Mediator Myths and Urban Legends

Fran L. Tetunic
Mediation, 1 firmly rooted as a vital component of Florida’s court system, is the present, not the wave of the future. The Florida Legislature and judiciary have created “one of the most comprehensive court-connected mediation programs in the country.” Over 18,000 people have completed a Supreme Court of Florida certified mediation training program, and over 5,000 people are certified by the Supreme Court of Florida as county, family, circuit, or dependency mediators. All 20 judicial circuits routinely refer cases to mediation. Additional cases go to mediation by agreement of the parties or as a requirement prior to filing suit.

Significant changes in mediation law and ethical rules have taken place over the last four years. In 2004, the Mediation Confidentiality and Privilege Act (act) came into effect, and in 2006, the Florida Rules for Certified and Court-appointed Mediators (Mediator Rules) were amended to be consistent with the act. Also in 2006, the Rules Regulating The Florida Bar were amended to include third-party neutrals in the rule regarding conflict of interest and to add a rule specific to third-party neutrals. Additionally, the Mediator Ethics Advisory Committee (MEAC), a standing committee of the Supreme Court of Florida, continues to respond to written ethical questions posed by mediators subject to the Florida Rules for Certified and Court-appointed Mediators. MEAC has issued over 100 advisory opinions, which, while not law, serve as guidance on which mediators may rely in good faith when grappling with ethical dilemmas.

The significant body of mediation law, rules, and advisory opinions offers lawyers the requisite information to serve their clients by understanding the mediation process, knowing how to prepare their clients for mediation, and knowing when and how to mediate. Attorneys need to be mindful of the complexity of mediation confidentiality, the civil remedies for breach of mediation confidentiality, and the potential for a court to overturn or reform a mediated agreement based on mediator misconduct. This article identifies and debunks the top 10 mediation myths and urban legends to assist lawyers in better representing their clients in mediation-related matters.

1) Everything in Mediation Is Confidential

Confidentiality, while a hallmark of mediation, is not absolute. The Mediation Confidentiality and Privilege Act, enacted in July 2004, provides for the confidentiality of mediation communications. "Mediation communication" means 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. The definition specifically excludes "[t]he commission of a crime during a mediation." All mediation communication is confidential except as delineated in the act, which mandates disclosure in only one regard. Mediation participants are obligated to make mandatory reports of abuse and neglect of children and vulnerable adults “solely for the purpose of making the mandatory report to the entity requiring the report.” The permissive disclosure of “reporting, proving, or disproving professional malpractice [or misconduct] occurring during mediation” is similarly limited “for the purpose of the professional malpractice proceeding” or “internal use of the body conducting the investigation.”

Mediation parties may waive confidentiality for any mediation communication directly by agreement or indirectly by “disclos[ing] or mak[ing] a representation about a privileged mediation communication . . . to the extent necessary for the other party to respond to the disclosure or representation.” The disclosed communication “remains confidential and is not discoverable or admissible for any other purposes, unless otherwise permitted” by the act. In contrast, mediation parties must expressly agree, consistent with the law, that a mediated agreement is confidential, for the act does not provide for “confidentiality or privilege attached to a signed agreement reached during a mediation.”

The act provides two additional significant exceptions to confidentiality for mediation communications: those “willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence” and those intended “for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation.” Despite confidentiality,
Mediators are obliged to “maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties.”

The Florida Rules for Certified and Court-Appointed Mediators obligate mediators to “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 contrast, the Rules Regulating The Florida Bar oblige lawyers to report another lawyer who they know “has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” The two ethical standards are consistent, allowing the lawyer-mediator to follow both, for the law permits this disclosure. The act provides an exception to confidentiality “for any mediation communication: 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.” This information “remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted” by another statutory exception.

4) If All Parties Waive Any Conflict of Interest Disclosed by the Mediator, the Mediator May Mediate

A mediator is prohibited from mediating “a matter that presents a clear . . . conflict of interest.” Clear “conflicts occur when circumstances or relationships involving the mediator cannot be reasonably regarded as allowing the mediator to maintain impartiality.” “Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual.” Examples of clear conflicts identified by the Mediator Ethics Advisory Committee include a father serving as mediator for a case his daughter-lawyer is handling.
a lawyer-mediator mediating a case for a third-party administrator with whom he has a legal relationship.50

"A conflict of interest which clearly impairs a mediator's impartiality is not resolved by mere disclosure to, or waiver by, the parties."51 If a conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw," even if all parties expressly agreed to the mediator continuing.52

An attorney who acted as an advocate for a party or parties may not ethically mediate for the same parties and same subject matter involved in the initial matter, regardless of waivers from the parties.53 Similarly, lawyer-mediators may, at times, be prohibited from representing a client based on the Florida Rules for Certified and Court-appointed Mediators rather than the Rules Regulating The Florida Bar. The applicable Bar rule provides "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a... mediator, or other third-party neutral, unless all parties to the proceeding give informed consent confirmed in writing."54 In contrast, the MEAC has advised that it is inappropriate for a mediator to represent a party regarding any matter arising from the subject mediation.55 The Rules Regulating The Florida Bar acknowledge the lawyer-mediator's dual obligations: "A Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators."56

5) The Mediation Is Not Over Until the Mediator Declares Impasse57

The parties' right of self-determination includes their deciding to end the mediation. "Decisions made during a mediation are to be made by the parties."58 "A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination."59 Just as parties are not required to settle,60 they are not required to stay at mediation until excused by the mediator.

A mediator is required to "adjourn the mediation upon agreement of the parties."61 Mediation, by definition, gives decision-making authority to the parties.62 The MEAC has advised that "a mediator should adjourn or terminate a mediation if 'any party is... unwilling to participate meaningfully in the process.'"63 Specifically, if a party requests an impasse, the mediator should declare an impasse,64 and if a party objects to the mediator, the mediator should not continue to mediate.65

Rules of procedure require the mediator to "report the lack of an agreement to the court without comment or recommendation."66 In lieu of reporting no agreement, the parties may choose to adjourn or reschedule the mediation for another time, with other parties or with a different mediator.

6) The Mediator Holds the Privilege to Refuse to Disclose Confidential Mediation Communications

The parties alone, and not the mediator, hold the "privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications."67 While not the holder of the privilege, the mediator is ethically required to "maintain the confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties."68 The Mediator Ethics Advisory Committee has advised mediators who are subpoenaed to "either file a motion for a protective order, or notify the judge... that the mediator is statutorily required to maintain confidentiality of mediation proceedings."69 However, should the parties waive, there would be no privilege for the mediator to assert.

7) The Mediator May Predict an Outcome at Trial if Requested by All the Parties

A mediator is prohibited from offering "a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute."70 However, "a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense."71 While maintaining impartiality and protecting party self-determination, "a mediator may provide information that the mediator is qualified by training or experience to provide,"72 yet remains prohibited from offering "a personal or professional opinion intended to coerce the parties, or unduly influence the parties, decide the dispute, or direct a resolution of any issue."73

8) The Mediator Has the Obligation to Write the Mediated Agreement

Mediators are responsible for seeing that mediated agreements are reduced to writing, but are not responsible for personally writing the agreements.74 The mediator has the obligation to "cause the terms of any mediated agreement reached to be memorialized appropriately, and discuss with the parties and counsel the process for formalization and implementation of the agreement."75 Rules of procedure require that mediated agreements be reduced to writing.76 While mediators have an obligation to ensure compliance with these rules, they are not required to personally write the agreements.77

9) Mediators Report to the Court When Parties Fail to Mediate in Good Faith

Mediators are ethically prohibited from reporting to the court that parties failed to mediate in good faith.78 The Mediator Ethics Advisory Committee advises mediators not to accept a case where the judge's referring order states that the mediator will report the conduct of a party who failed to mediate in good faith, as the mediator is prohibited from doing so.79 Additionally, rules of procedure specifically direct mediators to report the absence of a mediated agreement without either comment or recommendation.80 Rules of procedure, as well as court orders, advise who must appear at mediation and require the parties to appear with the requisite authority to settle.81 Mediators may report a party's failure to appear when the party's appearance was required, yet the party failed to appear physically.82

While parties may be required to attend mediation, they are in no way
required to settle or even make a settlement offer. Applying a general good faith obligation to mediation is foreign to the process in both theory and practice. By definition, the parties are the decision makers and exercise self-determination. Even court-ordered mediation, although mandatory in requiring appearance at mediation, is voluntary in allowing parties to determine the extent of their involvement and whether they settle at mediation. "There is no requirement that a party even make an offer at mediation, let alone offer what the opposition wants to settle."  The use of mediation has grown significantly in the Florida Court System, which has used mediation to resolve disputes for over two decades. The act gives parties "a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications." The rules require mediators to maintain the confidentiality of mediation communications unless required or permitted by law or agreed to by the parties. Mediation communications remain confidential absent a specific statutory exception. No exception exists for reporting failure to mediate in good faith; without a statutory basis allowing communication, mediators are precluded from disclosing communications purporting to show absence of good faith.

10) Mediator Misconduct, Like Legal Malpractice, Does Not Serve as a Basis for Setting Aside a Mediated Agreement

"Mediator misconduct can be the basis for a trial court refusing to enforce a mediated agreement reached at court-ordered mediation." Mediator misconduct is an exception to the general rule that coercion and duress by a third party will not suffice to invalidate an agreement between the contracting parties. "During a court-ordered mediation, the mediator is no ordinary third party, but is, for all intent and purposes an agent of the court carrying out an official court-ordered function." Therefore, "the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement obtained through violation and abuse of the judicially-prescribed mediation procedures." Interestingly, "the largest growth has been in the private sector resolution of court-ordered cases and the resolution of cases through mediation which would otherwise become civil suits." Attorneys should keep abreast of mediation developments to best advise their clients whether or when to mediate, to prepare their clients for mediation, and to choose and work with mediators to best meet their clients' interests and needs. As mediation is a private process, public discussion helps to deter misunderstandings. By understanding the most common mediation myths and urban legends, attorneys can meaningfully evaluate how best to utilize mediation in their practice.

Conclusion

The use of mediation has grown significantly in the Florida Court System, which has used mediation to resolve disputes for over two decades. Currently, we have [nine] CDS [Citizen Dispute Settlement Centers], 49 county mediation programs (serving all 20 circuits), 45 family mediation programs, 13 circuit civil mediation programs, 40 dependency mediation programs ... and one appellate mediation program.

1 FLA. STAT. §44.1011(2). "Mediation" means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making...
authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.  


Id.

Id.

See FLA. STAT. §720.311.  


In re Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, 931 So. 2d 877 (Fla. 2006) (amending FLA. R. CERT. & CT.-APPTD. MEDIATORS).

In re Amendments To The Rules Regulating The Florida Bar, 933 So. 2d 417 (Fla. 2006) (per curiam) (creating 4-2.4, Lawyer Serving as Third-party Neutral, and amending 4-1.12 to add Mediator or Other Third-party Neutral).

Mediators address their questions to Mediator Ethics Advisory Committee, c/o Florida Dispute Resolution Center, Supreme Court Building, Tallahassee, FL 32399.


FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.900(c).

FLA. STAT. §44.406.

Vitakis-Valchine v. Valchine, 793 So. 2d 1094 (Fla. 4th D.C.A. 2001).

FLA. STAT. §§44.401-401.44-406.

FLA. STAT. §44.403(1).

Id.

FLA. STAT. §44.405(1).

FLA. STAT. §§44.405(4)(a)(3).

FLA. STAT. §§44.405(4)(a)(4) and (6).

FLA. STAT. §§44.405(4)(a)(4).

FLA. STAT. §§44.405(4)(a)(1).

FLA. STAT. §§44.405(4)(a).

FLA. STAT. §§44.405(4)(a)(5).

FLA. STAT. §§44.405(4)(a)(2).

FLA. STAT. §§44.405(4)(a)(5).

FLA. STAT. §§44.405(5).

FLA. STAT. §§44.402(1)(a).

FLA. STAT. §§44.402(1)(b).

FLA. STAT. §§44.402(1)(c).

FLA. STAT. §§44.402(2).

FLA. STAT. §§44.406(1).

FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).

FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).

FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).

FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).

Id.

FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).

R. REGULATING FLA. BAR 4-2.4(b) comm. notes.


R. REGULATING FLA. BAR 4-1.12, R. REGULATING FLA. BAR 4-2.4.


Id., FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.340(a) comm. notes.


FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.340(c).


R. REGULATING FLA. BAR 4-1.12(a).


R. REGULATING FLA. BAR 4-2.4 comm. notes.

The term "impasse" is commonly used to signify that the parties did not reach agreement. The Florida Rules for Certified and Court-Appointed Mediators do not use this term. The rules discuss terminating or adjoining mediation.


Id.

See notes 81-83 and accompanying text.


See FLA. STAT. § 44.1011(2).


Id.

Id.

Id.


FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).

R. REGULATING FLA. BAR 4-8.3.

FLA. STAT. §§44.405(4)(a)(6).

FLA. STAT. §§44.405(4)(b).

FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.370(b).

FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.370(b) comm. notes.

R. REGULATING FLA. BAR 4-2.4(b).  

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**Books**

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The compilation is edited by Lawrence J. Fox, a partner at Drinker Biddle & Reath in Philadelphia, who was instrumental in the creation of the ABA Commission on the Evaluation of the Rules of Professional Conduct, on which he served.

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By Edward Matisik

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Edward N. Matisik is a writer and attorney in Washington, D.C., who has written extensively on disability and education law.
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Peter M. Dunbar is a partner in the law firm of Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., in Tallahassee. Before joining the firm he served in the Office of the Governor of the State of Florida as general counsel and later as chief of staff.

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