreement with the parties, and gives the parties a copy of the agreement after all parties have signed it.

When the parties reach a verbal agreement prior to entering the mediation room with the mediator, may a mediator dispense with delivering an opening statement and proceed with helping the parties reduce the agreement to writing even if the mediator has to ask them questions about the elements of their verbal agreement, and/or possibly help them negotiate some of the finer points of the verbal agreement that may not become apparent until they attempt to reduce the agreement to writing?

If a mediator may not dispense with the opening statement in these circumstances, please offer some guidance on the best way for a mediator to deliver the opening statement when the

parties are more focused on reducing their agreement to writing and terminating the mediation process as quickly as possible.

### Authorities Referenced

Rules 10.200, 10.420(a) and (c), Florida Rules for Certified and Court-Appointed Mediators  
MQAP Opinion 1995-009

### Summary

Rule 10.420(a), Florida Rules for Certified and Court-Appointed Mediators, by use of the term “shall,” makes delivering an opening statement (orientation session), by a mediator, mandatory.

### Opinion

Rule 10.420(a), Florida Rules for Certified and Court-Appointed Mediators, requires that a mediator give an orientation session in order to commence a mediation. See also MQAP 1995-009 (Mediator Qualifications Advisory Panel, the predecessor of the MEAC). According to the rule:

*Upon commencement of the mediation session, a mediator **shall describe the mediation process and the role of the mediator and shall inform the mediation participants that:***

- (1) mediation is a consensual process;*
- (2) the mediator is an impartial facilitator without authority to impose a resolution or adjudicate any aspect of the dispute; and*
- (3) communications made during the process are confidential, except where disclosure is required or permitted by law.*

There is no ambiguity to these requirements nor are there any exceptions. Regardless of party negotiations, the mediator must deliver the orientation session.

11/12/14

Signed and Dated by Beth Greenfield-Mandler, MEAC Committee Chair