May 2, 2001

THE QUESTION

Facts: Today had a family mediation in which one client was pro se and one was represented. Both parties were strong individuals; neither was going to be easily overwhelmed. The pro se party indicated in passing that it had consulted with an attorney, who had given advice. Apparently casual advice re some issues was addressed to the "pro se" parties' satisfaction. After approx. 2 hours of back-and-forth (parties chose to be separate throughout the process), much discussion of detailed issues, arguments and settlement terms, a formal settlement agreement incorporating the agreed upon terms was printed and signed by the one party and attorney. When it was presented to the pro se party, it was discovered she was still consulting with the non-present, non-appearing attorney via telephone. The "pro se" party then announced she had been advised not to sign the agreement and to declare an impasse.

Questions:

2001-004 (a) Should the mediator have declared an impasse - or done what ? - upon first learning the "pro se" party was in telephonic communication with a non-present attorney giving advice?

2001-004 (b) Similarly, what should mediator do when a participant wants to consult an extra-mediation source or advisor? Should the mediator have terminated the mediation?

2001-004 (c) Should the mediator report that the party was not mediating in good faith? It can't be demonstrated that there was no good-faith intent to settle. But, wasn't the party who retained counsel disadvantaged by the alleged "pro se" party's appearing to be unrepresented, but following the advice of an attorney not present during the negotiations?

2001-004 (d) Is this an ethical breach such that the "pro se" party's attorney be reported to the Florida Bar? If so, does the mediator have any duty to report?

Certified County, Family, Circuit
and Dependency Mediator
Central Division

AUTHORITY REFERENCED

Rules 10.220, 10.310, 10.420(b)(3), Florida Rules for
Certified and Court-Appointed Mediators
Rules 1.720(b) and 1.730(a), Florida Rules of Civil Procedure
Rules 8.290(l) and 8.290(o)(2), Florida Rules of Juvenile Procedure
Rules 12.740(d) and (f), Florida Family Law Rules of Procedure
MQAP Opinions 95-003, 95-009, 96-005, 99-012

SUMMARY

(a) and (b) A mediator should declare an impasse upon request of a party, but need not immediately cancel a mediation because a party calls an attorney or other "extra-mediation source or advisor."

(c) A mediator should not report to the court that a party was not mediating in good faith since there is no requirement that a party mediate in good faith. A mediator's report should be limited to only those matters authorized by applicable court rule.

(d) The actions of an attorney to a party to mediation are subject to the ethical jurisdiction of the Florida Bar not the MEAC. In addition, a mediator should not voluntarily testify or disclose confidential communications absent a waiver.

OPINION

Rule 10.220, entitled Mediator's Role, generally describes the mediator's function as follows:

> The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute. The ultimate decision-making authority, however, rests solely with the parties.

Clearly, one of the foundations of mediation is a party's right to self-determination. The Committee Note to rule 10.310, entitled Self-Determination, states that it is "critical that the parties' right to self-determination (a free and **informed** choice to agree or not to agree) is preserved during all phases of mediation" [emphasis added]. Seeking the advice of counsel is a primary method for a party to obtain the information necessary to make an "informed" choice.

The Committee notes that for family mediations, a party is deemed to appear "if the named party is physically present at the mediation conference." Rule 12.740(d), Florida Family Law Rules of Procedure. The rule continues that "family mediation may proceed in the absence of counsel unless otherwise ordered by the court." In addition, rule 12.740(f), Florida Family Law Rules of Procedure, provides as follows:

> If counsel for any party is not present when the agreement is reached, the mediator shall cause to be mailed a copy of the agreement to counsel within 5 days. Counsel shall have 10 days from service of a copy of the agreement to serve a written objection on the mediator, unrepresented parties, and counsel.

Thus, a party may attend a family mediation without counsel. If a party attends without counsel and signs an agreement at a family mediation, the party has the opportunity to have counsel review that agreement. If counsel finds any portion of the agreement unwise or unacceptable, counsel need only serve an objection on the mediator, unrepresented parties, and counsel to render that agreement void. Given the importance of self-determination and these procedural rules, the Committee opines that there is nothing inappropriate about a party consulting with counsel via telephone during a family mediation.

Regarding your specific questions:

2001-004 (a) and (b)

Pursuant to rule 10.420(b)(3), a mediator should adjourn or terminate a mediation if "any party is... unwilling to participate meaningfully in the process." Thus, the mediator should declare an impasse if a party requests that this be done, as the party apparently did at the conclusion of the referenced mediation. However, the mediator need not immediately cancel the mediation just because the party calls an attorney or any other "extra-mediation source or advisor." In MQAP 95-003, the Panel (former name of this Committee) recognized the utility of a party contacting someone not in attendance at mediation and opined that this was acceptable. The Panel merely cautioned the mediator to remind the party of the confidentiality privilege provided by statute and that any communication about the specific content of the mediation must remain confidential.

2001-004 (c)

The Committee notes that there is no requirement in the statutes, rules or common law governing court-ordered mediation which requires a party to "negotiate in good faith." As stated in MQAP 95-009, a mediator may report to the court a party's lack of appearance at mediation [rule 1.720(b), Florida Rules of Civil Procedure; rule 8.290(l), Florida Rules of Juvenile Procedure; and rule 12.740(d), Florida Family Law Rules of Procedure] or, in the alternative, may report the lack of an agreement to the

court without comment or recommendation [rule 1.730(a), Florida Rules of Civil Procedure; rule 8.290(o)(2), Florida Rules of Juvenile Procedure; and rule 12.740(f)(3), Florida Family Law Rules of Procedure]. The mediator's reporting of any matter which is not specifically authorized in the procedural rules is a violation of the confidentiality statute and the mediator standards of conduct. An example of such an unauthorized report would be an accusation that a party failed to mediate in good faith.

2001-004 (d)

The Committee is charged with providing advisory ethical opinions on the Florida Rules for Certified and Court-Appointed Mediators, not The Florida Bar Rules of Professional Conduct. Thus, the Committee cannot answer your final question regarding whether the attorney representing the "pro se" party committed an ethical breach. The Committee cautions against voluntarily testifying or disclosing confidential communications absent a waiver of all parties of their privilege. See, for example, MQAP 96-005, 99-012.

May 2, 2001
Date

Charles M. Rieders
Charles M. Rieders, Panel Chair