FLORIDA SUPREME COURT
Mediator Ethics Advisory Committee

Opinion Number: 2013-009
Date of Issue: January 21, 2014

The Question

In MEAC 2010-004, the Committee opined that ". . . a mediator is prohibited from taking on the dual role of mediator and notary." In reaching that conclusion, MEAC relies on Rule 10.340(d)'s admonition that, "[d]uring a mediation, a mediator shall not provide any services that are not directly related to the mediation process." MEAC also quotes Rule 10.340's Committee Note: "To maintain an appropriate level of impartiality and to avoid creating conflicts of interest, a mediator's professional input to a mediation proceeding must be confined to the services necessary to provide the parties a process to reach a self-determined agreement. Under subdivision (d), a mediator is accordingly prohibited from utilizing a mediation to supply any other services which do not directly relate to the conduct of the mediation itself. By way of example, a mediator would therefore be prohibited from providing accounting, psychiatric or legal services, psychological or social counseling, therapy, or business consultations of any sort during the mediation process." MEAC further references two earlier MEAC opinions, 2004-004 and 2007-005. Further, in MEAC 2011-004, MEAC "retain[ed] confidence in its conclusion and affirms its position that a mediator is prohibited from taking on the dual role of mediator and notary." MEAC cited to the same authorities.

I write to ask you for further clarification of your opinions 2010-004 and 2011-004 in light of the following.

The Rule specifies that ***"[d]uring a mediation***, a mediator shall not provide any services that are not directly related to the mediation process [emphasis supplied]." Fla. R. Med. 10.340(d). The rule begs the question of whether a mediator who notarizes the parties' mediated settlement agreement is doing so "[d]uring a mediation."

Neither the Rules for Certified and Court-Appointed Mediators, the Florida Rules of Civil Procedure, the Florida Small Claims Rules, the Florida Rules of Juvenile Procedure, the Florida Rules of Appellate Procedure, nor the Family Law Rules of Procedure specify when the mediation process ends. However, the Florida Mediation Confidentiality and Privilege Act states that mediation ends, at least for confidentiality and privilege purposes, upon the mediator declaring an impasse, the mediator terminating the proceedings, or when "[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." Fla. Stat. §§ 44.404(1)(a), (2)(a). Since a notary notarizes once the document has been signed before him/her, then the mediation has ended at the time the notary performs his/her function: the parties have already signed the settlement agreement. Thus, the mediator/notary is not performing his/her notarial service

"[d]uring a mediation." If that is the case, then the Rule, by its terms, does not apply to the situation; instead we must look to limitations on post-mediation conduct. MEAC 2004-004 and 2007-005 apply to post-agreement conduct of the mediator.

Both of the opinions MEAC cites rely in large part on the Comment to Rule 10.340(d), and evidence concerns with the neutral beginning to provide non-neutral services to the mediation parties after the mediation process. MEAC 2004-004 dealt with whether a mediator, after helping the parties reach a mediated settlement agreement, could assist the parties in drafting such a "marital settlement agreement suitable for the parties to file with the court". In essence, the Committee agreed that a mediator could do so, as long as impartiality, party self-determination, limits on professional advice were maintained. However, the Committee began to balk at the mediator serving an increasingly attorney-like role, for example, in helping the parties drafting pleadings to be filed (although the Committee properly noted a mediator could assist the parties in completing the standard forms), and clearly drawing a line that a mediator should not prepare packets of pleadings for the parties, relying in large part on Rule 10.340(d). Likewise, in MEAC 2007-005, the Committee opined a mediator in a family mediation should not prepare a proposed Qualified Domestic Relations Order (QDRO) because of both Rule 10.340(d) and broader impartiality concerns. Those loss of impartiality concerns do not arise when the nature of the service being provided post-mediation is quintessentially impartial, such as service as a Notary Public.

As noted in Florida Jurisprudence, 2nd, a "'notary public' is defined as a public, civil, or ministerial officer, and ***impartial*** agent of the state, who in the performance of his or her duties exercises a delegation of the state's sovereign power, as in attesting the genuineness of any deeds or writings in order to render them available as evidence of the facts contained therein [emphasis supplied]." Fla. Jur. 2d, Acknowledgments, etc. § 40. In fact, a notary public is required not to "notarize a signature on a document if the notary public has a financial interest[1] in or is a party to the underlying transaction. . . ." Fla. Stat. § 117.107(12). The very essence of the notary public role is neutral and impartial. Thus, the post-mediation advocacy concerns that the MEAC raises in 2004-004 and 2007-005 do not apply to the act of a notary public notarizing a mediated settlement agreement that the notary, as mediator, helped the parties reach. Provision of that notarial service is completely consistent with the impartial role of the mediator. For example, County Mediators sign small claims stipulations routinely; most County Courts' mediation agreement forms *require* the mediator to sign. Since the mediator is not a party to the agreement, the requirement of mediator signature is only justified as a means for the Court to be confident that the deal being presented for approval is the deal the parties actually reached at mediation. A notary public provides the same guarantee of authenticity when s/he notarizes a mediated settlement agreement. Notarization of signatures is a ministerial post-mediation function, entailing the same degree of impartiality as when signing a small claims stipulation, making photocopies of the settlement agreement, or filing an agreement with the Court (a task usually left to counsel).

Alternatively, if we suppose that the mediation is not ended at the time the mediator/notary notarizes a mediated settlement agreement, then the notarial service is being provided "[d]uring the mediation" but is "directly related to the mediation process." Rule

[1] Other than receipt of a fee for service or employment by one of the parties. Fla. Stat. § 117.107(12).

10.340(d). As a practical matter, parties who ask the mediator/notary to notarize a mediated settlement agreement are only willing to enter into the mediated settlement agreement if the parties' signatures are notarized. Thus, the mediator/notary is still assisting the parties in exploring settlement, while preserving the mediator/notary's impartiality and the parties' self-determination.

In this context, it is important to read the entirety of Rule 10.340(d): the Rule's initial sentence informs the balance of the paragraph. "Conflict During Mediation. A mediator shall not create a conflict of interest during the mediation. During a mediation, a mediator shall not provide any services that are not directly related to the mediation process." Thus, the purpose against provision of other services is to avoid the creation of a conflict of interest. This is borne out by the examples given in the Committee Note, "By way of example, a mediator would therefore be prohibited from providing accounting, psychiatric or legal services, psychological or social counseling, therapy, or business consultations of any sort during the mediation process." Each of those examples is likely to entail greater assistance to one party than to the other, often at the expense of the other. In contrast, notarizing a mediated settlement agreement raises no such conflict of interest. The notary is not on one side or the other, is not advocating for either side, and is not helping one side more than the other.

For all these reasons, whether the act of notarizing the mediated settlement agreement is seen as occurring during or after the mediation, I urge you to reconsider 2010-004 and 2011-004, and opine that mediator/notaries may notarize mediated settlement agreements they have helped the parties reach.

Certified County and Circuit Mediator
Central Division

Authorities Referenced

Rule 10.340(d), Rules for Certified and Court-Appointed Mediators
Rule 10.340 Committee Note, Rules for Certified and Court-Appointed Mediators
§§ 44.404(1)(a), (2)(a), and § 117.107, Fla. Stat. (2013)
Florida Jurisprudence 2d, Acknowledgments, etc. § 40
MEAC Opinions 2011-004, 2010-004, 2007-005 and 2004-004

Summary

Engaging in the dual role of mediator and notary is ethically inappropriate.

Opinion

The Committee has been asked to reconsider its position in MEAC Opinions 2011-004 and 2010-004 and change its current position that mediators may not serve simultaneously as mediators and notaries. After careful consideration of the inquirer's argument for allowing such dual services, the Committee declines to amend its' previous decisions and affirms once again that such dual service is prohibited.

Because the inquirer requested additional "clarification" of the MEAC's previous opinions on this subject, the MEAC offers the following:

The main tenets of the inquirer's argument are 1) notarization is only ministerial in function; 2) notarization takes place **after** the mediation is concluded, and 3) in small claims courts, mediators are often required to sign the agreement written at mediation. The MEAC will address each item in turn.

While the inquirer advances an artful argument, the MEAC does not agree with the assertion advanced by the inquirer that "Notarization of signatures is a ministerial post-mediation function, entailing the same degree of impartiality as when signing a small claims stipulation, making photocopies of the settlement agreement, or filing an agreement with the Court (a task usually left to counsel)." In fact, in further support of its position, the MEAC, refers to the inquirer's quote of the Florida Jurisprudence definition:

> [A notary] exercises a delegation of the state's sovereign power, **as in attesting the genuineness** of any deeds or writings in order to render them available as evidence of the facts contained therein . . . .. [Emphasis added.]

The fact that a notary can and may be asked or required to **attest** to anything related to the mediation is evidence enough to prohibit a mediator from performing this function. Notarization puts the mediator in the position of potentially attesting (testifying perhaps) in a subsequent proceeding. This is a possibility, in addition to the prohibition against a mediator performing dual services, which is unacceptable to the MEAC. The Committee cautions mediators that performing notary services should not be considered ministerial tasks similar to making photo copies of agreements.

The second argument propounded by the inquirer is that the notarization takes place **after** the mediation is ended. The inquirer bases this on the Mediation Confidentiality and Privilege Act (Act) which states the mediation ends (for the Act's purposes) when all necessary signatures are executed. While this argument is an attempt to legitimize the process of notarization, it does not hold true. If a notarization is necessary to finalize the signatures and thereby effectuate a settlement, then the act of notarizing is **during** the mediation.

The third and final argument of the inquirer is to point out that many small claims programs require mediators to sign court promulgated agreement forms before they deliver them to the court at the end of a mediation. It is the opinion of the inquirer that this is because the court wants an assurance that the "deal" presented to the court is the one to which the parties agreed. The motives of the court in requiring mediators to sign small claims stipulation agreements is pure speculation on the part of the inquirer, cannot be relied on by the MEAC, and is beyond the MEAC's jurisdiction. Further, and perhaps more importantly, the MEAC is not asked here to opine on the requirements of court programs. Best practice might dictate that courts require a mediator to sign a cover sheet and attach the parties' agreement rather than having the mediator sign the actual agreement.

For the reasons set forth above, the MEAC retains confidence in its historical position that a mediator should not perform the dual services of mediator and notary.

January 21, 2014

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