The Question

Some mediators circulate a “Confidentiality Agreement” at the beginning of their mediation session. The mediators inform all parties, counsel, and other participants that they need to review and sign the agreement before the mediator begins the joint session. The following language is similar to what appears in some of these “Confidentiality Agreements.”

CONFIDENTIALITY AGREEMENT

CASE NO. Johnson v. Smith

1. The parties agree to participate voluntarily in mediation in an effort to resolve the issues pending in the above referenced lawsuit.

2. The parties agree that all matters discussed during the mediation are confidential, unless otherwise discoverable, and cannot be used as evidence in any subsequent administrative or judicial proceeding. Confidentiality, however, will not extend to threats of imminent physical harm or incidents of actual violence that occur during the mediation.

3. Any communications between the mediator and the parties are considered dispute resolution communications with a neutral and will be kept confidential.

4. The parties agree not to subpoena the mediator or compel the mediator to produce any documents provided by a party in any pending or future administrative or judicial proceeding. The mediator will not voluntarily testify on behalf of a party in any pending or future administrative or judicial proceeding. The parties further agree that the mediator will be held harmless for any claim arising from the mediation process.

5. Mediation sessions will not be taped-recorded or transcribed by the mediator or any of the participants. All information including all notes, records, or documents generated during the course of the mediation shall be destroyed at the conclusion of the session. Parties or their representatives are not prohibited from retaining their own notes. However, the mediator will not maintain any such notes or records as part of his/her record keeping procedures.

6. If a settlement is reached by all parties, the agreement shall be reduced to writing and when signed shall be binding upon all parties to the agreement. If the lawsuit is not resolved through mediation, it is understood by the parties that the parties may pursue other legal remedies.

Plaintiff Signature

Defendant Signature

Mediator Ethics Advisory Committee Opinion 2017-007
I would appreciate the Committee’s thoughts on the following questions related to this business practice.

Questions:
  1. What is the practical effect of requiring the parties and counsel to sign a confidentiality agreement? In other words, does a confidentiality agreement make mediation communications more confidential; or if a mediator does not require parties to sign a confidentiality agreement, does that somehow make the mediation communications less confidential?
  2. Is a mediator permitted to condition his/her performance on parties, counsel, and other participants agreeing to sign the confidentiality agreement?
  3. If a party or counsel refuses to sign the confidentiality agreement, can the mediator force them to sign the agreement?
  4. If a party or counsel refuses to sign the confidentiality agreement, should the mediator withdraw from the case?
  5. Does paragraph 2 of the confidentiality agreement accurately inform the parties and counsel about the confidentiality of mediation communications? If not, what is incorrect, misleading, or deficient about paragraph 2?
  6. Is it ethical for a mediator’s confidentiality agreement to inform the parties and counsel that they agree not to subpoena the mediator for future legal proceedings? In other words, do the provisions of Florida Statute 44.405 preclude parties or counsel from subpoenaing a mediator or seeking testimony from a mediator for one of the reasons authorized by statute?
  7. Is it appropriate for a mediator to require the parties or counsel to sign a hold harmless clause “for any claim arising from the mediation process?”
  8. Are there any problems with paragraph 5 of the confidentiality agreement (more specifically, preventing parties or counsel from recording or transcribing a mediation session; requiring destruction of all notes, records, or documents (but allowing parties or representative to keep their own notes); and destruction of the mediator’s notes and records when some may be needed for compliance with Rule 10.380(d))?

Florida Supreme Court Certified
Circuit, Appellate, and County Court Mediator
Central Division

Authorities Referenced

Rules 10.220, 10.300, 10.310, 10.360, and 10.380, Florida Rules for Certified and Court-Appointed Mediators
Mediation Confidentiality and Privilege Act, sections 44. 401-406, Florida Statutes

Mediator Ethics Advisory Committee Opinion 2017-007
Summary

The confidentiality provisions which apply to Florida Supreme Court certified and court-appointed mediators are sections 44.401 - 44.406, Florida Statutes, and rule 10.360, Florida Rules for Certified and Court-Appointed Mediators. The MEAC answers eight questions regarding the confidentiality agreement a mediator requires parties, counsel, and other mediation participants to sign at the beginning of their mediation session.

Opinion

The confidentiality provisions which apply to Florida Supreme Court certified and court-appointed mediators are sections 44.401 - 44.406, Florida Statutes, and rule 10.360, Florida Rules for Certified and Court-Appointed Mediators.

Answer to Question One:
The practical effect of requiring the parties and counsel to sign a confidentiality agreement is not within the purview of the MEAC as it is a legal question, not an ethics question.

Answers to Questions Two and Three:
A mediator may make the business decision to only conduct mediations for parties, counsel, and other participants who agree to sign a confidentiality agreement. However, if a party or counsel refuses to sign the confidentiality agreement, the mediator cannot force them to sign the agreement as doing so would violate a party’s right to self-determination under rule 10.310(a) and (b), Florida Rules for Certified and Court-Appointed Mediators.

Answer to Question Four:
If the mediator uses a confidentiality agreement, it should be provided to the parties in advance of the mediation in order to allow the parties a reasonable amount of time to make an informed and voluntary decision regarding the terms of the confidentiality agreement or opt to choose another mediator. Providing the confidentiality agreement to parties in advance would establish and promote the parties’ trust in the mediator pursuant to rules 10.220 and 10.300, and protect their decision-making authority while avoiding any appearance of coercion by the mediator under the foundational principle of self-determination as required by rule 10.310(a) and (b), Florida Rules for Certified and Court-Appointed Mediators.

If the confidentiality agreement is not provided to the parties until their arrival at mediation, that may create an environment in which the parties believe that they are being improperly influenced or coerced to consent to the agreement and they have no choice but to do...
so or incur the cost (lost salary for time away from work, transportation, child care, etc.) and time delay of scheduling mediation with another mediator. Additional pressure to agree may be experienced by the parties if they have an upcoming court date which does not permit them to choose a different mediator. Thus, the parties should make the decision regarding whether to select the mediator based on the mediator’s business practice of using a confidentiality agreement prior to attending the mediation and there would be no need for the mediator to “withdraw” due to the parties’ refusal to sign the agreement on the day of the mediation.

Answer to Question Five:
Paragraph 2 of the confidentiality agreement described by the inquirer does not accurately reflect confidentiality as delineated in rule 10.360, Florida Rules for Certified and Court-Appointed Mediators, and section 44.405, Florida Statutes. Comparing rule 10.360(a) to paragraph 2, paragraph 2 does not inform the parties that “a mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties.” (Emphasis added.) Section 44.405(4)(a)(1) also allows all parties to waive the “confidentiality or privilege against disclosure.” Instead, paragraph 2 states “the parties agree that all matters discussed during the mediation are confidential, unless otherwise discoverable, and cannot be used as evidence in any subsequent administrative or judicial proceeding.” Thus, paragraph 2 removes the parties’ right to agree to waive confidentiality thereby affecting their right to self-determination under rule 10.310.

Paragraph 2 is also inaccurate and misleading in that the two exceptions to confidentiality it lists constitute the one exception in section 44.405(2)(a)(2), Florida Statutes, and the five other exceptions in section 44.405(4)(a)(1) – (6) are omitted. The provision in paragraph 2 which states, “the parties agree that all matters discussed during the mediation are confidential . . . and cannot be used as evidence in any subsequent administrative or judicial proceeding” does not comport with the exceptions to confidentiality in section 44.405(4)(a)(4) – (6) which allow mediation communications to be used as evidence in professional malpractice proceedings, legal proceedings to void or reform a settlement agreement reached during mediation, and in professional misconduct proceedings. Of equal concern, paragraph 2 does not include the exception which requires mandatory reporting of child and vulnerable adult abuse, neglect, abandonment, and exploitation.

Answer to Question Six:
It is not ethical for a mediator’s confidentiality agreement to include a provision that the parties and counsel agree not to subpoena the mediator for future legal proceedings. The provisions of section 44.405 do not preclude parties or counsel from subpoenaing a mediator or seeking testimony from a mediator for one of the reasons authorized by the exceptions to section 44.405(4)(a)(4) – (6) as mentioned in the answer to question five above.

Mediator Ethics Advisory Committee Opinion 2017-007
Answer to Question Seven:
A confidentiality agreement including a hold harmless clause “for any claim arising from the mediation process” violates the parties’ right to self-determination as outlined in rule 10.310, Florida Rules for Certified and Court-Appointed Mediators.

Answer to Question Eight:
A mediator may ask the parties not to record or transcribe the mediation session and to agree to destroy “all notes, records, or documents generated during the course of the mediation” at the conclusion of the session; however, it is ultimately the parties’ right to exercise their self-determination under rule 10.310 in making an informed and voluntary decision as to whether to agree to this term of the confidentiality agreement. A mediator may destroy their notes and records of the mediation session as long as they maintain the records necessary to support their charges and expenses as required by rule 10.380(d).

Signed and Dated by Susan Dubow, MEAC Committee Chair

Oct 20, 2017