

July 24, 2006

The Question

Can a Florida Supreme Court Certified mediator be sanctioned for behavior “unbecoming” of a mediator when participating in a mediation as a party or an attorney?

Specifically, Jane Doe (Party) and Rick Roe (Attorney) are Certified Circuit Civil Mediators and Family Law lawyers. Jane Doe is also a Family Law Mediator. Jane was married to John Doe, and they have a young daughter. The Parties had previously agreed to divide their daughter’s summers in segments. John returned from the first part of their vacation on July 5, and transferred their daughter to Jane. He was to pick her up on July 18, 2006, to resume their vacation.

The Parties had a Mediation scheduled for July 11, on John’s pending Petition to Modify Visitation and Child Support. The July 11th Mediation collapsed quickly, as Jane only offered John to dismiss his Petition.

Within hours after the failed mediation, Rick said that Jane had decided not to let John see or talk with their daughter again, until the Court heard a Petition she was going to file claiming that John was an unfit parent and required strict supervision of visitation. The Petition would take months to get to Court.

On July 20 Jane called John and said she would go to another Mediation, but only the following day, at 3:30 PM, at the Mediation Center. A non-lawyer Mediator was appointed. Rick and Jane again offered for John to dismiss his Petition, but this time, in return they would not file their Petition, and if John agreed, he could pick up his daughter the following day to resume their vacation, with the old visitation schedule.

John agreed. Jane then produced many additional demands. It was about 6:30, and the air conditioning in the building turned off. The heat and humidity in the building soared, the rooms were sweltering. A pattern for the Mediation was set: Demand was made, John objected, then reminded that to see his daughter the next day he had to, and he would agree. John repeatedly requested that the Mediation be adjourned or postponed. Rick and Jane required that the Agreement be completed that night, or no deal.

The Marital Settlement Agreement was signed about 10:30PM, reciting the "mutuality" of the agreement, etc. In fact, there was no mutuality to the agreement, but John picked up his daughter the next day. The complaints about him as a parent were not mentioned again.

Is it ethical for Mediators to use such tactics such as Coercive withholding of the daughter of the parties, "Bait and switch", and requiring the mediation to be concluded in very uncomfortable conditions, when they are not the actual Mediators?

Submitted by a Certified County Mediator
Northern Division

Authority Referenced

Rules 10.110, 10.310(d), 10.420(b), and 10.620, Florida Rules for Certified and Court-Appointed Mediators

Summary

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; however, there is no general prohibition regarding a mediator exhibiting behavior "unbecoming" a mediator. In addition, the actions of an attorney or a party in a mediation, cannot be judged as if they were those of a mediator.

Opinion

A certified mediator is subject to a good moral character requirement in rule 10.110 and is prohibited from performing any act which would compromise the mediator's integrity. Rule 10.620. There is no general prohibition regarding a mediator exhibiting behavior "unbecoming" a mediator.

The automatically disqualifying acts enumerated in the good moral character requirement relate to criminal offenses. Rule 10.110(c).¹

¹ The August 1, 2006 revision to rule 10.110(c) clarifies that "the good moral character [is] required for initial and continuing mediator certification."

Otherwise, the particular behavior under scrutiny is subjected to a multi-factored analysis, which unfortunately does not give particular guidance on the issue of what constitutes good moral character. In Black's Law Dictionary, the first definition of the term is a "pattern of behavior that is consistent with the community's current ethical standards and that show an absence of deceit or morally reprehensible conduct." The definition of integrity is also somewhat vague, that is, a firm adherence to a code of especially moral or artistic value. See Merriam-Webster Online.

The behaviors which you find objectionable on the part of the certified mediators are actions taken in their respective capacities as attorney and party in a mediation. The Committee believes that such actions are not evidence of mediator behavior because they do not occur when the individuals are acting as a mediator. The behavior of an attorney or a party is not required to be neutral, as is the case in relation to mediators. Therefore, the actions of an attorney or party cannot be judged as if they were the actions of a mediator.

The acts of attorneys and other professionals may, of course, be subject to the ethical standards of their profession, including disciplinary proceedings, as applicable. Further, although not raised by the questioner, the Committee notes that the scenario presented includes several matters worthy of consideration regarding the mediator. Specifically, questions are raised as to whether this mediation should have been terminated due to the presence of duress or the inability of the party to participate meaningfully in the mediation process or to freely exercise self-determination. Rules 10.310(d) and 10.420(b).

Date

Fran Tetunic, Committee Chair