

FLORIDA SUPREME COURT
Mediator Ethics Advisory Committee

Opinion Number: 2018-001

Date Issued: June 13, 2018

The Question

In MEAC Opinion 1997-005, MEAC concluded that a mediator should not become an interested party in the parties' settlement agreement. In other words, a mediator should refrain from including in the settlement agreement the mediator's specific terms of payment, the process by which the mediator would go about collecting the mediator fee in the event of a party's non-payment, etc.

I recently became aware of a mediator's desire to include the following language in the settlement agreement:

The mediator is and has remained a neutral, impartial facilitator for (a) the parties throughout the mediation; (b) although the mediator is a licensed attorney in Florida and may have used their experience to make observations or play "devil's advocate" during the course of the mediation, nothing the mediator did or stated during the mediation was relied upon by the parties or their counsel as legal services, legal advice, or a legal opinion of the mediator; (c) the mediator did not make any decisions for the parties regarding whether to settle their dispute and/or on what terms to settle; (d) the mediator did not render any legal services or legal advice in connection with the drafting of this agreement, except as a scrivener; and (e) the parties have solely relied upon the advice of their counsel for the drafting and execution of this agreement.

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

Questions:

1. Does the inclusion of the language referenced above make the mediator an "interested party" in the parties' settlement agreement?
2. Is a mediator prohibited by the Rules for Certified and Court-Appointed Mediators from including this language in the parties' settlement agreement? If so, which provisions are violated?

3. Is a mediator permitted under the Rules for Certified and Court-Appointed Mediators to include any portions of subparts (a) - (e) in the parties' settlement agreement? If so, which subparts could be included in the parties' agreement?

Florida Supreme Court Certified County, Circuit, and Appellate Mediator

Central Division

Authorities Referenced

Rules 10.230(b), 10.300, 10.310(a) and (b), and 10.420(c), Florida Rules for Certified and Court-Appointed Mediators
MQAP 1997-005

Summary

Settlement agreement language inserted into an agreement by the mediator regarding a mediator's compliance with the ethical rules does not promote or respond to the needs and interests of the parties, may create an obstacle to the parties signing the agreement which otherwise memorializes their agreed upon terms, and may result in the parties feeling coerced to agree to additional substantive language regarding ethical issues extraneous to their dispute in order to obtain a written agreement.

Opinion

According to rule 10.300, Florida Rules for Certified and Court-Appointed Mediators, the purpose of mediation is to provide a forum for consensual dispute resolution by the parties. The concepts upon which mediation is based include an emphasis on the needs and interests of the parties, rule 10.230(b). "Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party" and "a mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in mediation," rule 10.310(a) and (b). Rule 10.420(c) provides that "the mediator shall cause the terms of any agreement reached to be memorialized appropriately . . ."

The MEAC believes the settlement agreement language regarding the mediator's compliance with the ethical rules provided by the inquirer does not promote or respond to the needs and interests of the parties, may create an obstacle to the parties signing a settlement agreement which otherwise memorializes their agreed upon terms, and may result in the parties feeling coerced to agree to additional substantive language regarding ethical issues extraneous to their dispute in order to obtain a written agreement. The language adds to the written agreement substantive terms which would not have been raised by the parties. Moreover, the terms benefit

the mediator, not the parties. Although the subject matter of the language differs in this scenario from the language considered in MQAP 1997-005, as in that opinion, the MEAC believes the appropriate location for such language is in a separate agreement between the mediator and the parties rather than in the parties' settlement agreement.

 6/13/18

Signed and Dated by Charles Castagna, MEAC Committee Chair