

***Advisory Opinion******MEAC 2011-007***

Mediator Ethics Advisory Committee

c/o Florida DRC, Supreme Court Building, 500 S. Duval Street, Tallahassee, FL 32399

April 15, 2011

**The Question:**

As a mediator certified in both Family and Circuit Civil, I do a number of Department of Financial Service Mediations. In most cases they proceed smoothly, with the parties agreeing to agree or agreeing to disagree, in which case we call an impasse and the participants can go to the next step. My question is in the way that they disagree. In most cases each party is respectful of the other and the disagreements take on a professional tone. How do we handle it when the disagreement takes on an unprofessional demeanor, by either one of the professional representatives, either the Licensed Professional Adjuster (PA) or the representative from the insurance company? Under a normal scenario, where confidentiality laws are not applicable, you would call the representative's supervisor and complain that their employee is acting in an unprofessional manner. It would then be recorded that an employee acted inappropriately, and if a number of complaints were received, the company would take action.

In our circumstances, where the mediation and its components are considered confidential, what are we to do when the professionals are acting unprofessionally and preventing a resolution of the issues?

**Rule 10.360 Confidentiality**

- (a) Scope. 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.
- (b) Caucus. Information obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party.
- (c) Record Keeping. A mediator shall maintain confidentiality in the storage and disposal of records and shall not disclose any identifying information when materials are used for research, training, or statistical compilations.

44.405

Confidentiality; privilege; exceptions.

- (1) Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. A violation of this section may be remedied as provided by s. 44.406. If the mediation is court ordered, a violation of

this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees.

(2) A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.

(3) If, in a mediation involving more than two parties, a party gives written notice to the other parties that the party is terminating its participation in the mediation, the party giving notice shall have a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding only those mediation communications that occurred prior to the delivery of the written notice of termination of mediation to the other parties.

(4)(a) Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:

1. For which the confidentiality or privilege against disclosure has been waived by all parties;
2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;
3. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;
4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;
5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or
6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

(b) A mediation communication disclosed under any provision of subparagraph (a)3., subparagraph (a)4., subparagraph (a)5., or subparagraph (a)6. remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this section.

(5) Information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation.

(6) A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation.

History.s. 4, ch. 2004-291.

While it appears that according to 44.405 subsection (4) or (6) I may be allowed to discuss unprofessional conduct with the originating organization, in this case DFS, but can I not disclose same to the company that the offending professional is employed by?

Doesn't the professional's company deserve to know that there representative is displaying unprofessional behavior so they could correct it?

This directly affects the claimants monetarily, yet they have no control over the actions of the professionals. I would therefore appreciate your response as to how to deal with this problem.

Submitted By  
Florida Supreme Court Certified Family & Circuit Mediator  
Southern Division

### **Authorities Referenced**

Rules 10.360, 10.410, and 10.420(b)(3), Florida Rules for Certified and Court-Appointed Mediators  
Section 405, Chapter 44, Florida Statutes, 2010

### **Summary**

Question One: How to handle a situation when a mediation disagreement takes on an unprofessional tone is primarily a matter of mediator technique and practice and further calls into consideration the mediator's duty to maintain a balanced process and to consider options for termination and adjournment referenced in the Rules for Certified and Court-Appointed Mediators.

Question Two: What a mediator is to do when mediation participants are acting unprofessionally and preventing a resolution of issues is a matter of mediator training and skill, and is generally dealt with by Rules 10.410 (Balanced Process) and 10.420(b)(3) (Conduct of Mediation).

Questions Three and Four: While it may be beneficial for the employing company of the professional to know that the professional is behaving in a way the mediator considers "unprofessional," a disclosure of unprofessional conduct to the company that the offending professional is employed by is prohibited by the Mediation Confidentiality and Privilege Act (Section 405, Chapter 44, Florida Statutes).

### **Opinion**

The questioner is seeking guidance on how to address unprofessional conduct displayed by a mediation participant (in this case an insurance representative) and whether such conduct can be disclosed to the professional's employer.

Overcoming obstacles, such as unprofessional conduct, or conduct which is not productive in reaching a possible resolution, is a skill that the mediator learns through training and experience. An insurance representative, as any mediation participant, has a right to be uncooperative and may be doing so because the insurance company is reluctant to settle. Lack of control over the actions of the participants by a mediator, in contrast to the role of a judge, is part of the concept of party self-determination which is a key element of mediation. However, as a facilitator of communication, the mediator should use techniques to promote resolution, despite resistance by one or both parties.

As stated in Rule 10.410, "A mediator shall promote mutual respect among the mediator participants and encourage the participants to conduct themselves in a collaborative, non-coercive, and non-adversarial manner." Further, if one of the parties is unable or unwilling to participate meaningfully in the process, the mediator shall terminate or adjourn the mediation. Rule 10.420(b)(3). [emphasis added]

The second part of the inquiry requests guidance on reporting unprofessional conduct to a participant's employing company. Two of the exceptions to confidentiality in Florida Statutes, §44.405(a)(4) and (6), apply to disclosures with regard to professional malpractice and professional misconduct. The disclosure of "unprofessional" conduct to an employer who did not attend mediation is not a delineated exception to mediation confidentiality and thus would be prohibited by the Mediation Confidentiality and Privilege Act. (Section 405, Chapter 44, Florida Statutes).

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Date

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Beth Greenfield-Mandler, Committee Chair