Demystifying Florida Mediator Ethics: The Good, the Bad, and the Unseemly

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I. INTRODUCTION AND BACKGROUND

"A man without ethics is a wild beast loosed upon this world."¹

– Albert Camus

Society depends on the ethical conduct of its members. The June 2007 disbarment of Durham district attorney Michael B. Nifong exemplifies the havoc wreaked when an individual authorized to act on behalf of the citizenry abuses power and breaks canons of ethics. The ethics panel investigating Mr. Nifong blamed him for the "fiasco in which innocent young men were charged [with sexual assault] and the legal system suffered disrepute."² Society demonstrates a broad interest in ethical conduct which includes promulgating laws and codes of conduct, investigating potential violations, sanctioning wrongdoing, and advising individuals on ethical conduct in their daily lives. The Ethicist, a regular column in the New York Times Magazine, answers questions on matters as mundane and complex as telling the truth and dividing living expenses.³

¹ Ethics Update (Dartmouth College Ethics Institute, Hanover, N.H.), Spring 2003, available at www.dartmouth.edu/~ethics/newsletter/spring03/moral.html (last visited Dec. 20, 2007).
Members of society who depend on the ethical behavior of judges, law enforcement officials, and lawyers in the public manifestations of our legal system also depend on the ethical behavior of mediators in the more private process of mediation. A mediation succeeds not because the parties resolved their dispute, but because the mediator conducted the mediation within ethical standards giving the parties an opportunity to meaningfully participate in the process and exercise self-determination. The legislation of ethical conduct, investigation of alleged violations, sanctioning of wrongdoing, and answering of ethical questions that permeates the conduct of lawyers and judges is mirrored in Florida's ethical standards for mediators.

Florida is in the forefront of states that have taken initiatives to develop ethical guidelines for use in mediation. Florida was the first jurisdiction to develop mediator standards of conduct which include enforcement provisions, [and the first state] to establish a panel to render advisory opinions on ethical issues arising in mediation. The Florida Legislature and judiciary have created "one of the most comprehensive court-connected mediation programs in the country." Over the past twenty-five years, the use of mediation has steadily increased to become a vital component of the court system. Interestingly, mediation has seen its largest growth in the private sector for both court-ordered cases and matters without court involvement. Increasingly, attorneys and parties directly participate in mediator selection. "[O]ver 90 percent of the parties agree on a mediator," allowing them to base their selection not only on certification status, but also mediation style, skill, knowledge, and ethical comportment.


7. Id.


10. Id. Private sector refers to private mediators hired by the parties, not mediators employed by or through court-connected programs. See id.

11. See Fla. R. Civ. P. 1.720(f). Parties have ten days from the trial court's order referring a case to mediation to mutually agree on a mediator, who may or may not be certified. Id.

“As mediation has grown in popularity over the past few decades as an alternative to costly and protracted litigation, a whole new field of professional ethics—mediation ethics—has emerged.”

The many and diverse ethical issues within this field range from practical matters such as business and conflict of interest, to more abstract matters such as confidentiality and the nature and scope of the mediation process. A mediator’s ethics affect not only the quality of the mediation process, but also the viability of the mediation agreement. The ethical precepts governing Florida’s more than 5000 mediators require them to abide by the Florida Rules for Certified and Court-Appointed Mediators. Mediators subject to these rules must also “comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.” Additionally, some mediators must follow other ethical codes by virtue of additional professional callings. These multi-faceted obligations may, at times, seem perplexing or contradictory.

In 1994, the Supreme Court of Florida created a nine member committee to respond to written ethical questions posed by mediators subject to the Florida Rules for Certified and Court-Appointed Mediators. From 1994 to 2007, mediators address their questions to Mediator Ethics Advisory Committee, c/o Florida Dispute Resolution Center, Supreme Court Building, Tallahassee, FL 32399.

14. Id.
15. See id. at 480. “[T]he mediator is no ordinary third party . . . .” Vitakis-Valchine v. Valchine, 793 So. 2d 1094, 1099 (Fla. 4th Dist. Ct. App. 2001). “During a court-ordered mediation, the mediator is, [in effect,] an agent of the court carrying out an official court-ordered function.” Id. 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 agreement obtained through violation and abuse of judicially-prescribed mediation procedures.” Id. A mediator is accountable to the referring court with ultimate authority over the case, and the court may overturn a mediated agreement entered into based on significant mediator misconduct. Id.; see also Fran L. Tetunic, Florida Mediation Case Law: Two Decades of Maturation, 28 NOVA L. REV. 87, 124 (2003).
16. PRESS, supra note 8, at iii (stating that there were 5241 certified mediators as of May 2007).
20. Mediators address their questions to Mediator Ethics Advisory Committee, c/o Florida Dispute Resolution Center, Supreme Court Building, Tallahassee, FL 32399.
21. Florida State Courts, Mediator Ethics Advisory Committee (MEAC) Opinions: Summaries from 1994–2007,
August 2007, the committee, presently known as the Mediator Ethics Advisory Committee (MEAC), issued 114 opinions. Each opinion represents the concurrence of all deliberating committee members and, in true mediator fashion, no member has ever issued a dissenting opinion.

MEAC opinions do not carry the weight of law. They do serve as advisory opinions upon which mediators may rely in good faith. While such reliance will not constitute a defense in a disciplinary action, the Mediator Qualifications Board (MQB) may consider it as evidence of the mediator’s good faith in its determination of guilt or in mitigation of punishment. The opinions respond directly to the written questions posed to the committee in the context of the applicable law and ethical rules in effect at the time.

The ethical standards found in the Florida Rules for Certified and Court-Appointed Mediators apply to all mediations conducted by a certified mediator, and all court-appointed mediators whether or not certified. The applicability of the professional standards to any given situation will depend on whether the activity falls within the rubric of “mediation.” Individuals who are mediators perform many non-mediator functions. A mediator who negotiates a car sale on behalf of a spouse or a business matter for a town council would act in the role of advocate, not mediator. Similarly, during mediation, actions taken by an attorney or party, who also happens to be a mediator, will not “be judged as if they were the actions of a mediator.”

http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/Index%20of%20Opinions%20-%202007_web.pdf [hereinafter MEAC Summaries]. The rules apply to Supreme Court of Florida certified mediators as well as mediators appointed by the state courts. See FLA. R. CERT. & CT. APPTD. MEDIATORS 10.200. Mediators who violate the rules are subject to disciplinary action as determined by the Mediator Qualifications Board. See FLA. R. CERT. & CT. APPTD. MEDIATORS 10.900(f).

22. MEAC Summaries, supra note 21. MEAC was previously known as the Mediator Qualifications Advisory Panel (MQAP). See FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.900(f).

23. The Mediator Qualifications Board (MQB) hears grievances filed against certified mediators and reviews mediator “good moral character” issues. See id. The Florida Rules for Certified and Court-Appointed Mediators pertain to both certified mediators and mediators who are not certified but are court-appointed.
Nonetheless, "[a] certified mediator is subject to a good moral character requirement and is prohibited from performing any act which would compromise the mediator's integrity."\footnote{31}

In a dozen years and over one hundred opinions, there have been multiple amendments to the \textit{Florida Rules for Certified and Court-Appointed Mediators}, in addition to multiple statutory changes—the most significant being the 2004 passage of the Mediation Confidentiality and Privilege Act (Act).\footnote{32} While the body of MEAC opinions has withstood the test of time, some opinions warrant attention given the statutory and rule changes. This article organizes and summarizes the MEAC opinions, and identifies those subject to modification or reconsideration. Even though portions of three opinions have been rescinded, and other opinions require amendments to conform to current rules and law, the overwhelming majority still represents the best practices for mediators. For each rescinded opinion, as well as for those subject to modification or reconsideration, this article identifies the relevant statutory or rule changes, and analyzes their significance and effect on the opinion. Each of the issued opinions is referenced in the hope of offering a convenient summary and analysis for mediators, for attorneys when selecting mediators and representing clients, and for participants in the mediation process.

\section*{II. MEDIATION CONFIDENTIALITY}

\subsection*{A. Developments and Background}

Mediators have an ethical obligation to maintain confidentiality, the bedrock of the mediation process.\footnote{33} Effective August 1, 2006, the ethical rule governing mediator confidentiality changed.\footnote{34} Previously, the rule directed a mediator to "maintain confidentiality of all information revealed during mediation, except where disclosure is required by law."\footnote{35} Presently, "[a] media-
tor 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.”

This amendment “was proposed in response to the 2004 adoption of the Mediation Confidentiality and Privilege Act, sections 44.401–44.406, [Florida Statutes] (2005).” The Supreme Court of Florida amended the rule governing the scope of confidentiality to be consistent with the language in the Act.

This significant rule change, permitting more disclosure by the mediator, may have less practical effect than the word change would initially suggest. The Act delineates required and permissive exceptions based on the type of disclosure. For example, the mandatory reporting of abuse and neglect of children and vulnerable adults applies “solely for the purpose of making the mandatory report to the entity requiring the report.” Similarly, communication to report, prove, or disprove professional misconduct or professional malpractice occurring during mediation is limited to the internal use of the body conducting the misconduct, investigation, or the professional malpractice proceeding.

Another exception applies “for the limited pur-
pose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation.\textsuperscript{42} 

While still too early to determine whether mediator disclosure of mediation communications will significantly increase following the August 1, 2006 rule change, the mediator's own threshold determination of the existence of exceptions will prove crucial. The Act does not provide guidance as to when, how, or by whom an exception determination is made.\textsuperscript{43} In the past, mediators reported abuse and neglect based on the threshold established in the mandatory reporting statutes;\textsuperscript{44} that remains the same. Similarly, then and now, parties may waive the confidentiality privilege they hold.\textsuperscript{45} As before, mediators should obtain documentation of the waiver so as not to unwittingly breach confidentiality.\textsuperscript{46} Also, as before, a signed written mediated agreement is not confidential "unless the parties agree otherwise."\textsuperscript{47}

Although the Act applies to all mediation participants, mediators alone are bound by the Rules for Certified and Court-Appointed Mediators, and are therefore subject to heightened ethical obligations and scrutiny.\textsuperscript{48} While the rule requiring confidentiality is less restrictive than before, the other ethical obligations to which a mediator must adhere, such as impartiality, remain constant.\textsuperscript{49} Mediators continue to have an ethical obligation to maintain the confidentiality of information revealed during mediation.\textsuperscript{50} Nonetheless, now as before, parties may waive their statutory privilege and have the mediator disclose mediation communications,\textsuperscript{51} and courts may order mediators to disclose mediation communications for legally recognized purposes, such as voiding or reforming a settlement agreement.\textsuperscript{52} Many mediators still continue to wait for court direction to disclose information so as not to make

\textsuperscript{42} Id. § 44.405(4)(a)5.
\textsuperscript{43} See id. § 44.405.
\textsuperscript{44} Id. §§ 39.201, 415.1034.
\textsuperscript{45} FLA. STAT. § 44.405(4)(a)1. "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." Id. § 44.405(2).
\textsuperscript{46} See id. § 44.402(2).
\textsuperscript{47} Id. § 44.405(4)(a).
\textsuperscript{48} FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.200. "These Rules provide ethical standards of conduct for certified and court-appointed mediators . . . to both guide mediators in the performance of their services and instill public confidence in the mediation process." Id.
\textsuperscript{49} FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.330.
\textsuperscript{50} FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).
\textsuperscript{51} FLA. STAT. § 44.405(4)(a)1. Parties, not the mediator, hold a statutory privilege and may choose to waive it. Id.
“legal” decisions and run afoul of ethical obligations. For these mediators, the rule change will have little appreciable effect.

Notably, the rule change may well alter the way in which mediators, subject to two or more ethical codes of conduct, interpret their possibly inconsistent ethical obligations. For example, a lawyer governed by the Rules Regulating The Florida Bar, “who knows that another lawyer 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 shall inform the appropriate professional authority.” At the same time, the lawyer-mediator is obligated to maintain mediation confidentiality pursuant to the Rules for Certified and Court-Appointed Mediators. In this context, the rule change allowing mediators to make disclosures permitted by law allows the lawyer-mediator to reconcile both ethical obligations. The next section summarizes the MEAC opinions on confidentiality and discusses the ethical rule changes as they relate to MEAC opinions, including those on concurrent ethical obligations.

B. Scope of Confidentiality

Even before the Act’s passage, one of the MEAC’s early opinions painted a broad scope for mediation confidentiality, applying confidentiality before the parties came to the mediation table. In this 1997 opinion, the MEAC advised that “[i]nformation obtained from the parties prior to the commencement of mediation, which would be confidential if obtained during the mediation” is confidential. The Act comports with prior practice in identifying the beginning of mediation, for confidentiality purposes, as when a court orders the mediation, or “when the parties agree to mediate, or as required by agency rule, agency order, or statute, whichever occurs earlier.” Additionally, the Act provides for the confidentiality of communications made in furtherance of mediation. The Act “appl[ies] to any mediation . . . [r]equired by statute, court rule, agency rule or order, oral or written

53. R. REGULATING FLA. BAR 4-8.3(a). The “rule does not require disclosure of information . . . protected by rule 4-1.6 or information [obtained] while participating in an approved lawyers assistance program.” R. REGULATING FLA. BAR 4-8.3(c); see also R. REGULATING FLA. BAR 4-8.3(d).
56. FLA. STAT. § 44.404(1) (2007).
57. Id. § 44.404(2).
58. Id. § 44.405.
case-specific court order, or court administrative order" conducted under the Act "by express agreement of the mediation parties" or "[f]acilitated by a mediator certified by the Supreme Court [of Florida], unless the mediation parties expressly agree" otherwise. However, the parties may agree in writing that some sections of the Act "will not apply to all or part of [their] mediation." As a general statement, matters that fall within the definition of mediation communication, but not within any of the enumerated statutory exceptions, remain confidential. Therefore, a written apology given during a mediation that was not included in the agreement, waived by the parties, or otherwise falling within a statutory exception, met the definition of mediation communication.

Two MEAC opinions clarify the applicability of the Act. "[I]f a mediation falls within the scope of the Mediation and Confidentiality and Privilege Act, then all mediation participants are obligated to adhere to its provisions." Additionally, "[e]ach co-mediator is to be treated as a mediator subject to the . . . Act" and "many of the communications made to [staff in] the mediation unit would be included under the umbrella of confidentiality."

59. Id. § 44.402(1)(a).
60. Id. § 44.402(1)(b).
61. FLA. STAT. § 44.402(1)(c).
62. Id. § 44.402(2). "[T]he . . . parties may agree in writing that any or all of [sections] 44.405(1), 44.405(2) or 44.406 will not apply to all or part of [their] mediation . . . ."
63. Id. § 44.403(1). The definition of a "mediation communication" by the Florida Statutes is as follows:

"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 commission of a crime during a mediation is not a mediation communication.

64. FLA. STAT. § 44.405(4)(a).
65. Id. § 44.405(1).
68. "‘Mediation participant’ means a mediation party or a person who attends a mediation in person or by telephone, videoconference, or other electronic means.” FLA. STAT. § 44.403(2).
C. Rule Changes Suggest Updating Opinions

Two changes to the ethical rules regarding confidentiality may require modification of several MEAC opinions to make them consistent with the amended rules. The opinions track the language of the then-existing rules and, if answered today, would necessarily track the language of the current rules. One significant rule change no longer requires mediators to maintain confidentiality if the law permits disclosure.

Prior to August 2006, a mediator had an ethical obligation to maintain mediation confidentiality "except where disclosure [was] required by law." The present amended ethical rule advises that "[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 1995, the MEAC advised mediators "to preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information." The then-cited authority for this opinion is no longer applicable. Now, mediators must make disclosures required by law and must make decisions on whether to make disclosures permitted by law. Additionally, the Mediation Confidentiality and Privilege Act specifically permits mediators to communicate with a party's counsel. However, an act not legally prohibited is not necessarily an advisable act. Interestingly, the options presented by the MEAC in 1995 remain sound advice, even with the rule and statutory changes. Similarly, in 2005 MEAC again advised a mediator to maintain confidentiality unless required by law. The opinion dealt with a document given during mediation which, as a mediation communica-

72. Petition, 931 So. 2d 877, 883 (Fla. 2006). See also supra discussion accompanying notes 36–37.
73. Fla. R. Cert. & Ct.-Apptd. Mediators 10.360(a) (2005); Petition, 931 So. 2d at 883.
74. Id.
78. See Advisory Op. 95-010, supra note 75. The question posed to MEAC dealt with a party's phone call to his attorney's office during a break in mediation. Id. Following the phone call, the party told the mediator that he had spoken with the attorney’s assistant who advised him that he would not have to pay any attorney’s fees and the attorney for the other side was "known to 'rape' his clients financially." Id. MEAC offered two options to the mediator: "inform the party that he or she may wish to speak with his/her attorney, rather than a member of the attorney's staff," or "advise the party to contact his/her attorney to inform the attorney of [the assistant’s advice]." Id.
tion not subject to statutory exception, remained confidential. For this opinion, the rule change alters neither the result nor the reasoning.

Presently, a mediator also has an ethical obligation to inform the participants that “communications made during the process are confidential, except where disclosure is required or permitted by law.” Prior to August 1, 2006, a mediator only needed to inform the participants of the exception as required by law. Consequently, one MEAC opinion issued in 2001 should be updated to reflect the permissive disclosure. As before, a mediator need not “go into detail as to any specific statutory provisions.” Mediators are also advised to remind a party, who wishes to make a phone call to aid decision-making during mediation, of the confidentiality privilege. This is increasingly important, for following passage of the Act, a “mediation participant who knowingly and willfully discloses a [confidential] mediation communication” is subject to civil penalties. Additionally, mediators should not provide information that would lead a participant to breach confidentiality. Accordingly, it would be unethical for a mediator to “suggest that a party, without the consent of all parties, discuss mediation communications with someone who does not attend the mediation” for the mediator’s suggestion could lead the party to breach confidentiality.

D. Disclosure of Information by Mediator

Under no circumstances should a mediator report to the court that a party failed to mediate in good faith, as there is no requirement that a party me-
Mediators must maintain the confidentiality of mediation communications made during caucus unless the party consents to disclosure. "[A] mediator may establish as a ground rule for the mediation that nothing in caucus will be deemed confidential unless a party specifically indicates that it should be confidential, if the party has expressly consented to such a procedure." However, the MEAC advised that the better practice would be for the mediator to get the party's consent for specific communications before disclosing them to a party who was not present during the caucus. This would relieve the party from the burden of having to identify each and every sentence he did not want communicated, and allow the mediator to confirm the substance and form of the purposeful communications.

MEAC opinions over the last decade have addressed the confidentiality of mediator testimony, affidavits, and reports of threats. In 1997, the MEAC advised that a mediator should neither voluntarily report nor testify about threats made during mediation. This opinion warrants discussion given the 2006 rule change. The Mediation Confidentiality and Privilege Act states there is no confidentiality or privilege for any mediation communication that is "willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence." The Act does not offer guidance in determining when a communication meets this statutory

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94. See Fla. R. Cert. & Ct.-Apptd. Mediators 10.360(b). Caucus refers to private meetings between the mediator and one or some of the mediation participants. See id.
97. Id.
exception. Some mediators may wait to be ordered by the court to provide information. Others may view the statutory exception as disclosure "permitted by law." Those mediators should also take into account their other ethical obligations, notably, maintaining impartiality and responsibility to the profession, and weigh the need for immediate communication against waiting for the legal determination of whether the communication was willfully used for criminal activity or to threaten violence. Mediators well know that the same words, differently conveyed through voice and body language, take on markedly different meanings and are subject to the interpretation of the listener. Determining when a mediation communication fits within this exception may not be an easy task.

Many mediators are bound by ethical codes in addition to the Rules for Certified and Court-Appointed Mediators. In 1997, the MEAC advised that a psychologist-mediator did not have a duty to warn an individual of a threat which became known to the mediator during mediation. The opinion considered case law, the Florida statutory privilege for psychologists, and the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct in reaching its opinion. The MEAC reasoned that the mediator's primary obligation was to follow the ethical rules for mediators in the event of inconsistency with other ethical obligations.

101. See id.
102. Advisory Op. 96-005, supra note 98.
103. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(a).
106. See FLA. STAT. § 44.405(4)(a)(2) (2007).
109. FLA. STAT. § 490.0147 (1997). The statute has not been amended since 1997. See FLA. STAT. § 490.0147 (2007). Similar provisions for mental health professionals were and are found at Florida Statutes section 491.0147. Id.
112. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.030(b) (1997) read: "Nothing herein shall replace, eliminate, or render inapplicable relevant ethical standards, not in conflict with these rules, which may be imposed upon a mediator by virtue of the mediator's professional calling." The current (renumbered) rule on concurrent standards reads: "Other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediation services, however, these rules prevail over conflicting ethical standards to which a mediator may otherwise be bound." FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.650.
As mediators were then required to maintain confidentiality unless disclosure was required by law, and reporting threats was not required, mediators were obligated to maintain confidentiality. Now, however, mediators are ethically required to maintain confidentiality, “except where . . . required or permitted by law.” Psychologists may report a clear and immediate probability of physical harm to the patient or other individuals and a statutory exception exists for mediation communications threatening violence. The mediator is then left to determine whether the specific mediation communication was willfully used to threaten violence. In an earlier opinion, the MEAC also stated that, based on the rules and statutes governing mediation, “a mediator had no duty to warn because the [facts presented] did not rise to the level of imminent harm.” To date, the MEAC has not offered an opinion on a realistic threat of imminent harm made during mediation.

Mediators may testify in court if all parties waive their privilege; if ordered to testify by the court, mediators should abide by the court order. Further, “if subpoenaed, [the mediator] should either file a motion for protective order, or notify the judge . . . that the mediator is statutorily required to maintain the confidentiality.” “A mediator should always determine what, if any, statutory confidentiality provisions are applicable.”

Predating the Act’s determination that a mediation participant may disclose a mediation communication to another mediation participant’s counsel, the MEAC, in 1999, advised that “a mediator may, under certain conditions, disclose to the party’s attorney(s) the factual circumstances surrounding the mediation agreement.” However, the MEAC cautioned that it would be inappropriate for the mediator to offer a personal opinion about the case. The Act codifies and broadens permissible communication with parties’ attorneys by allowing mediation participants to disclose mediation communi-

116. FLA. STAT. § 490.0147(3) (2007). “[T]he person licensed under this chapter communicates the information only to the potential victim, appropriate family member, or law enforcement or other appropriate authorities.” Id.
117. Id. § 44.405(4)(a)(2).
120. Id. (citing Advisory Op. 96-005, supra note 98). If a party believes the court “has inappropriately obtained testimony from the mediator, the party may wish to obtain a review through the appellate courts which could strike such testimony” it deemed confidential from the record. Id.
122. Advisory Op. 99-012, supra note 119; but see Advisory Op., 95-010, supra note 75.
cations to other participants and their counsel.124 Also predating the Act, a MEAC opinion, issued in 2000, advised that a mediator was not ethically prohibited from signing an agreement to mediate stating that the mediator agrees not to voluntarily testify unless a mediation participant engages in behavior specifically identified in the mediation agreement as excluded from confidentiality.125 The question dealt with a U. S. Postal Service mediation program which excluded “genuine threat[s] of physical harm,” “suspected child or elder abuse,” as well as reports of criminal activity on or “fraud or abuse of postal property.”126 The MEAC further advised that, if an issue listed in the agreement was revealed during mediation, the mediator could “report the activity without committing an ethical violation.”127

The Act, in addition to delineating confidentiality exceptions, also allows for parties to opt-out of confidentiality provisions.128 On two occasions in 2001, and once again in 2006, the MEAC addressed the confidentiality of bar grievances.129 Most recently, the MEAC advised that “the filing of a grievance with The Florida Bar [is] . . . not prohibited by the statutory and rule confidentiality requirements.”130 In contrast, in two earlier opinions, both pre-Act and pre-rule change, the MEAC advised mediators not to voluntarily agree to testify in a bar grievance proceeding to preserve the statutory and court rule confidentiality provisions,131 and advised the non-attorney mediator not to disclose communications made during a Florida Bar Grievance mediation session, even if such testimony might be relevant in a subsequent proceeding.132 In reconciling these opinions, three critical factors are operative: statutory law, ethical rules, and whether the mediator is a non-lawyer.133

Mediators maintain the confidentiality of mediation, except where required or permitted by law. The Act only requires disclosure for abuse and

126. Id. The agreement is signed by everyone who participates in the mediation. Id.
127. Id.
128. Fla. Stat. § 44.402(2).
neglect of children and vulnerable adults. Therefore, disclosure of professional misconduct is not required by statute. However, a Florida lawyer is obligated to report another lawyer who he knows 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." Further, the mediator rules covering concurrent standards advise that, although "[o]ther ethical standards to which a mediator may be professionally bound are not abrogated, ... [i]n the course of performing mediation services, [mediation] rules prevail over any conflicting ethical standards." Accordingly, the lawyer-mediator may resolve the apparently conflicting ethical dilemma by deciding that the rules for mediators permit disclosure as required by the rules for lawyers. This is consistent with the Act, which states there is no confidentiality or privilege for any mediation communication, "[o]ffered 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." On the other hand, the non-lawyer, having no obligation to report, may wait to be ordered to testify.

III. CONFLICT OF INTEREST

A. Developments and Background

The Florida Rules for Certified and Court-Appointed Mediators governing conflict of interest were last amended in 2000 to require mediators to decline or withdraw from mediation entailing a clear conflict of interest. While previously, conflicts were subject to waiver by the parties following disclosure by the mediator, presently, a clear conflict is not subject to waiver under any circumstances. The Rules Regulating the Florida Bar saw significant pertinent amendment in 2006, when third-party neutrals were in-
cluded in the rule regarding conflict of interest, and a new rule for third party neutrals was added.

The Rules of Professional Conduct provide that, "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a . . . mediator," and parallel the preexisting rule governing representation by a former judge. In significant contrast with the mediator rules, The Florida Bar rules do permit representation, if "all parties to the proceeding give informed consent, confirmed in writing." Reconciling the difference, the Bar rules acknowledge "[a] Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators." Further, the mediator rules establish that while other ethical standards are not abrogated, "[i]n the course of performing mediation services," the mediator "rules prevail over any conflicting ethical standards to which a mediator may otherwise be bound." The newly issued Rules Regulating The Florida Bar, do not alter the MEAC opinions regarding lawyer mediators. As a result, lawyers may be precluded from representing a client based not only on the rules regulating lawyers, but on the rules regulating mediators.

B. Required Disclosure by Mediator

Mediators, prohibited from mediating matters that present clear conflicts of interest, are also prohibited from mediating matters that present undisclosed conflicts of interest. The burden to disclose potential conflicts of interest rests on the mediator, who shall disclose them as soon as practical after the mediator becomes aware of a potential conflict. Several MEAC opinions provide guidance on permissive and mandatory disclosure. An early MEAC Opinion advised that a mediator may disclose that she has mediated with an attorney, claims representative, or other

140. R. REGULATING FLA. BAR 4-1.12. The amended rule governs arbitrators, mediators and other third-party neutrals. Id.
141. R. REGULATING FLA. BAR 4-2.4.
142. R. REGULATING FLA. BAR 4-1.12(a). The rule forbids representation unless all parties to the proceedings give informed consent in writing. See R. REGULATING FLA. BAR 4-1.12 cmt.
143. R. REGULATING FLA. BAR 4-1.12 cmt. (stating rule generally parallels R. REGULATING FLA. BAR 4-1.11).
144. R. REGULATING FLA. BAR 4-1.12(a).
145. R. REGULATING FLA. BAR 4-1.12 cmt.
146. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.650.
148. Id.
parties, but is not required to do so unless there is a "close personal relationship" or other circumstances specifically referenced in the rules. 149 In contrast, in 2001, the MEAC advised that a mediator must disclose former associations, such as previous employment, but need not withdraw unless such past relationship constitutes a clear conflict. 150 If the conflict is not clear, the mediator must still disclose prior referral relationships and, if all parties consent, may proceed with the mediation. 151 Similarly, in 2003, the MEAC cautioned a mediator to be mindful of the extent of her relationship with a particular adjuster or carrier and determined "that a mediator who is routinely selected by a particular carrier or adjuster, is obligated to disclose this to the other side... and may only continue to serve if all parties agree." 152

In contrast, if the extent of the relationship does create a clear conflict, the conflict would be non-waivable. 153 Clear "conflicts occur when circumstances or relationships involving the mediator cannot be reasonably regarded as allowing the mediator to maintain impartiality," 154 and are "not resolved by mere disclosure to, or waiver by, the parties." 155 Distinguishing a waivable and non-waivable conflict, the MEAC determined that a father would not be able to mediate a case his attorney daughter was handling because it represented a clear conflict not subject to waiver. 156 However, a case handled by the daughter's firm, if she had no involvement with the case, might be subject to waiver by the parties after disclosure. 157 The mediator is ultimately responsible for determining whether a conflict is clear or waiv-


Potential conflicts of interests which require disclosure include the fact of a mediator's membership on a related board of directors, full or part time service by the mediator as a representative, advocate, or consultant to a mediation participant, present stock or bond ownership by the mediator in a corporate mediation participant, or any other form of managerial, financial, or family interest by the mediator in any mediation participant involved in a mediation. A mediator who is a member of a law firm or other professional organization is obliged to disclose any past or present client relationship that firm or organization may have with any party involved in a mediation.


151. Id.


153. Id.

154. FLA. R. CERT & CT.-APPTD. MEDIATORS 10.340 comm. notes. "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." FLA. R. CERT & CT.-APPTD. MEDIATORS 10.330(a).


157. Id.
able.\textsuperscript{158} "[I]f a conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the parties" to proceed.\textsuperscript{159}

C. Lawyer-Mediator Conflicts

The MEAC opinions identify clear conflicts prohibiting a lawyer from subsequent representation of a prior mediation party. In its second issued opinion, the MEAC confirmed that an attorney who mediated a case may not subsequently serve as co-counsel regarding the same case.\textsuperscript{160} Predictably, in the MEAC's next issued opinion, it reaffirmed that serving as counsel following service as a mediator for the same case was not permitted.\textsuperscript{161} It is similarly impermissible "for a mediator to represent either party in [a] . . . proceeding or in any matter arising out of the subject mediation."\textsuperscript{162} The prohibition against future representation is not solely based on having mediated the same subject matter for the same parties. A mediator who meets with prospective mediation parties to discuss their case, yet never mediates their case, may not ethically represent either party in their pending legal matter.\textsuperscript{163} In these fact patterns presented to the MEAC, the mediator may have been privy to confidential information that might work to a party's detriment.\textsuperscript{164} In all three fact patterns, the mediator is precluded from representing one of the parties for whom the mediator previously provided mediation services.\textsuperscript{165} For these matters, the ethical rules for mediators preclude representation regarding the same or related legal matter.\textsuperscript{166}

Lawyer mediators need to be mindful that the ethical rules for mediators may mandate greater restrictions on representation than do the ethical rules for lawyers. The amended rule governing conflict of interest for lawyers who serve as mediators provides that the "lawyer shall not represent anyone

\textsuperscript{158} See FLA. R. CERT & CT.-APPTD. MEDIATORS 10.340 comm. notes.
\textsuperscript{159} FLA. R. CERT & CT.-APPTD. MEDIATORS 10.340(c).
\textsuperscript{160} Mediator Qualifications Advisory Panel, Op. 94-002 (Jan. 19, 1995).
\textsuperscript{161} Mediator Qualifications Advisory Panel, Op. 94-003 (Jan. 19, 1995).
\textsuperscript{166} Id. Same subject matter does not refer to case category, such as automobile collisions generally, but rather the specific automobile collision. Same subject matter would refer to a post dissolution action following the same parties' dissolution of marriage. See Mediator Ethics Advisory Comm., Op. 2004-007 (Nov. 22, 2004).
in connection with a matter in which the lawyer participated personally and substantially as a . . . mediator, . . . unless all parties to the proceeding give informed consent, confirmed in writing." Written, informed consent will not permit a certified or court-appointed mediator to represent a party regarding any matter arising from the subject mediation. The provision of services, albeit limited and preliminary to formal mediation, precludes the attorney from representing a party regarding the same subject matter. This heightened ethical standard for mediators is sanctioned in the Rules Regulating the Florida Bar, which provide in the commentary: "[a] Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators." Mediators subject to multiple ethical codes follow all codes to the extent they are consistent. When inconsistent, the mediator code prevails regarding mediation matters.

Reversing the order of events so representation precedes mediation does not change the result. An attorney, who has acted as an advocate for a party, may not ethically conduct mediation for the same parties and same subject matter involved in the initial matter, irrespective of waivers from the parties. Similarly, an attorney whose firm has contemporaneous cases—in addition to the mediation matter—pending against a mediation party would have a clear conflict of interest precluding mediation of a case with the party.

Some consecutive work as lawyer then mediator, or mediator then lawyer, is ethically permissible. A mediator may handle legal work on a matter other than the subject of the mediation. However, having done so, the mediator would be precluded from re-mediating with the original parties regarding the original subject. The MEAC has advised that "[p]rior representation of a party to a mediation, which involved different parties, a differ-

167. R. REGULATING FLA. BAR 4-1.12(a).
170. R. REGULATING FLA. BAR 4-2.4.
172. Id.
ent case or different subject matter would be subject to disclosure and may be waivable based on a case by case determination.”\(^\text{177}\)

Highlighting the importance of analyzing each situation with careful attention to the factual and relational variables, the MEAC gave different answers to two similar questions posed by one mediator. “A mediator (who is also an attorney) engaged in an ongoing legal relationship with a third party administrator must not serve as a mediator in cases involving the third party administrator because it is a clear, non-waivable conflict of interest.”\(^\text{178}\) The MEAC noted that “some third party administrators are vested with full decision-making authority and hire counsel.”\(^\text{179}\) For purposes of determining mediator conflict of interest, the third party administrator is, in essence, the attorney’s client.\(^\text{180}\) In contrast, “[a] mediator (who is also an attorney) may serve [as a mediator] in cases involving a reinsurer, . . . if the relationship is disclosed and the parties waive any potential conflict . . . .”\(^\text{181}\) Unlike the third party administrator, the reinsurer is not a “party” to the case and does not have decision-making authority.\(^\text{182}\)

D. Other Potential and Actual Conflicts of Interest

A mediator who had a prior professional relationship with individuals, who are now parties to mediation, will not automatically be precluded from mediating for the parties. The MEAC has advised that mediating for parties who have been marriage counseling clients of the mediator,\(^\text{183}\) or for whom the mediator provided training, is permissible, if following disclosure by the mediator, the parties request the mediator’s service.\(^\text{184}\) Similarly, “[a] mediator is not precluded from mediating a case in which one of the parties [previously] attended a parenting course taught by the mediator.”\(^\text{185}\) When the relationship does not create a clear conflict, the mediator discloses the relationship, and all parties request the mediator’s service, the mediator may

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179. Id.

180. Id.

181. Id. The result depends on finding that no clear conflict exists. Id.


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ethically mediate for the parties. However, some relationships create clear, non-waivable conflicts requiring the mediator to decline or withdraw from the mediation. Service as an evaluator of the parent and guardian in a dependency case is such a conflict, thus precluding the evaluator from mediating the case.

The MEAC has often addressed whether a person’s primary employment prohibited him from becoming a certified mediator, or privately mediating cases. In two opinions, the MEAC advised that a guardian ad litem is not expressly prohibited from becoming a certified mediator and serving as a dependency mediator. Additionally, the rules do not prohibit a full-time mediator, who is employed by the county, from mediating privately on her own time. Consistently, a mediator’s employment as a Deputy Clerk does not inherently cause ethical problems, and working as a judicial assistant does not automatically prohibit one from mediating. Notably, mediators have an on-going obligation to determine on a case by case basis that the matters they mediate do not present either clear or undisclosed conflicts of interest.

IV. PROCESS

A. Developments and Background

“A mediator is responsible for safeguarding the mediation process.” Whether the case actually settles is secondary to the mediator confirming that each case is suitable for mediation and conducting the mediation “in an informed, balanced, and timely fashion.” Mediators have responsibilities to the parties, the courts, the profession, and the process. Virtually all

of the MEAC opinions have an impact on the mediation process. Some opinions clearly fit within one subject heading, while others may fall under two or more subjects. To avoid duplication, with few exceptions, this article discusses the MEAC opinions in only one subject section. Therefore, reference to the other subjects in this article will provide a broader overview of the mediation process.

Over the past few years, Florida has seen significant changes in mediation law, including passage of the Act, amendments to the Florida Rules for Certified and Court-Appointed Mediators, and amendments to the Rules Regulating the Florida Bar related to mediation. Accordingly, in 2006 the MEAC for the first and only time changed a published position, thereby rescinding portions of three previously issued opinions. Changes in the statutory law governing confidentiality necessitated a change in the MEAC’s position that approved a mediator reporting to the court that a party who lacked full settlement authority failed to appear for mediation. This section will discuss the changed position, identify opinions subject to reconsideration, and summarize the remaining MEAC opinions relating to the process of mediation.

B. Changed Position—Lack of Full Settlement Authority

In several opinions, the MEAC advised that a party who appeared for mediation without the requisite settlement authority had not appeared for mediation, and his lack of appearance could be reported to the court. This conclusion was premised on the applicable Florida Rule of Civil Procedure, which defined appearance as requiring the individual to have full settlement authority. While seemingly illogical that one who physically appears has not legally appeared, case law interpreting the procedural rule supports this conclusion. The law remains the same regarding the individual’s obliga-
tion to appear for mediation.203 The law regarding the mediator’s reporting such nonappearance has changed.

The Mediation Confidentiality and Privilege Act provides that all mediation communications are confidential unless the parties agree otherwise or the statute provides an exception.204 For confidentiality purposes, mediation commences when the court orders mediation, the parties agree to mediate, or as required by agency or statute.205 Therefore, by the time the participants appear for the scheduled mediation and advise the mediator of less than full settlement authority, the mediation has commenced and the mediator has the ethical obligation to maintain confidentiality unless required or permitted by law or the parties agree to the disclosure. No statutory exception to confidentiality exists for advising the court of lack of settlement authority learned by the mediator during the course of the mediation. Therefore, it is a confidential communication unless the parties agree to its disclosure. Admittedly, a participant positioned to be sanctioned by the court for his nonappearance206 is likely disinclined to grant permission for the mediator to communicate this information.

In MEAC 2006-003, the Committee states the reasons for its departure from its previous position and rescinds portions of three previously issued opinions.207 In two earlier opinions, the MEAC distinguished between information learned by the mediator in caucus as opposed to joint session.208 Previously and presently, the information learned in caucus necessitated confidentiality because an ethical rule prohibited the mediator from disclosing this information without party permission.209 The same analysis now applies to information regarding settlement authority learned of in joint session; statutory law requires the mediator to keep the communication confidential absent a legally recognized exception.210 Therefore, the mediator’s obligation to maintain confidentiality is now consistent and not altered by whether information was learned in caucus.

203. FLA. R. CIV. P. 1.720(b)(1); see also Mediator Ethics Advisory Comm., Op. 2002-001 (Mar. 22, 2002) (stating that a party’s appearance requirement is not satisfied by appearance of party’s counsel or in-house counsel).
204. FLA. STAT. § 44.405(1) (2007).
205. Id. § 44.404(1).
206. FLA. R. CIV. P. 1.720(b). “If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion shall impose sanctions, including an award of mediator and attorneys’ fees and other costs, against the party failing to appear.” Id.
C. Appearance, Authority to Settle

Mediators may report lack of appearance by a party when the party does in fact fail to physically appear. Failing to appear is not a mediation communication and may be reported to the court. A mediator’s “report to the court regarding nonappearance should not include any reason for the nonappearance.”

A mediator lacks the authority to compel attendance at mediation and does not have an affirmative duty to inquire about settlement authority. Nonetheless, if an attorney-in-fact appears for a party found to be incompetent to proceed in criminal court, the legal authority of the representative should be resolved before proceeding with the mediation.

Notably, although parties may be court-ordered to mediation, no rule requires a party to “negotiate in good faith.” Thus, a mediator should not report failure to mediate in good faith and should limit reported matters to those authorized by applicable court rule. Further, a mediator has the affirmative obligation to decline to mediate if the order of referral to mediation requires the mediator to report to the court whether the parties mediated in good faith.

“When the mediation is court ordered, the parties are required to appear at mediation.” In 1995, the MEAC advised that if a party leaves prior to the mediator completing an opening statement, the mediator may report nonappearance. However, eleven years later the MEAC receded from the opinion “relating specifically to the mediator’s report to the court based on

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212. See Fla. Stat. § 44.403(1). “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.” Id.
217. Id.
220. Id.
MEAC has not been asked to revisit this opinion since the passage of the Act; it is not known whether the MEAC would continue to maintain that failure of a party to sit through the opening statement is tantamount to a party’s failure to appear.

D. Advice and Forms

While prohibited from giving legal advice, mediators must at times advise parties of their right to counsel. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel. However, a mediator does not have a duty to advise a party of the specific legal ramifications of a considered agreement. Similarly, a mediator has no ethical obligation to advise a party who does not have counsel in a family mediation to take the signed agreement to an attorney for review. The mediator does have a duty to advise the parties of the importance of understanding the legal consequences of an agreement and giving the parties an opportunity to seek advice if they desire. The applicable Rule Regulating the Florida Bar reads:

A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.

225. Mediator Ethics Advisory Comm., Op. 2003-002 (May 22, 2003). See also Kalof v. Kalof, 840 So. 2d 365, 366 (Fla. 3d Dist. Ct. App. 2003) (limiting Fla. Fam. L. R. P. 12.740(f)(1) to the unusual situation in which a party’s counsel leaves the mediation before the agreement is ready for signature and the client remains to sign the mediated agreement). Under these circumstances, party’s counsel would have ten days from service of a copy of the agreement to serve a written objection on the mediator. See id. at 366–67.
227. R. Regulating Fla. Bar 4-2.4(b). The Florida Bar has withdrawn Florida Bar Ethics Opinion 86-8, see Fla. Bar Prof’l Ethics Comm., Op. 07-2 (Sept. 7, 2007), which required attorneys who mediate to “explain the risks of proceeding without independent counsel and advise the parties to consult independent counsel during the course of the mediation and before signing any settlement agreement.” Fla. Bar Prof’l Ethics Comm., Op. 86-8 (Oct. 15,
The commentary to the rule further provides that disclosure will vary based on the parties, subject matter, and dispute resolution process.228 Mediators may, while maintaining their impartiality and preserving party self-determination, provide information they are qualified by training and experience to provide.229 Mediators are, however, strictly prohibited from predicting how the court will rule,230 and from directly or indirectly giving legal advice.231 Posing questions rather than making statements does not negate the impropriety of the legal advice.232 For example, inquiring whether a party is aware that the agreement provides for a significantly higher interest rate than would a judgment is inappropriate.233 Similarly, a mediator may not inform a party "of a right to make a claim."234 A mediator may not ask why a claim is not being made, but should determine the competency of the party to enter into negotiations and proceed without counsel.235 Consistently, if a party is unaware of a potential cause of action, a mediator is precluded from pointing this out as doing so would be giving legal advice.236 Inappropriate advice may also arise in a mediator's provision of additional services. For example, "[d]rafting pleadings and providing advice on how to file them would be an inappropriate additional service not directly related to the mediation process."237 "While a mediator may assist the parties in completing authorized forms, a mediator should stop short of ‘drafting’ the Petition for Dissolution, Answer, or other pleadings."238 "[A]ssisting pro se litigants with filling out forms approved by the Supreme Court of Florida after a mediation is not a per se violation of the mediator ethical standards."239 However, a mediator should exercise caution "to ensure compliance with mediation rules and other professions’ standards of conduct."240 Additionally, non-lawyer mediators

1986). As this opinion is now withdrawn, Florida mediator ethics and attorney ethics appear consistent in this area.
228. R. REGULATING FLA. BAR 4-2.4 cmt.
232. Id.
233. Id.
235. Id.
238. Id.
239. Id.
must be cautious not to give legal advice so as to engage in the unlicensed practice of law—a third degree felony.\footnote{241}

E. \textit{Withdrawing from, Declining, and Discontinuing Mediation}

Mediators are, at times, ethically required to decline to mediate, withdraw from the mediation, adjourn, or terminate the mediation. A mediator should decline to mediate when the court order "contains provisions contrary to the mediator's role and requires the mediator to act in a manner inconsistent with the mediator's ethical rules."\footnote{242} For example, a court order requiring the mediator to advise the court if the parties are not mediating in good faith would create an irresolvable ethical dilemma for the mediator.\footnote{243} Further, a mediator is also ethically obligated to withdraw if a party requests that he no longer continue or the mediator is no longer impartial.\footnote{244} However, if the parties agree, the mediator may continue the mediation in a different format such as a co-mediation or a bifurcated proceeding.\footnote{245}

A mediator is required to adjourn or terminate a mediation if he believes it "entails fraud, duress, absence of bargaining ability, or unconscionability."\footnote{246} Upon the request of a party, "[a] mediator should declare an impasse, \ldots but need not immediately cancel a mediation because a party calls an attorney or other \ldots advisor."\footnote{247} Significantly, a mediator should not prematurely declare an impasse based on arbitrary time limits or because a judge requests that the mediation be concluded.\footnote{248} "While a judge may interrupt the mediation and request that it be concluded," the mediator should not declare impasse unless the parties have in fact reached impasse.\footnote{249} "The appropriate report to the court should be an 'adjournment' if the parties will return at a future time, or 'termination by the court' if the parties will not return to mediation."\footnote{250} Mediation emphasizes self-determination,\footnote{251} the

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\item \footnote{241}{FLA. STAT. § 454.23 (2007).}
\item \footnote{242}{Advisory Op. 2004-006, \textit{supra} note 89.}
\item \footnote{243}{\textit{Id}.}
\item \footnote{244}{Advisory Op. 2005-005, \textit{supra} note 67. For discussion of MEAC opinions on conflict of interest requiring the mediator to withdraw, see \textit{supra} Part III B.}
\item \footnote{245}{Mediator Ethics Advisory Comm., Op. 2000-005 (Aug. 31, 2000).}
\item \footnote{246}{Mediator Ethics Advisory Comm., Op. 2004-009 (Mar. 18, 2005); see also Advisory Op. 2003-001, \textit{supra} note 152 (advising the mediator to "adjourn or terminate a mediation where there is a complete absence of bargaining ability").}
\item \footnote{247}{Advisory Op. 2001-004, \textit{supra} note 90.}
\item \footnote{248}{Mediator Ethics Advisory Comm., Op. 2001-007 (Sept. 26, 2001).}
\item \footnote{249}{\textit{Id}.}
\item \footnote{250}{\textit{Id}.}
\end{thebibliography}
parties' needs and interests, fairness, and procedural flexibility. "Decisions made during a mediation are to be made by the parties." Should a mediator decide an impasse is reached based on arbitrary time limits, it would violate "the parties' self-determination and the mediator's responsibility to protect such self-determination."

F. Scheduling Mediation

When scheduling cases, a "mediator must allow 'sufficient' and 'appropriate' time for completing mediation, and should not double . . . book mediations." Although a mediator may schedule a mediation without the advance agreement of all parties, a party may request that the mediation be rescheduled. As a general rule, "[i]f a party [requests] that the mediation be rescheduled for 'good cause,' the mediation should be rescheduled to a mutually convenient time." A mediator may violate ethical rules through scheduling mediations by: 1) "[i]nitiating the mediation process without the required judicial involvement;" 2) "[r]eferring sanctions for failure to participate in a mediation" when the case was not "court-ordered to mediation;" or 3) "[b]y contracting with only one party in a dispute," possibly violating the impartiality requirement.

G. Non-Party Participants and Contact with Parties

Early MEAC opinions addressed a mediator's permissible contact with the parties, stating that a "mediator is not prohibited from having contact

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254. Advisory Op. 2001-007, supra note 251. The mediator asked whether a judge, using a bailiff, may interrupt the mediation after a specific period of time, based on the judge's determination that if the matter was not resolved within a time frame determined by the judge, an impasse should be declared with the parties signing a statement of non-agreement. Id.


257. Id.

258. Mediator Ethics Advisory Comm., Op. 2003-004 (May 22, 2003). The facts presented to the MEAC stated that the mediator was hired by the attorney of one party. Id. The mediator then sent a letter to the unrepresented party stating that by Administrative Order, the party was required to attend mediation. Id. The mediator also gave the date of the scheduled mediation and advised that failure to participate in mediation prior to trial may result in sanctions. Id.
with either party . . . before or after the mediation.”259 Objection of a party’s counsel to have contact with his client does not prohibit the mediator from contact with the party, but the mediator should consider the impact of the action.260 Additionally, with the consent of counsel, the parties, and stipulation of confidentiality, contact with the parties after mediation in an effort to resolve the case was also permissible.261

Parties, in their exercise of self-determination, decide who will attend their mediation. Accordingly, a mediator is not permitted to dictate who attends the mediation.262 If all parties agree on the attendance of non-party participants, the participants would be bound by confidentiality pursuant to the Act.263 If the parties agree, a non-lawyer may participate and assist a party during mediation.264

Significantly, as both the number and types of cases going to mediation increase, parties are increasingly making decisions about who will participate in their mediation. In criminal matters, parties may choose to proceed with a deputy inside or right outside the mediation room.265 However, in responding to a question regarding a civil case, the MEAC advised that if an armed guard is a necessary ingredient to a mediation and the mediator believes there is an absence of bargaining power or a troubling power imbalance, “the mediator should suspend or terminate the mediation.”266

H. Mediated Agreements

“[A] mediator is obligated to see that a mediated agreement is reduced to writing,” but a mediator is not obligated to personally draft the agreement.267

This rule is consistent with the statutory provision requiring a family mediator to prepare a consent order because the statute merely requires that the mediated agreement be incorporated into the consent order the mediator prepared.268 A mediator does have the obligation to see that the agreement is properly memorialized.269 “While a mediator cannot compel parties who

263. Id.
266. Id.
268. Id.
269. Id.
have reached an agreement to put such agreement in writing, the mediator does have the obligation to "discuss with the parties and counsel the process for formalization and implementation of the agreement."\textsuperscript{270} Having mediated a case, the mediator may not escape ethical obligations by claiming to act as scrivener rather than mediator.\textsuperscript{271} Additionally, when memorializing the "agreement, a mediator must observe the ethical rules regarding impartiality, professional advice, and other professions' standards, such as the unauthorized practice of law."\textsuperscript{272} It is not appropriate for a mediator to routinely attach a copy of the mediated agreement to the Mediation Disposition Report which is submitted to the court.\textsuperscript{273} It is never "the mediator's role to make substantive decisions for the parties."\textsuperscript{274}

V. BUSINESS

A. Developments and Background

"A mediator's business practices should reflect fairness, integrity and impartiality"\textsuperscript{275} and "[a] mediator is responsible for maintaining . . . forthright business practices."\textsuperscript{276} These obligations appear in the Florida Rules for Certified and Court-Appointed Mediators in the sections governing mediators' responsibilities to the parties and the profession, respectively.\textsuperscript{277} Such obligations underscore the importance of business matters in the ethical performance of mediation. Approximately twenty-five percent of the ethical questions posed to the MEAC regard business matters.\textsuperscript{278} This section organizes, summarizes, and discusses the business MEAC opinions issued over the last thirteen years.\textsuperscript{279}

\textsuperscript{270} Id.
\textsuperscript{272} Advisory Op. 2004-004, supra note 237.
\textsuperscript{273} Mediator Ethics Advisory Comm., Op. 2007-002 (May 1, 2007). The parties may agree to have a copy of the mediated agreement attached to the report which is submitted to the court. Id.
\textsuperscript{274} Advisory Op. 2004-004, supra note 240.
\textsuperscript{275} Fla. R. Cert. & Ct.-Apptd. Mediators 10.300.
\textsuperscript{276} Fla. R. Cert. & Ct.-Apptd. Mediators 10.600.
\textsuperscript{277} See Fla. R. Cert. & Ct.-Apptd. Mediators 10.300, 10.600.
\textsuperscript{278} This section on Business MEAC opinions includes 29 of the 114 opinions issued through August 2007.
\textsuperscript{279} Although the 2006 Rules were amended to substantially change mediator certification requirements, MEAC's jurisdiction does not include certification matters and therefore they will not be addressed in this section. See Mediator Ethics Advisory Comm., Op. 2006-001 (Apr. 6, 2006). The Supreme Court Committee on Alternative Dispute Resolution Rules and Policy filed a petition with the Supreme Court of Florida proposing amendments to the Florida
B. Referral and Selection

"A mediator may not compensate another for merely making a referral, but may compensate a colleague or mediation service for actual work performed . . . ."\textsuperscript{280} The MEAC provided examples of actual work subject to compensation that included "scheduling and noticing mediations, and billing [and] collecting mediation fees."\textsuperscript{281} This opinion reaffirms the mandate that "[n]o commissions, rebates, or similar remuneration shall be given or received by a mediator for a mediation referral."\textsuperscript{282}

In a second opinion regarding referrals, the MEAC addressed the matter of attorney-mediators referring cases to and receiving referrals from a firm for a fee.\textsuperscript{283} The questioner stated that, he occasionally both referred cases for which he received referral fees and accepted cases for which he paid referral fees.\textsuperscript{284} The MEAC opinion does not discuss the ethics of attorneys taking or receiving referral fees—for this is clearly not within its limited jurisdiction. Attorneys, as mediators, are prohibited from taking or receiving referral fees.\textsuperscript{285} They may give and receive compensation for actual work performed. The questioner may well have used the term "referral attorney fees" loosely, and the work may have justified the financial transaction. As with all matters having to do with ethical considerations based on codes of conduct for other professions, the professional is governed by the applicable code of conduct.\textsuperscript{286} Notably, in the case of attorney-mediators, the codes are consistent in prohibiting fees for the mere referral of cases.\textsuperscript{287}

\textsuperscript{281} Id. This opinion also states that "a mediator may compensate another for [the] use of office space." \textit{Id.}
\textsuperscript{282} FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.380(e).
\textsuperscript{283} Advisory Op. 2001-009, supra note 147. The MEAC advised that "[r]eferring cases to [and] receiving referrals from a firm for a fee may constitute a [clear] conflict" necessitating the mediator’s withdrawal. \textit{Id.} Additionally, the MEAC advised that a mediator must disclose former associations, such as previous employment. \textit{Id.}
\textsuperscript{284} \textit{Id.}
\textsuperscript{285} FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.380(e); R. REGULATING FLA. BAR 4-1.5.
\textsuperscript{286} See R. REGULATING FLA. BAR 4-1.12 cmt.
\textsuperscript{287} See FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.380(e); R. REGULATING FLA. BAR 4-1.5.
Mediators, in addition to getting referrals, often get cases by court appointment or agreement of the parties. In 1998, the MEAC advised that the rules of procedure "[do] not contemplate the court appointing a corporation" as a mediator; however, courts may and do appoint individuals associated with a mediation group. During the same year, also regarding mediation referrals, the MEAC advised that pre-suit mediation agreements that "name a specific individual as the exclusive mediator" are suspect.

Two MEAC opinions address the propriety of mediators working with mediation services corporations or organizations. In 1999, it advised that a non-lawyer may start a private mediation network of certified mediators, both lawyers and non-lawyers, who conduct mediations across the state. Accordingly, the non-lawyer may pay the lawyer and non-lawyer mediator based on a flat fee arrangement for the mediation services they render. However, even if an entity solicits business and handles bookings and payment arrangements, the individual mediator is the one bound to abide by all the ethical rules and "adhere to the highest standards of integrity, impartiality, and professional competence." Similarly, a law firm may maintain a mediation department within the firm as long as the mediation practice is conducted in conformity with the Rules of Professional Conduct. Under Florida Bar ethical constraints, non-lawyers "may not have an ownership interest in either the law firm or [its] mediation department," and the attorney advertising rules apply to the firm's mediation department.

Mediator networking also raises ethical issues. An early MEAC opinion identified problems with the networking organization described in the posed question. The concerns included "mediator impartiality, fee arrangement, and [mediator] integrity." The MEAC noted the critical distinction between the allowable administrative fee and the prohibited referral

293. Id.
294. FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.030 (1999); Advisory Op. 99-011, supra note 291. This opinion does not address the matter of appropriate business solicitation and should be read in conjunction with MQAP 98-003 regarding courts not appointing corporations as mediators. See Advisory Op. 99-011, supra note 291; Advisory Op. 98-003, supra note 289.
297. Id.
fee banning remuneration for the "referral of clients for mediation or related services." 

Also troubling to the MEAC was the company’s hope of entering into business relationships with "attorneys, businesses, [and] insurance companies" as their "exclusive purveyor of [mediation and arbitration] services." 

The MEAC cautioned the mediator against entering into a relationship resulting in a financial connection that might cause "the mediator [to] lose objectivity and impartiality." It also cautioned that a mediator’s use of questionable marketing strategies—in derogation of the traditional court system—might raise questions about the mediator’s integrity, for a mediator is charged with "adher[ing] to the highest standards of integrity" and prohibited from "undertak[ing] any act . . . compromis[ing] the mediator’s integrity."

C. Advertising and Soliciting

A Supreme Court of Florida certified mediator must "ensure that ‘all advertising . . . represent[s] honestly the services to be rendered [and makes] [n]o claims of specific results or promises which imply favoritism to one side . . . for the purpose of obtaining business."

Additionally, "[a] mediator shall make only accurate statements about the mediation process, its costs and benefits, and the mediator’s qualifications."

It is therefore unethical to advertise that mediation is "a dispassionate evaluation by a neutral party," as this definition is inaccurate and inconsistent with the statutory definition of mediation. Consequently, it would be misleading and unethical

298. Id. (citing FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.100(c) (1996)). The applicable rule following the 2000 Revision is 10.380(e).


300. Id.

301. Id. (quoting FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.030(a)(1) (1996)). The applicable rule following the 2000 Revision is 10.620.


303. Id. (quoting FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.130 (1996)).


"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, decisionmaking 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.
"for mediators to advertise that they are providing evaluation services under the guise of mediation."\(^{305}\)

The MEAC has addressed several questions regarding the content of advertisements. It has advised that a certified mediator should not use the state seal or the seal of the Supreme Court of Florida "on any advertisement without express permission" to do so.\(^{306}\) Additionally, "[t]he generic designation, ‘certified mediator,’ is inherently misleading," and its use without identifying the specific areas of mediation certification is violative of the ethical rule governing advertising.\(^{307}\) Also misleading and violative of the rule, is the use of letterhead which includes two names and the statement "Circuit Court Mediation," where only one of the named parties is a certified circuit court mediator.\(^{308}\) Similarly, a mediator’s advertisement in which the mediator is referred to as a judge, "may confuse or mislead the public," requiring the mediator to include clarifying information for use of the term judge to be permissible.\(^{309}\)

Mediators are permitted to send letters to attorneys and other individuals advertising their services.\(^{310}\) They may also send follow-up letters with information about their available services after the mediation has ended.\(^{311}\) The letters must be consistent with the advertising requirements and the requirement for mediator impartiality.\(^{312}\) Additionally, mediators are not prohibited from soliciting letters of reference from persons for whom they have mediated.\(^{313}\) These evaluations are not categorically prohibited in advertising, so long as the advertising is truthful.\(^{314}\)

The MEAC has also answered questions about mediator sponsored events and the purchase of items and meals, determining “that logo embossed items of minimal value are permissible forms of advertising,” whereas items of greater value “may create the appearance of mediator bias and
raise doubts as to the mediator’s neutrality.” 315 “[L]unches and golf outings [paid for by the mediator] for the purpose of developing goodwill and attracting . . . clients can create the appearance of bias,” and therefore, are inappropriate activities. 316 However, sponsoring a sports tournament which is open to the public or holding a silent auction to raise money for charity, while incorporating the name of a mediation firm in advertising the event, is permissible if consistent with the rules for impartiality, conflict of interest, advertising, and integrity. 317

While mediators may not use the mediation process to solicit future business, 318 they may provide information such as a mediator’s business card. 319 Specifically, a mediator may respond to a party’s request for a business card as they walk back to the court following mediation, even if the other party is not a witness to the request. 320 The mediator could have provided the card at a point in time earlier in the mediation, and is also allowed to do so at a later time. 321

Mediators may use creative means that are consistent with ethical requirements to advertise. For example, a mediator may produce a television show with real parties in a live mediation, so long as “the parties are informed of their statutory right to confidentiality and they waive that right.” 322 However, if a mediator was not competent to handle the cases for which he is advertising, or he provided information that was false or misleading, then the advertisement would violate rule 10.610 of the Florida Rules for Certified and Court-Appointed Mediators. 323

D. Fees and Payment

“A mediator must comply with ethical and procedural rules in relation to charging fees for mediation.” 324 Failure to do so [results in] an ethical vio-

316. Id. A mediator is not precluded “from giving or accepting de minimis gifts or incidental items . . . to facilitate the mediation.” FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.330(c) comm. notes.
320. Id.
321. Id.
Accordingly, a mediator must notify the parties of payment terms "within a reasonable period of time prior to the mediation." A mediator who participates in a program, such as the Department of Business and Professional Regulation's Homeowners Association Program, providing for fee allocation, must disclose the fee allocation sufficiently before mediation begins to give the parties the opportunity to either agree to the allocation or negotiate another fee arrangement. Additionally, a mediator who agreed "to perform services for a specified fee [via court order, must] perform such services at that fee unless relieved of that duty by the court." Like other professionals, mediators who are not paid for services they rendered, "may seek payment in any lawful manner."

E. Notes and Records

On two occasions, the MEAC declined to answer questions regarding retention or disposal of mediation records, stating the matter was not ethical in nature, and therefore, not within the scope of its jurisdiction. The MEAC has replied to two questions regarding mediation notes, advising that "there is no statutory rule or requirement that a mediator's notes taken during a family mediation be kept in the [court] file." To the contrary, any "notes which relate to confidential information [shall not] be part of a [public] file." "[T]he voluntary disclosure of a mediator's notes . . . is fraught with potential risks and hazards." While a mediator does have discretion with regards to providing his or her notes upon request of a party, "a mediator should carefully weigh the benefits and perils of sharing this information, and should proceed with the utmost caution."
F. Mentorship, CME, and Gifts

Certified mediators have an ethical obligation to allow a minimum of two observations of their mediations per year, but are not obligated to allow co-mediation or supervised mediation.335 "[A] certified mediator is required to preserve the quality of the profession, to maintain forthright business practices, . . . [refrain from] provid[ing] any service that would compromise [his] integrity or impartiality, . . . and . . . support the advancement of mediation by participating in public education."336 Consistent with these provisions, charges for continuing mediator education programs may be determined by the competitive market.337

In 1999, the MEAC wrote that the rules imply mediators may not give gifts to court personnel.338 However, subsequent to that opinion, the 2000 Revision Committee Notes read, "[g]iving gifts to court personnel in exchange for case assignments is improper. De minimis gifts generally distributed as part of an overall business development plan are excepted."339 The impropriety seems to arise from the intent to improperly influence court personnel, rather than the giving of generally distributed de minimis gifts. Additionally, a mediator has an affirmative obligation to maintain impartiality, including "neither giv[ing] nor accept[ing] a gift, favor, loan, or other item of value . . . [d]uring the mediation process."340

VI. CONCLUSION

Florida stands squarely in the forefront of the establishment and enforcement of mediator ethical standards. With over two decades of experience with court-connected mediation, a vast body of mediation case law, statutes, rules of procedure, and finely tuned ethical rules, Florida offers a wealth of information to attorneys, mediators, and mediation participants. Building on the firm foundation of the comprehensive Act, the 2006 amendments to the Rules for Certified and Court-Appointed Mediators and Rules Regulating the Florida Bar provide further direction regarding concurrent ethical standards, and go a long way in providing mediators with ethical

337. Id.
guideposts. Yet, there will always be some unmarked and unforeseen forks in the road. The MEAC opinions provide a roadmap of past questions asked and answered to assist with present and future decisions. This article is part of the continuing dialogue in which mediators engage to identify ethical issues, consider and evaluate options, and reach satisfactory resolution. The MEAC opinions serve as additional signage for mediators to locate and follow the highest road.