

FLORIDA SUPREME COURT  
Mediator Ethics Advisory Committee

Opinion Number: 2017-020

Date Issued: May 8, 2018

### The Question

#### **Scenario 1:**

Pursuant to Rule 10.380(c), Florida Rules for Certified and Court-Appointed Mediators, a mediator timely provides the parties with a written explanation of fees, including fees for cancellation of a mediation session. Party A either (1) does not appear at the mediation and is subject to their pro rata share of the mediation fee despite their non-appearance; or (2) cancels the mediation on the morning of the mediation and is subject to a cancellation fee for the untimely cancellation. The mediator considers filing a motion in the pending court case to seek an order directing Party A to pay the mediator's fee.

#### **Scenario 2:**

A mediator conducts a mediation between Party A and Party B. After the mediation, the mediator sends an invoice for their services to Party A and Party B. Party A either fails to pay, or refuses to pay the mediator's fee. The mediator considers filing a motion in the pending court case to seek an order directing Party A to pay the mediator's fee.

The mediator is concerned that filing a motion in the underlying court case to secure payment of the unpaid mediator fees in Scenario 1 or 2 may be unethical since (1) MEAC 2014-011 states a mediator should file documents in the court case "only in limited and authorized circumstances;" and (2) the decision in *In re: Saul Cimbler v. Mediator Qualifications Board*, AOSC17-84, (Fla. 2017), upheld a sanction against a mediator who intervened in the underlying court case and placed himself in an adversarial position to the parties who had originally hired him to mediate their dispute. However, in *Aurora Bank v. Cimbler*, 166 So.3d 921 (Fla. 3rd DCA 2015), the court said "[w]e do not quarrel with the trial court's decision to award Mr. Cimbler the \$1,250 that Mr. Cimbler sought as a monetary sanction for not being notified of the cancellation [of the mediation]." Mr. Cimbler sought the sanction pursuant to Florida Rule of Civil Procedure 1.720(f) which states: "If a party fails to appear at a duly noticed mediation conference without good cause, the court, upon motion, shall impose sanctions, including award of mediation fees, attorney's fees, and costs, against the party failing to appear."

I would appreciate the Committee's opinions on the following questions.

Questions:

1. Is a mediator ethically permitted to file a Motion for Sanctions pursuant to Florida Rule of Civil Procedure 1.720(f) when a party fails to appear at a duly noticed mediation without good cause?
2. If the answer to question 1 is yes, is a mediator ethically permitted to assert in a Motion for Sanctions that a party failed to appear at a duly noticed mediation *without good cause* or does making such an assertion conflict with the mediator's obligation to remain neutral and impartial?
3. If a party fails or refuses to pay a mediator's fee after the mediator conducts the mediation, is the mediator ethically permitted to file a motion in the court case to secure an order directing the non-paying party to pay the mediator's fee?
4. If the answer is to question 3 is yes, what is the rule or statute that permits the mediator to file the motion in the court case involving Party A and Party B to secure payment of the mediator's fee?
5. Am I correct that if a party fails or refuses to pay the mediator's fee, the mediator would be ethically permitted to initiate a separate court proceeding in small claims court to collect the unpaid mediator's fee in the same way any other professional would be permitted to collect an unpaid debt?

Supreme Court Certified County, Circuit, and Appellate Mediator

Southern Division

### **Authorities Referenced**

Rule 1.720(f) and (k), Florida Rules of Civil Procedure  
MQAP Opinion 95-001

### **Summary**

A mediator is entitled to be compensated for services rendered. If the mediator is not compensated, the mediator has the same right as any other creditor to seek payment in any lawful manner.

### **Opinion**

As is the case with any other professional service provider, a mediator is entitled to compensation at the time the services are rendered in accordance with the agreement of the parties regarding payment or the provisions of the court order appointing the mediator. See MQAP 95-001. If the Mediator is not successful in obtaining voluntary payment for services at

the conclusion of the mediation, the mediator, like any other creditor, may ethically seek payment in any lawful manner, which may include filing a motion with the presiding judge seeking payment of the mediator's fee or filing a separate lawsuit. Florida Rule of Civil Procedure 1.720(k), formerly 1.720(g), provides the basic tenets for the payment of a mediator in a civil court case:

When the mediator is compensated in whole or in part by the parties, the presiding judge may determine the reasonableness of the fees charged by the mediator. In the absence of a written agreement providing for the mediator's compensation, the mediator shall be compensated at the hourly rate set by the presiding judge in the referral order. Where appropriate, each party shall pay a proportionate share of the total charges of the mediator. Parties may object to the rate of the mediator's compensation within 15 days of the order of referral by serving an objection on all other parties and the mediator.

Thus, the rule provides authority for the presiding judge to make decisions in matters regarding mediation fees and the MEAC believes that authority includes the payment of fees. The mediator may also choose to initiate a separate court proceeding in small claims court to collect unpaid fees in the same manner any other professional would to collect an unpaid debt.

A mediator is not ethically permitted to file a motion for sanctions pursuant to Florida Rule of Civil Procedure 1.720(f). By its plain language rule, 1.720(f) pertains to sanctions for a party's failure to appear at mediation "without good cause" which may include the award of mediation fees against the party who failed to appear. Such a motion would only be filed by a party. A mediator could not file a motion alleging a lack of "good cause" without violating the mediation confidentiality of section 44.405, Florida Statutes. Significantly, the rule does not state that it provides a means by which a mediator may obtain fees when one or both parties fail to pay fees for mediation services.

 May 8, 2018  
 Signed and Dated by Charles Castagna, MEAC Committee Chair