The Question

We are Florida Supreme Court Certified Circuit mediators, and we work as full-time mediators for the State at the Florida Commission on Human Relations (FCHR or Commission).

Under the Florida Civil Rights Act, our Commission’s basic statutory responsibilities are set forth in Chapter 760, Florida Statutes, to investigate and mediate discrimination cases in the areas of employment, housing, and public accommodation, as well as complaints filed by state employees under the Whistle-blower’s Act. Florida Administrative Code 60Y also provides general procedural definitions and guidelines for the Commission.

FCHR partners with the Equal Employment Opportunity Commission (EEOC) and the Department of Housing and Urban Development (HUD) to handle discrimination cases in Florida, and FCHR has certain reporting requirements to these federal agencies on dual-filed cases.

FCHR has a case management system (Actionstep) to record all actions within our cases to comply with case processing guidelines/timelines and for accountability. This system is only used/viewed by Commission employees. The Commission also reports to HUD in a case management system called HEMS, under which the mediation information is to be considered confidential.

Under our mediation program (see website https://fchr.myflorida.com/mediation), we follow the mediation confidentiality requirement, however, we are facing a dilemma between keeping mediation discussions completely confidential and complying with our Commission’s reporting requirements. What information, if any, can we report in our Commission’s case management systems after a mediation and comply with “Rule 10.360 Confidentiality” at the same time?

Florida Certified Circuit Mediator
Central Division

Mediator Ethics Advisory Committee Opinion 2019-001
MEAC 2019-001 Additional Information Provided by the Inquirer

**Question:** What information are you asked to provide and who will have access to the information?

**Answer:** All FCHR & HUD employees have access to the case management systems that would contain the highlights of the negotiation information discussed during mediation.

**Question:** Does that include offers and counter-offers? Demeanor of the parties? Other specific mediation communications?

**Answer:** Yes, it would include specific mediation communication (i.e. offers & counter-offers) to record in the system what was discussed as part of a resolution attempt. At this stage, we are not disclosing any of this information because of confidentiality.

We offer mediation as a confidential process with FCHR, however, our management team was wondering if we/mediators could disclose any of the negotiation exchanges between the parties in our case management systems.

Especially with HUD, when “conciliation” is offered to the parties to resolve a case, their employees usually enter the negotiation information in their case management system (HEMS). Since FCHR has a work share agreement with HUD, we handle some of the dual filed cases for them, except at FCHR, we are Florida Supreme Court Certified mediators, and we mediate under different requirements than HUD employees.

If there is no provision in state or federal laws (i.e. Florida Civil Rights Act, Title VII of the Civil Rights Act, Fair Housing Act) under which we operate requiring mediators to report mediation discussions, are we allowed to disclose any of that information? It does not appear so from Rule 10.360 Confidentiality, but we would like to find out for certain.

**Authorities Referenced**

Rules 10.360 and 10.520, Florida Rules for Certified and Court-Appointed Mediators

MEAC Opinion 2011-002

Section 44.405, Florida Statutes

**Summary**

A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties.

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Opinion

Initially, it is important to recognize that negotiations during mediation – offers and counter-offers – are “mediation communications” as defined in section 44.403(1), Florida Statutes:

an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation.

Rule 10.360(a), Rules for Certified and Court-Appointed Mediators, provides “A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties.” In answering the question “what information, if any, can we report in our Commission’s case management system after a mediation and comply with Rule 10.360 Confidentiality at the same time,” the Committee assumes that there is no state or federal law that requires the disclosure of the information the mediator is being asked to report.

In section 44.405, Florida Statutes, there is no exception which would allow a mediator to report negotiations or offers under the circumstances the inquirer has described. Therefore, unless the parties sign a waiver of confidentiality, this information is confidential under the statute and rule 10.360. If compliance with departmental regulations requires the mediator to collect and report mediation communications, then the mediator shall so advise the parties prior to beginning the mediation and if the parties do not waive confidentiality, the mediator should decline to mediate the case.

When advising parties of their right to waive confidentiality, the mediator should be careful to do so in a manner that is not coercive. If the parties choose to waive confidentiality of any or all mediation communications, the parties must be advised as to the specific information which will be disclosed and the purpose of the disclosure.

As stated in MEAC 2011-002 and rule 10.520, Rules for Certified and Court-Appointed Mediators, mediators are required to “comply with all statutes, court rules, local court rules or administrative orders relative to the practice of mediation” and at the same time adhere to the Rules for Certified and Court-Appointed Mediators. If compliance with departmental regulations compromises a mediator’s ethical obligations under the rules, the mediator should decline to conduct the mediation.

Signed and Dated by Christy Foley, MEAC Committee Chair

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