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Rulemaking Should Be Reevaluated on Bilingual Family Mediation

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When the court is focused on increasing access to justice and the legal process, it is surprising that recent rulemaking is limiting access to bilingual mediators.

A recent opinion of the mediation ethics advisory committee, a standing advisory committee of the Florida Supreme Court, seems to impose harsh, albeit unintended, restrictions on the mediation process, particularly for family law matters. Considering the significant demand in multicultural Florida for bilingual mediators, the MEAC should reevaluate its position in this matter.

Some background: For more than 30 years, the mediation process has been one of the most familiar and routinely utilized alternative dispute resolution methods for parties to resolve their disputes outside of the courtroom. Florida has 5,810 certified mediators in the areas of county, circuit, family and dependency. Although mediation is often scheduled on a voluntary basis, all contested family court cases in Florida are referred by the court to mediation before trial.

Neutrality of the mediator is at the core of the mediation process. For example, a mediator may not engage in the dual role of notary and mediator. Likewise, the mediator may not advocate for either party and may not provide any service other than those "confined to the services necessary to provide the parties to reach a self-determined agreement."

Florida was particularly affected by the overwhelming number of residential foreclosure actions, which plagued the nation a few years ago, and a

foreclosure mediation program was created to move the thousands of cases through the legal system.

At the height of the foreclosure crisis in 2011, the MEAC determined that serving the dual role of mediator and interpreter or translator creates a perception of bias and would violate the impartiality rules governing mediators. Impartiality encompasses "word, action or appearance." At the time, the ethical question in foreclosed involved homeowners as the Spanish-speaking party. According to 2013 Census Bureau reports, Spanish is the most common foreign language spoken in Florida and is spoken by an estimated 25 percent of state residents, or 3.6 million Floridians.

Intimate Issues

In late 2014, that advisory opinion was expanded. Although a mediator may conduct mediation in a foreign language common to all parties, the mediator may not memorialize the agreement in a different language. The MEAC concluded this amounted to a conflict of interest. Further, the parties may not expressly waive the conflict, so waiver is not a solution.

A mediator may not translate or read back in Spanish an agreement reached and written in English unless the mediator is a competent translator and the parties understand the English language in the written agreement.

One should question whether the competency of the mediator as an interpreter or translator was given any consideration to support this advisory opinion. If so, should the competency of the bilingual mediator be measured or tested to ensure they are effective and proficient to mediate in two languages?

One may argue the parties expressed self-determination and informed consent when they selected and agreed on appointment of a bilingual mediator. Bilingual mediators have provided and should continue to provide a positive and significant option to litigants. The mediation session is confidential and closed to all parties except the petitioner, respondent and their attorneys. Third parties are not admitted to the mediation session without the consent of the parties.

In family law matters, which involve the couple's most intimate issues, it is especially important to maintain confidentiality. By requiring a third-party translator, one may be compromising the mediation process because the parties may feel inhibited, embarrassed or otherwise unwilling to participate fully in the process as a direct result.

One alternative to comply with the advisory opinion may be that the mediator conducts the mediation in the foreign language and assists in writing the settlement agreement in that language. Thereafter, the agreement must be formally translated into English by a translator.

Another option is for the parties to be responsible to retain an interpreter to attend the mediation. Unfortunately, it is not likely these options would be viable as either alternative interjects an additional cost that oftentimes the parties either cannot afford or cannot agree to split.

Without a doubt, the time has come for the MEAC to revisit the matter independent of the backdrop of the foreclosure crisis that gave rise to the advisory opinion.

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