

October 22, 2003

THE QUESTION

The Florida Mediator Ethics Advisory Committee has been extremely helpful in addressing prior inquiries relating to the issue of satisfying the provisions of Fla.R.Civ.P. 1.720(b)(1), namely, “the party or its representative having full authority to settle without consultation.” See MEAC Opinion 2002-001 and MQAP Opinion 99-002.

In particular, when referring to the presence of the party’s attorney or in-house counsel, the panel observed in part:

“The requirements of 1.720(b)(1), Florida Rules of Civil Procedure, regarding appearances cannot be satisfied by the physical presence of the parties’ attorney or in-house counsel of an entity without the named party.”

In situations where an insurance carrier is not involved and the sole defendant is a corporation, my reading of the panel’s opinions suggest that a representative of the corporation is necessary. In some instances, the in-house counsel also occupies a corporate position in the corporation such as “Vice President and General Counsel,” and in that instance, it would seem that the representation requirements of Rule 1.720(b)(1) are satisfied.

However, the dilemma I have found myself in are those situations where the “representative” of the corporation, who also occupies the dual status of corporate officer and counsel or where that corporate representative is a corporate officer and not an attorney, is the fundamental question of authority.

It is clear that if, at the very outset of the mediation conference, there is the revelation that the representative does not have “full authority,” but only some type of limited authority and might have to consult with someone else by telephone, the “full authority” issue has been fleshed out. Opinion MQAP 99-002 makes it clear that if this revelation is made in front of the other party, the decision whether to proceed with the mediation rests with the other party. However, since Opinion MQAP 99-002 prohibits a mediator from revealing knowledge that may be learned in caucus about the lack of a representative’s “full authority,” the question then presents itself as to whether it is the mediator’s responsibility to make a thorough inquiry at the outset of the mediation when all parties are present, so as to avoid learning of the authority issue in caucus and being unable to convey this information to the other party.

The question is two-fold: (1) is it the mediator’s responsibility at the outset of the mediation to inquire about the representatives full authority, and (2) to what extent and depth should that inquiry be pursued? Is it simply sufficient if the mediator asks the corporate representative whether he/she has full authority to settle without the necessity of further probing, if the representative says “yes.” Does any further inquiry stop? All too often, the cursory inquiry, as previously indicated, does not

bring out the full extent of the representative's authority. It only becomes apparent in caucus when the representative says, "well that's all the money I came with because that's all the money the committee would approve."

The net result of a cursory inquiry and learning about this information in caucus and being, thereafter, precluded from disclosing such limitation, is to undermine the basic concept of the mediation process, which is to have the presence of people that can make the decision at the mediation conference.

Your attention to this two-fold inquiry would be greatly appreciated.

Very truly yours,

Certified Circuit Mediator
Southern Division

AUTHORITY REFERENCED

Rule 10.420(a), Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinion 99-002

SUMMARY

A mediator has no affirmative duty at the beginning of a mediation to inquire about a representative's authority, since there is no specific rule requiring such. While it would be good practice for a mediator to pursue the issue of whether full authority exists, ultimately it is a matter of discretion whether, when, and to what extent the mediator pursues the issue.

OPINION

As you note, the Committee has previously considered the issue of "full authority," most notably in MEAC 99-002. In that opinion, the Committee stated that the mediator may report that a party did not appear if there is a lack of authority. Your present question suggests the possible existence of an affirmative duty on the part of a mediator to determine whether "full authority" exists.

In response to your first question, the Committee is of the opinion that the mediator has no duty at the outset to inquire about a representative's authority, since there is no specific rule requiring such. Rule 10.420(a) outlines the responsibility of the mediator upon commencement of the mediation, to wit, to describe the mediation process and role of the mediator and specifically inform the participants of the following three aspects of the process: 1) mediation is a consensual process; 2) the mediator is an impartial facilitator; and 3) mediation communications are confidential. There is no reference to the mediator making any determination of authority in this rule or any other rule. Thus, the Committee answers your first question in the negative.

In relation to your second question, the Committee believes that, under the present rules, it is a matter of discretion whether, when, and to what extent the mediator pursues the issue of full authority. However, it would be difficult to dispute the proposition that, as a matter of good practice, a mediator should pursue the issue of whether full authority exists, since the lack thereof may derail the entire process.

Date

Fran Tetunic, Committee Chair