

31 August 2000

THE QUESTION

Re: Mediator Ethical Dilemma in Ongoing Multi-Party Construction Mediation

I am seeking the guidance of your Mediator Ethics Advisory Committee regarding a dilemma I have encountered in my efforts to mediate a partially-mediated, complex and multi-party Court-ordered Circuit Civil case in a Central Division County.

I was initially contacted by the attorneys for the plaintiff (the condominium association) and the primary defendant (the developer and general contractor) toward the end of 1999, and at their request agreed to mediate their condominium construction case. I have mediated quite a few other complex construction cases involving these two attorneys, and quite a few of the attorneys for the other parties (now 17 attorneys involved). The case was then in an early stage, numerous other defendants were being added to the litigation, and it was agreed that I would assist all parties and their counsel in their efforts (early in litigation) to develop an overall cost-effective and expedited plan for the mediation of all issues and parties in the case, which would and has since included: preliminary meetings and teleconferences with counsel and parties; identification, clarification of the key issues to be resolved; coordination of numerous site visits and exchange of information by the parties' experts and representatives; and incremental mediation of those key issues.

Counsel for these primary parties undertook to draft and submit their requested Order Appointing Mediator to the trial judge, and advised me that there would be an initial Order Appointing Mediator on the roof issues only (which we were mediating first due to weather concerns), and then a second Order Appointing Mediator for the other issues and additional parties to be incrementally mediated. We mediated the roof issues on April 20, 2000, and a full settlement was achieved between those four parties on those issues. My Interim Mediation Report was sent to the Court on May 1, 2000.

It was during that first mediation that one of the attorneys mentioned that there had been an objection by one of the new lawyers in the case to my serving as mediator, and that there had been a hearing on that and other issues, as to the second requested Order Appointing Mediator on the remaining issues. The identity of that attorney was not known to me until a teleconference on May 5, 2000, with several counsel in preparation of a master calendar for further site visits, teleconferences, exchange of

expert and other information, and the scheduling of mediation conferences on the remaining issues. I had, in fact, received a copy of the judge's second Order Appointing Mediator (on all the remaining issues and parties) on May 1, in which the judge had appointed me as mediator. The Order reads:

This cause came before the Court on Plaintiff's Motion to Appoint Mediator and with this Court being subsequently advised at the hearing on Plaintiff's Motion that a mediator has not been mutually agreed upon between the parties; and the Court having provided the parties an opportunity to contest the appointment of the mediator proposed by Plaintiff, it is hereby, ORDERED AND ADJUDGED as follows:Mediator: The Court appoints (named) as the mediator to attempt to achieve a settlement of the issues in this case.

On the very day that I was first apprised of the identity of the attorney who had objected to my serving as mediator, I contacted this lawyer (whom I knew and respected from litigation many years ago) by phone, in an effort to determine, notwithstanding the Court's Order appointing me as mediator over his objections, if we could clear the air on whatever his objections or his client's objections to me may have been, and in an effort to determine if any of those concerns would bear upon my qualifications to serve as mediator.

After some pleasantries, and despite my requests for some particulars on his objections, he offered nothing specific, vaguely alluding to something that happened a long time ago the details of which he didn't fully recall, and indicated that his objections really stemmed from the adamant manner in which plaintiff's counsel had insisted on me as the mediator. He went on to say that he had "painted himself into a corner" with his objections, which were apparently made in writing privately to the judge, and that he didn't think he could back down now. I indicated that he had given me no reasons why I could not serve as mediator, as ordered, and that I had a responsibility to all the other parties and their lawyers, and the Court, to do my best in continuing the mediation of the case, and that I had certainly no information from him or any others that would bear upon my ability to be neutral and impartial and to do my best for him and his client and all the others involved.

I advised him that I hoped we could work together, and he was equivocal, but seemed still adamant that he didn't think he could "back down." I told him the only alternative, since I was not going to withdraw as mediator, was for him to discuss with other counsel the prospects of agreeing to another mediator for the issues he would be involved with for his client. I did not agree to this, but told him I would call plaintiff's counsel and run it by him, and suggested he do the same. We concluded the conversation cordially, and I was left with the sense that, upon reflection, he would probably agree to participate in the mediation.

I then called the plaintiff's attorney and advised him that I had attempted to clear the air with the objecting attorney, and we discussed the prospects of a second mediator. I was told that those issues involving the objecting attorney's client included a number of the remaining issues to be mediated, and that a second mediator was out of the question. I also advised plaintiff's counsel that I had requested the objecting attorney contact him, and I encouraged him to see if they could not make peace on this issue, and even offered to mediate it by teleconference.

I then did a Fax Memo that same day (May 5) to all counsel in this case, as I wanted to alert them to the teleconference we had had on the site drainage issues earlier that morning, and to let them know we were proposing dates for site visits, expert meetings, and some proposed dates for the incremental mediation of the other issues. Since apparently I was the only one who was unaware

of the fact I'd been objected to, I wanted all counsel to know I had tried to address any such concerns, and was hopeful that everyone could work together. Accordingly, I included this paragraph in my May 5 Fax Memo:

I was not made aware until today the identity of one attorney who had apparently objected to my serving as the mediator in this case. I immediately contacted this attorney, for whom I have the highest respect, in an effort to confidentially air any issues which might bear upon his or his client's concerns regarding my qualifications, training and background as mediator, or any other concerns regarding my ability to be neutral and impartial and to do my best for all parties in this matter. I am satisfied from that conversation that I have no impediment to serving as (the Judge) has ordered me to serve, and I hope that we can all continue working together to make this mediation effort a successful one. I look forward to being of service to each of you and your clients.

On May 11, I conducted a previously-scheduled teleconference on the PRV valve and some water pressure issues with three of the defendants' counsel. One of the parties involved in these issues was the client for the objecting attorney. His son, who is apparently an associate, participated fully in that conference, which lasted about 45 minutes and was highly productive. His son indicated he was looking forward to the planned negotiation of the issues we discussed, and at no time did I have any inkling that the objecting attorney had not decided to participate in the mediation, as I had hoped would be the case.

Later that afternoon I had an irate message on my service from the objecting attorney (the father of the attorney who had several hours earlier participated in our teleconference), accusing me of being a liar: in telling the other attorneys in my Fax Memo he had agreed to me as mediator; in not calling plaintiff's attorney about the possibility of a second mediator; in my having failed to hire another mediator for him; and in not withdrawing as I'd promised.

I called the objecting attorney back and addressed each of his complaints in a calm manner. I pointed out: that I had not agreed to withdraw, and he had given me no reason to do so; that my Fax Memo did *not* indicate he had agreed to me, only that I was satisfied *I* had no impediment to serving as mediator; that I *had* contacted plaintiff's counsel as I told him I would, and that plaintiff's counsel had not agreed to the idea of a second mediator; and that I had *never* agreed to secure or hire another mediator for him. I explained again my ethical duties to the Court, the parties and their counsel, the process and the profession, and again asked if he could tell me any specifics regarding why I should not serve as mediator. He told me he didn't have to tell me anything. I concluded our conversation, during which he was extremely agitated and angry, by again assuring him that I was ready willing and able to continue serving as the mediator, and that it appeared his real issue was not with me but in the manner I was apparently selected, which I had nothing to do with, and that I was bound to abide by the Court's Order.

Here's my query: do I have any ethical duty to withdraw or offer to withdraw from this case, or to secure a second mediator, just because one of 17 attorneys involved is opposed to my serving as the mediator for the "reasons" set forth above? Should I do something further than what I have already done? The other parties and their counsel have invested a lot of time and effort so far in this ongoing complex mediation, and I have a duty to them and the Court, as well of course to the objecting attorney and his client. What course of action will do the least harm or the most good?

There are time considerations in this case, which many parties are making every effort to meet; withdrawing and leaving it to someone new at this point (if everyone could agree on a new mediator) will result in additional costs, delay, and loss of productive momentum, with the approaching hurricane season and other time factors a stated concern by many parties.

I am continuing to review our newly-revised Rules, and am in the process of weighing my various duties here. I will seek some further confidential advice, as I know it will take weeks for your Committee to address this issue, but I wanted to document and pose the situation to your Committee, and would appreciate your thoughts and guidance.

Respectfully submitted,

Certified Circuit Mediator
Central Division

AUTHORITY REFERENCED

Rules 10.300, 10.330(a), 10.340, 10.620, Florida Rules for Certified
and Court-Appointed Mediators
Rule 1.720(b), Florida Rules of Civil Procedure
MQAP Opinions 95-009 and 99-008

SUMMARY

A mediator should not continue to mediate when a party objects to that mediator. However, if all of the parties agree and it is feasible, such mediation may continue, under certain circumstances, as a co-mediation, a bifurcated proceeding, or in some other acceptable format.

OPINION

A cornerstone of mediation is a mediator's obligation to maintain impartiality throughout the mediation process which, pursuant to rule 10.330(a), means "freedom from favoritism or bias in word, action, or appearance . . ." This obligation is further explained in rule 10.620, which states that "a mediator shall not accept any engagement, provide any service, or perform any act that would compromise the mediator's integrity or impartiality," and rule 10.340, which states that "a mediator shall not mediate a matter that presents a clear . . . conflict of interest. A conflict of interest arises when any relationship between the mediator and the mediation participants . . . appears to compromise the mediator's impartiality."

In response to the questions posed, a mediator should not mediate with a party when that party is opposed to the mediator's participation in the mediation. However, if the other parties are willing to accept a co-mediator, bifurcate the case (by having the original mediator handle the case with the exception of issues involving the objecting party), or utilize some other option which is acceptable to all the parties, then the original mediator may be able to continue mediating the case.

The committee emphasizes that mediation is a consensual process, even when it is conducted pursuant to court order. See rule 10.300. Specifically, the parties are only ordered to appear at mediation. If a party is uncomfortable with a particular mediator and unwilling to proceed with that mediator, the party can withdraw from the mediation without any consequences from the court. See

rule 1.720(b), Florida Rules of Civil Procedure, MQAP 95-009, and MQAP 99-008.

Date

Charles M. Rieders, Panel Chair