

## **Mediation: Secret Recording by a Party (Florida Mediator Ethics Advisory Opinion 2023-002)**

**Video Clip:** [https://open.mitchellhamline.edu/dri\\_mclvideo/52/](https://open.mitchellhamline.edu/dri_mclvideo/52/)

### **Overview of the Scenario**

During a Zoom mediation, one party disclosed in private session that they had recorded the joint session (audio and video) without prior consent of the mediator or other participants. Florida law generally requires consent from all participants to record conversations, so this recording may constitute a crime. The mediator sought an ethics advisory opinion from the Florida Supreme Court's Mediator Ethics Advisory Committee. **NOTE:** Law of recording conversations varies from state to state.

### **Classroom/Training Objectives**

- Apply ethics and relevant court rules to a complex ethical dilemma.
- Explore confidentiality, process quality, self-determination, impartiality, and evolving technology risks in mediation.

### **Key Teaching Points**

- Under relevant Florida law, mediators are permitted but are not obligated to disclose unauthorized recordings to other parties, the court, or law enforcement.
- In a state that mandates prior consent from all participants to record conversations, recording by a party without consent involves potential criminal activity and mediator withdrawal (and termination of the mediation) is necessary to protect process integrity.
- Mediators may, but are not required to, include non-recording policies in written agreements or opening statements.

### **Analysis (Florida Mediator Ethics Advisory Opinion 2023-002)**

Once learning about the recording without consent:

#### **Is the mediator obligated to disclose such information to those who have been recorded without consent?**

No. A mediator may, but is not obligated to, disclose the fact a recording was made to those who were recorded without their consent.

#### **Is the mediator required to terminate the mediation?**

Yes. If the mediation entails fraud, duress, the absence of bargaining ability, or unconscionability, a mediator must terminate the mediation. 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.

#### **Is the mediator obligated to inform the court or law enforcement?**

No, a mediator is not obligated to inform the court or law enforcement, but a mediator may report the infraction.

**Does the mediator violate confidentiality if they choose to disclose to the recorded parties, the court or law enforcement?**

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.

**Analysis (2005 Revised Model Standards of Conduct for Mediators)**

**Standard I: Self-Determination**

- **Principle:** Mediators must support parties in making voluntary, informed, and uncoerced decisions.
- **Application:** Secret recordings compromise party self-determination. Parties cannot make fully informed decisions if they are unaware that their conversations are being recorded.

**Standard II: Impartiality**

- **Principle:** Mediators must maintain impartiality throughout the process.
- **Application:** Discovery of covert recording by one party threatens the balance of fairness. Even if the mediator remains impartial, the process itself may no longer appear impartial. Impartiality is not merely avoiding bias; it includes managing the environment to ensure no party gains unfair advantage. Allowing undisclosed recording risks public confidence in mediation’s fairness.

**Standard V: Confidentiality**

- **Principle:** Mediators must maintain confidentiality of all mediation communications, except where exceptions apply.
- **Application:** Florida's Mediation Confidentiality and Privilege Act allows exceptions when communications are "used to plan or commit a crime." The covert recording falls into this exception, allowing disclosure. Same might be true in other jurisdictions.

**Standard VI: Quality of the Process**

- **Principle:** Mediators are responsible for ensuring that the mediation process is conducted fairly, diligently, and safely.
- **Application:** Secret recordings compromise the quality of the process by violating ground rules of mutual trust, safety, and fairness. Continuing under such conditions risks harm to all participants.

**Analysis (Case Law)**

At least one court has considered civil liability for unauthorized secret recordings in mediation. In *Glaser v. Mitchel*, No. A155815, 2019 WL 5800428 (Cal. Ct. App. Nov. 7, 2019), as modified on denial of reh'g (Nov. 27, 2019), the court affirmed liability on a crossclaim for invasion of privacy based on the crossclaim defendant’s surreptitious recording of the crossclaim plaintiff at a mediation session, reasoning that all parties to the mediation had a reasonable expectation of privacy).

**Discussion Questions**

1. How does undisclosed recording affect party self-determination?
2. What risks to impartiality arise when one party secretly records?
3. When and why does the exception to confidentiality apply in this situation?
4. Should mediators proactively include anti-recording provisions? What are the benefits and drawbacks?

**Resources**

- Download PowerPoint Slides from Mitchell Hamline Open Access: [PowerPoint Slides for Classroom Use](#) (with embedded video clip).
- [Florida Mediator Ethics Advisory Opinion 2023-002](#)
- [2005 Revised Model Standards of Ethics for Mediators](#)