Advisory Opinion **MEAC 2003-002**
MEDIATOR ETHICS ADVISORY COMMITTEE c/o Dispute Resolution Center ▪ Supreme Court Building ▪ Tallahassee, FL 32399

May 22, 2003

THE QUESTION

I am a Florida certified mediator and as part of my mediation practice I do court ordered mediations for a Central Division County as a contract mediator.

In this county, the Family Court Judges have recently decided that the statutory right of a party without an attorney at mediation to take a signed mediated agreement in 5 days to an attorney who may in 10 days object to the agreement, applies only to a party who has an attorney and who did not attend mediation, and that it does not apply to a party without an attorney.

As a result of this decision a paragraph on the last printed signature page used for every agreement in a court ordered mediation advising the pro se party of the 5 day/10 day right to have the signed agreement reviewed by an attorney has been deleted, and some mediators are not mentioning this right to pro se parties, and some are.

The ethical question is: Does a Florida certified mediator have an ethical obligation to verbally advise a party without an attorney in a family mediation where mediated agreement is signed, that he or she has the right to take the signed agreement to an attorney in 5 days and that the attorney has the right to object to the agreement in 10 days?

Sincerely yours,

Certified County, Family and Circuit Mediator
Central Division

AUTHORITY REFERENCED

Rules 10.310(a), 10.330(a), 10.370(b), 10.410 and 10.520, Florida Rules for Certified and Court-Appointed Mediators
Kalof v. Kalof, 28 Fla. L. Weekly D678 (Fla. 3d DCA March 12, 2003)

SUMMARY

No, a certified mediator does not have such an ethical obligation.

OPINION

A mediator has the ethical obligation to "comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation." Rule 10.520. The provision you reference in your question is found in the Florida Family Law Rules of Procedure. The exact language of rule 12.740(f)(1), reads:

> If agreement is reached as to any matter or issue, including legal or factual issues to be determined by the court, the agreement shall be reduced to writing, signed by the parties and their counsel, if any and if present, and submitted to the court unless the parties agree otherwise. By stipulation of the parties, the agreement may be electronically or stenographically recorded and made under oath or affirmed. In such event, an appropriately signed transcript may be filed with the court. *If counsel for any party is not present when the agreement is reached, the mediator shall cause to be mailed a copy of the agreement to counsel within 5 days. Counsel shall have 10 days from service of a copy of the agreement to serve a written objection on the mediator, unrepresented parties, and counsel.* Absent a timely written objection, the agreement is presumed to be approved by counsel and shall be filed with the court by the mediator. (emphasis added)

Additional ethical provisions require that a mediator: 1) advise a party of the right to seek independent legal counsel if the mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations [rule 10.370(b)]; 2) postpone a mediation if a party is unable to freely exercise self-determination [rule 10.310(c)]; and 3) adjourn a mediation if the mediator believes that any party is unable to participate meaningfully in the process [rule 10.420(b)(3)].

As is not uncommon, your question involves a mixture of law and mediator ethics issues. Legal interpretations of what rights a party may have are beyond the purview of this Committee.[1] From an ethical standpoint, the issue is whether your obligation under rule 10.520 (to comply with court rules) requires you to notify a *pro se* litigant of your interpretation of the rule affording that party the right to have the agreement reviewed by an attorney (an interpretation with which the judges of your Circuit's Family Court, as well as at least one panel of the Third District Court of Appeal disagree). The Committee opines that a certified mediator does not have such an ethical obligation, and, in fact, would be well advised not to make such a statement.

First, as mentioned above, it is not clear that such a right actually exists, and the mediator

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[1] However, the Committee notes that the italicized provision was recently interpreted by the Third District Court of Appeal to be limited to the situation where a party has counsel at mediation and that counsel leaves the mediation before the settlement agreement is ready for signature. *See Kalof v. Kalof*, 28 Fla. L. Weekly D678 (Fla. 3d DCA March 12, 2003).

making such a statement would then be giving legal advice. Second, the Committee observes that any action taken should be accomplished with the appropriate deference to the rules mandating self-determination [rule 10.310(a)]; impartiality [rule 10.330(a)]; and a balanced process [rule 10.410]. These rules require that the mediator neither bias the process in favor of, nor in opposition to, a party, including a *pro se* party. Of course, at all times in the process a mediator must also comply with the requirements of rule 10.370(b), that is, the mediator must advise a party lacking the requisite understanding of that party's legal rights or obligations to seek independent legal advice.

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Date Fran Tetunic, Committee Chair