

FLORIDA SUPREME COURT
Mediator Ethics Advisory Committee

Opinion Number: 2023-002

Date Issued: June 6, 2023

Question

Circumstance: During the course of a Zoom mediation, one of the lawyers discloses in private caucus to the mediator that they had recorded (audio and video) the joint session without previously seeking the consent to record from the mediator or other participants. Florida statutes seem to require permission of all participants to a private conversation before recording of any kind (audio and/or video) is permitted and such violation may be a felony.

Questions:

Once learning about the recording without consent:

1. [I]s the mediator obligated to disclose such information to those who have been recorded without consent?
2. [I]s the mediator required to terminate the mediation?
3. [I]s the mediator obligated to inform the court or law enforcement?
4. [D]oes the mediator violate confidentiality if they choose to disclose to the recorded parties, the court or law enforcement?
5. Can the mediator terminate the mediation?
6. Is it now part of best practices to make clear in the written notice as well as part of the mediation opening remarks to make clear that no participant is allowed to record the session?

Florida Supreme Court Certified Family Mediator
Central Division

Authorities Referenced

Mediation Confidentiality and Privilege Act, Sections 44.401-44.406, Fla. Stat. Section 44.405(4)(a)(2), Fla. Stat. (2022) Rule 10.420(b)(4), Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinions 2012-002 and 2004-009.

Summary

Disclosure of any mediation communication is subject to the Mediation Confidentiality and Privilege Act. While a mediator must inform participants that mediation communications are confidential as part of the opening statement, a mediator may, but is not obligated to, state also that recording is not permitted during mediation. This notice may be written or be part of the

opening statement. Further, a mediator may, but is not obligated to, disclose to the other participants when a participant records a mediation without consent. A mediator may, but is not obligated to, report the infraction to the court or law enforcement.

Opinion

Disclosure of any mediation communication is subject to the Mediation Confidentiality and Privilege Act, sections 44.401-44.406, Fla. Stat. The Mediation Confidentiality and Privilege Act does not extend to mediation communications which are “willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.” Section 44.405(4)(a)(2), Fla. Stat., rule 10.360(a), Florida Rules for Certified and Court-Appointed Mediators, and MEAC Op. 2012-002. Without delving into a legal analysis of section 934.03, Florida Statutes (2022), it is presumptively unlawful to record individuals without each individual’s consent. Confidentiality under the Mediation Confidentiality and Privilege Act does not attach to a mediation communication “willfully used to plan a crime, commit or attempt to commit a crime.” Section 44.405(4)(a)2., Fla. Stat.

Answer to Question One. No. A mediator may, but is not obligated to, disclose the fact a recording was made to those who were recorded without their consent. Under the Mediation and Confidentiality and Privilege Act, there is no mandatory reporting requirement for this activity although reporting is permitted. See sections 44.401-44.406, Fla. Stat. and MEAC Op. 2012-002. There are only two types of mandatory reports required for certified mediators: child abuse under chapter 39, Florida Statutes, and vulnerable adult abuse under chapter 415, Florida Statutes. *Id.*

Answer to Question Two. Yes. If the mediation entails fraud, duress, the absence of bargaining ability, or unconscionability, a mediator must terminate the mediation. Rule 10.420(b)(4), Florida Rules for Certified and Court-Appointed Mediators, and MEAC Op. 2004-009. Because an illicit recording of opposing parties entails one or more of the issues cited in the rule, the mediator must terminate the mediation when a party or participant has recorded the joint session without seeking consent to record from the mediator and other participants prior to the recording. *See id.*

Answer to Question Three. No, a mediator is not obligated to inform the court or law enforcement, but a mediator may report the infraction. *See* MEAC Op. 2012-002.

Answer to Question Four. No, the mediator would not violate confidentiality by disclosing the information to the recorded parties, to the court, or to law enforcement. Neither confidentiality nor privilege attach to any mediation communication “willfully used to plan a crime, commit or attempt to

commit a crime, conceal ongoing criminal activity, or threaten violence.” Section 44.405(4)(a)(2)., Fla. Stat., and *see* MEAC Op. 2012-002.

Answer to Question Five. The answer to question two, above, renders this question moot.

Answer to Question Six. No. MEAC issues “written advisory opinions to mediators subject to these rules in response to ethical questions arising from the Standards of Professional Conduct.” Rule 10.910, Florida Rules for Certified and Court-Appointed Mediators. Beyond its advisory opinions, the MEAC is not authorized to establish best practices for mediators. However, a mediator may establish a policy of issuing a written notice that no recording of the mediation is allowed or making a similar statement part of the mediator’s opening statement.


Christy L. Foley
Christy L. Foley (Jun 6, 2023 21:28 EDT)

Signed by Christy Foley, MEAC Committee Chair