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Mediation Is Not Like Vegas

While many believe the Las Vegas rule – what happens here, stays here – is a good rule, some lawyers and parties in mediation may think the same rule applies to what happens at mediation. Not exactly.

The Florida Mediation and Confidentiality Privilege Act at 44.401, *et. seq.* affords the parties and their attorneys the right to expect the discussions are not offered as evidence and broadly states "a mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel." However subsection 44.405(4) provides for six exceptions to the rule of non-disclosure. Subsection 44.450(4)(a)(6) permits a party to disclose mediation communication to report, prove or disprove professional misconduct occurring during the mediation solely for the internal use of the body investigating the conduct. Unethical behavior, including lying and deceptive acts, and making false statements of fact by an attorney to the mediator or other participants, are forbidden and could be reported to the Florida Bar as falling within the exception to the rules governing confidentiality.

Most mediators agree that some posturing, shading and discussing "what you hope to prove" is permitted. But there is a line one can cross. Falsely declaring that one has paid certain medical bills that were not in fact incurred, misrepresenting the limits of insurance available, the amount of prior settlements, and other knowingly deceptive statements of fact by a lawyer are considered unethical acts under the Rules of Professional Responsibility (see e.g., 4-4.1

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"Truthfulness in statements to others" and Rule 4-3.4 "Fairness to Opposing Party and Counsel"). A false statement of material fact to a third person violates the Rules of Professional Conduct (4-4.1(a) and mediation affords no exception. *In re Amendments to the Rules Regulating the Florida Bar*, 101 So.3d 807, 831(Fla. 2012)(noting exception to confidentiality for professional misconduct occurring during mediation).

Mediation rules afford plenty of room for creative arguments, "what ifs" and loose banter. But don't let the freedom of the informal mediation process and your desire to make a deal on favorable terms cause you to lose sight of the ever-present ethical mandates.

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