MEDIATOR ETHICS ADVISORY COMMITTEE c/o Dispute Resolution Center ▪ Supreme Court Building ▪ Tallahassee, FL 32399

February 13, 2004

THE QUESTION

As a certified county, family and juvenile dependency mediator, I would like to elicit the opinion of the Mediator Ethics Advisory Committee concerning the following:

Rule 10.520 states, “A mediator shall comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.” My two questions go to whether a mediator can comply with particular provisions in (1) a statute and (2) an administrative order in a manner that is consistent with mediation ethics rules.

A. Is a mediator personally required to reduce all mediation agreements to writing?

The Florida Statutes referenced above states, “If an agreement is reached by the parties on the contested issues, a consent order incorporating the agreement shall be prepared by the mediator and submitted to the parties and their attorneys for review.”

The Committee Notes following Rule 10.420 state in part, “Florida Rule of Civil Procedure 1.730 (b), Florida Rule of Juvenile Procedure 8.290(o), and Florida Family Law Rule of Procedure 12.740 (f) require that any mediated agreement be reduced to writing. Mediators have an obligation to ensure that these rules are complied with, but are not required to write the agreement themselves.”

There is an apparent discrepancy between the statute and the ethical rule. I would appreciate a clarification of the mediator’s ethical obligation in reducing agreements to writing.

B. May a mediator require the parties to immediately reduce their agreement to writing and to sign that written agreement?

Administrative Order (in my circuit) states, “When a mediated agreement is reached, the agreement shall immediately be reduced to writing, signed by both parties and their attorneys, and submitted to the court with a proposed order approving and adopting the agreement.”

Rule 10.420(c) states, “The mediator shall cause the terms of any agreement reached to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement.”

A mediator is without authority to compel the parties to reach an agreement; however, to comply with this Administrative Order, must the mediator be the one to compel the parties to put their agreement in writing and sign it immediately?

I am concerned that there is a conflict between the mediator's ethical obligations and this directive from the court. Would compliance with an administrative order requiring that a mediation agreement be immediately reduced to writing be consistent with the ethical rules?

Certified County, Family and Dependency Mediator
Southern Circuit

AUTHORITY REFERENCED

Rules 10.420, 10.520, Florida Rules for Certified and Court-Appointed Mediators
Rule 12.740, Florida Family Law Rules of Procedure
Section 61.183, Florida Statutes
MQAP 95-009

SUMMARY

A. Pursuant to family court rules, a mediator is obligated to see that a mediated agreement is reduced to writing, but is not obligated to write the agreement. This rule does not conflict with the statutory provision requiring the mediator to prepare a consent order, since this provision merely requires such agreement to be incorporated into a consent order prepared by the mediator.

B. While a mediator cannot compel parties who have reached an agreement to put such agreement in writing and sign it immediately, the mediator does have the obligation to "discuss with the parties and counsel the process for formalization and implementation of the agreement," and to see that the agreement is "memorialized appropriately."

OPINION

Your questions raise some important issues regarding the interplay among various requirements applicable to a certified mediator. The general rule is that statutes, adopted via the legislative process, govern substance; court rules, adopted by the Florida Supreme Court, take precedence regarding procedural issues; and administrative orders of the chief circuit judge must be consistent with the state constitution and court rules. Finally, Committee Notes are provided for guidance and are explanatory, but do not have the force and effect of a rule.

A. As you correctly point out, rule 10.520 requires a mediator to comply with all statutes, court rules (state and local) and administrative orders relevant to the practice

of mediation. In your specific instance, section 61.183, which governs mediation of dissolution of marriage, support and custody issues, contains the following provision:

> (2) If an agreement is reached by the parties on the contested issues, a consent order incorporating the agreement shall be prepared by the mediator and submitted to the parties and their attorneys for review...

The Committee Note to rule 10.420 indicates that mediators "are not required to write the agreement themselves." While this may appear to be a conflict, these obligations can be read to be consistent with each other. Specifically, the statute references the mediator's obligation to prepare a "consent order," while the rules specifically reference the "agreement." Thus, reading section 61.183 and the rule together, mediators of contested issues ". . . of parental responsibility, primary residence, visitation, or support of a child . . ." are obligated, pursuant to the statute, to prepare the consent order and, pursuant to rule 12.740, Family Law Rules of Procedure, to see that the mediated agreement is reduced to writing, although they are not obligated to write the agreement themselves.

B. In the second question, you raise concern regarding the interplay between an Administrative Order of the circuit court which states that "when a mediated agreement is reached, the agreement shall immediately be reduced to writing..." and an ethical rule. The MEAC once again believes that these seemingly conflicting issues can be read consistently since the Administrative Order is written in the passive tense, that is, while it states that the agreement shall immediately be reduced to writing, it does not state who must reduce it to writing. Rule 10.420(c), puts the burden on the mediator to "cause the terms of any agreement reached to be memorialized appropriately," but does not require that the mediator actually do the memorialization.

The MEAC also appreciates your recognition that a mediator is without authority to compel the parties to do anything. In fact, "[t]he underlying principle of mediation is that it is a consensual process whereby individuals in conflict arrive at an agreement which is mutually acceptable. It is not based on the power and authority of the mediator." See MQAP 95-009. Thus, while a mediator cannot compel parties who have reached an agreement to put such agreement in writing and sign it immediately, the mediator does have the obligation to "discuss with the parties and counsel the process for formalization and implementation of the agreement," and to see that the agreement is "memorialized appropriately."

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Date Fran Tetunic, Committee Chair