

THE QUESTION

I have a Florida Bar Grievance mediation scheduled with serious ethical questions for the mediator. [The remainder of this paragraph was omitted.]

1. The Bar accepted a grievance from someone found incompetent to stand trial (the "complainant") against their former attorney ("respondent attorney").
2. The Bar has investigated the matter, held a hearing on some issues in the matter, and has now referred the matter to mediation. The respondent attorney has agreed to mediate with the complainant's brother, who holds a 1990 Durable Family Power of Attorney. The brother is attending as attorney in fact for complainant via teleconference from out of state.
3. Both the attorney-in-fact for complainant and respondent attorney understand the complainant was "found to be *incompetent* to proceed" under Section 916.13, Florida Statutes, under an Amended Order of Commitment for Incompetence to Proceed entered on (date omitted) 1996, in criminal Circuit Court, and complainant was placed in a state institution.
4. Section §709.08(3)(b), Florida Statutes, states:

"Effect of delegation, revocation, or filing of petition to determine incapacity. -

...

(b) The attorney in fact may exercise the authority granted under a durable power of attorney until the principal dies, revokes the power, *or is adjudicated totally or partially incapacitated by a court of competent jurisdiction*, unless the court determines that certain authority granted by the durable power of attorney is to remain exercisable by the attorney in fact." [Emphases added.]

5. The Florida Bar has accepted the validity of the Durable Family Power of Attorney executed by complainant (date omitted) 1990, because it was before the ruling of incompetence to stand trial.
6. The mediator believes the authority of the attorney in fact is suspended by the Amended Order of Commitment for Incompetence to Proceed entered in 1996.
7. The respondent attorney wants to proceed in mediation to avoid a public forum, but is uncertain about the validity of any agreement reached.

Question: Can the mediator proceed with the scheduled mediation?

Please advise.

Certified County Mediator
Central Division

I am inclined to think there is a problem with:

- 10.050(b) -- Party unable to participate.
- 10.060(a) -- Parties' Right to Decide
- 10.090(c) -- Party unable to mediate for psychological or physical reasons.
- 10.110(a)(3) -- Integrity of the Agreement.

[Final sentence omitted.]

AUTHORITY REFERENCES:

Florida Rules for Certified and Court-Appointed Mediators - 10.090(c).
Florida Rules of Civil Procedure - 1.720(b).
Mediator Qualifications Advisory Panel Opinions - MQAP 95-002.
Rules Regulating The Florida Bar - 3-8.1(i)

SUMMARY OF THE OPINION:

The resolution of the representative's authority is necessary prior to proceeding. If the "attorney in fact" is found to have a valid durable power of attorney, the mediation may take place. If the mediator is not in a position to determine that all parties are present, the mediation should be canceled.

OPINION:

Prior to discussing the substance of the question, the panel would point out the basis for its jurisdiction over a Bar Grievance mediation question. First, the mediator is certified pursuant to the mediation rules and thus within the jurisdiction of the panel. Second, rule 3-8.1(i), Rules Regulating The Florida Bar, provides as follows:

The Florida Rules for Certified and Court-Appointed Mediators shall apply to proceedings under this rule unless otherwise stated herein or in conflict with the provisions of this rule or the Rules of Professional Conduct.

While the Bar Grievance rules contain a procedure (in subsection g) to be followed when a complainant fails to attend mediation without good cause (that is, the disciplinary file remains closed), they do not directly deal with the issue presented. That issue is how the mediator acts when a substitute for the complainant appears with questionable legal authority to act on behalf of the complainant.

While this panel cannot resolve the issue of whether the "attorney in fact" has the legal authority to represent the complainant in this matter (see MQAP opinion 95-002), it does believe that resolution of the representative's authority is necessary prior to proceeding. If the "attorney in fact" is found to have a valid durable power of attorney, the mediation may take place.

In your hypothetical, the specific issue is whether the complainant (or an authorized representative) is present for the mediation. If the mediator is not in a position to determine that all parties are present, mediation should be canceled in a manner consistent with rule 1.720(b), Florida Rules of Civil Procedure. This position is supported by rule 10.090(c), which provides that "[If] one of the parties is unable to participate in a mediation process for psychological or physical reasons, a mediator should postpone or cancel mediation until such time as all parties are able and willing to resume."

Feb. 1, 1999
Date

Charles W. Rieders
Charles Rieders, Panel Chair