

FLORIDA SUPREME COURT Mediator Ethics Advisory Committee

Opinion Number: 2014-004
Date of Issue: October 20, 2014

The Question

Scenario

Party A = Spanish speaking only.
Party B = Spanish and English speaking.
Mediator = Spanish and English speaking.

Mediation is held entirely in Spanish and the parties come to an agreement, but the agreement is required by the court to be written in English. The mediator writes the agreement in English, and then reads the agreement back to the parties in Spanish. Party B agrees with Mediator's translation of the document.

Questions

1. Is it appropriate for the mediator who conducted the mediation entirely in Spanish and wrote the agreement entirely in English (as required by the court) to then turn around and read the agreement back to the parties in Spanish for their approval/comment/correction, etc.?
2. Would one or both parties' inability to read English and/or Spanish affect the answer to Question Number 1?
3. Would both parties' inability to speak English affect the answer to Question Number 1?

MEAC Opinion 2011-017 says in Paragraph 2 of the Opinion section, "Regardless of how impartial the mediator may think s/he is, in attempting to interpret the *language or thoughts of others*, the mediator's own subconscious biases or favoritism may seep in or be perceived to have entered into how the mediator is performing this service" (emphasis added). Further, Paragraph 1 in the same section reads, "By taking on the role not only of mediator but also of translator or interpreter may create, if not the actuality, the perception of bias."

This Scenario above appears to be completely different from that in 2011-017 in that the mediator is not actually translating or interpreting either party's thoughts or meaning, but rather reading back to both parties in Spanish what was already agreed to in Spanish and written in English. While there may be a possible legal liability issue for the mediator if he or she misreads the document and the parties rely on that misreading, it doesn't appear to be a conflict of interest,

bias, or partiality – or the appearance of either – since the mediator is providing the service to both parties equally.

Submitted by a Certified County and Family Mediator
Central Division

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Authorities Referenced

Rules 10.340(d) and 10.410, Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinion 2011-017

Summary

In the scenario presented, if conducting a mediation in a language common to all parties and the mediator, it is inappropriate for a mediator to then memorialize any agreement reached in a language other than the one in which the mediation was conducted.

Opinion

While it is not prohibited for a mediator to conduct a mediation in a language (other than English) which is common to all parties and the mediator, it is inappropriate for a mediator to then memorialize any agreement reached in any language other than the one in which the mediation was conducted. To do so would constitute a translation of the foreign language deliberations. In this case, the mediator mediated in Spanish and memorialized the parties' agreement in English. While all parties and the mediator are represented by the inquirer as being fluent in Spanish, only one party understood written English.

Conducting the mediation in a language other than English and then memorializing the agreement reached in English creates at least the appearance of an unbalanced process, in violation of rule 10.410, Balanced Process. Additionally, performing a service (translation) other than a mediation for the parties is in violation of rule 10.340(d), Conflict of Interest.

Whether all parties are unable to speak English does not change this response.

 October 20, 2014

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

Dissent Opinion
MEAC 2014-004

OPINION

When, to facilitate an agreement, all mediation communications are made in Spanish [a language common to all the parties], a mediator, at the request of the parties, may translate part or all of a mediated agreement into English [as required for filing with the Court] provided:

- the mediator is a competent translator by virtue of life experience and education, and
- the parties understand the English language in the written agreement.

This opinion is based on self-determination, informed consent, and the special communication skills of the mediator.

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Signed and Dated by Patrick J. Mastronardo, MEAC Committee Member

Dissent to Majority Opinion
MEAC 2014-004

Dissenting Opinion

I dissent from the majority opinion in MEAC 2014-004, which relies on MEAC Opinion 2011-017. I was not a member of MEAC when MEAC opinion 2011-017 was written, but it is wrongly decided. Bilingual mediators perform an important service to the courts and to all mediation participants. All parties have the right to self determination. All parties have the right to use mediators who are able to enhance communication between the parties to enable them to reach their own agreement, and all mediators can write the agreement so long as it accurately reflects the understanding(s) reached by the parties. All mediators can read the agreement they have written back to the parties. All mediators can make sure that the parties understand and approve the contents of the written agreement and make changes to the written agreement requested by the parties. A bilingual mediator who is competent to perform these tasks in English or in a foreign language with the consent of the parties during the mediation process does not violate Rules 10.330, 10.340 and Rule 10.410 of the Florida Rules for Certified and Court-Appointed Mediators (hereinafter referred to by Rule number) so long as his role is clearly defined and agreed to by the parties, and the Mediator acts in compliance with Rules 10.500 and 10.510. The following rules and MEAC Opinions are cited in support of this Dissenting Opinion: Rules 10.210, 10.230, 10.300, 10.310, 10.370 and 10.420 and MEAC Opinions 2009-007 and 2000-009.



October 8, 2014

Meah Rothman Tell, Esq.
MEAC Committee Member

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