MQAP
95-009

Advisory Opinion

December 22, 1995

MEDIATOR QUALIFICATIONS ADVISORY PANEL c/o Dispute Resolution Center ! Supreme Court Building ! Tallahassee, FL 32399-1905

THE QUESTION:

As a result of several unusual incidents which have occurred during the mediation process, questions have been raised regarding the appropriate action to be taken by a mediator and the scope of the mediator's authority, duty and responsibility.

Both from the standpoint of the training received during the certification process and from personal experience, the undersigned mediator has always followed the practice, at the outset of the mediation to explain the scope and purpose of the mediation to the parties including therein, the role of the mediator and a brief discussion of the qualifications of the mediator. In addition to this introductory phase of the process, the undersigned traditionally invited counsel for the parties to briefly summarize their understanding of the issues, before proceeding into the caucus phase of the process.

The mediator has been presented with a situation where counsel for one of the parties, (i.e. plaintiff), has refused to participate in this introductory phase of the process, it being the counsel's position that neither counsel nor the parties are required to sit through any preliminaries, nor are they required to listen to what the defendant has to say. Instead, plaintiff's counsel would simply announce the demand and would then leave to let the defendants caucus with the mediator to consider a response. Conversely, defendant's counsel would urge that plaintiff and counsel be present for an introductory statement, as well as remain present during the defendant's presentation.

While the foregoing may seem to represent a hypothetical and extremely limited situation (it has actually occurred), there may be other variations of the foregoing which brings into play the appropriateness of the mediator's response and the scope of the mediator's authority.

Question 95-009A

1. Does the mediator have the power and authority to require all parties and their counsel to be present for the purposes of an explanation of the mediation process?

Question 95-009B

2. Does the mediator have the power and authority to require all parties and their counsel to be present for the purposes of eliciting a presentation from the plaintiff and defendant?

Question 95-009C

3. Should the mediator inquire of the participating party and counsel whether they wish to proceed on the basis of a simple demand for money?

Question 95-009D

4. Should the mediator announce to the participating party and counsel that the mediator has no authority to compel any party or parties' counsel to participate in a manner deemed appropriate by the mediator and therefore, an impasse must be declared leaving it to the affected party to seek whatever sanctions are deemed appropriate?

Question 95-009E

5. Is it the duty of the mediator to file a report with the court indicating that the plaintiff's refusal to participate in an introductory statement or comply with the mediator's request to be present when presentations are made, constitutes the absence of good faith mediation?

SUMMARY OF THE OPINION:

95-009A Mediation is a consensual process whereby individuals in conflict arrive at an agreement which is mutually acceptable. It is not based on the power and authority of the mediator. When the mediation is court-ordered, the parties are required to appear at mediation. If the parties refuse to participate in the orientation phase, the mediator may report to the court the lack of appearance by the party or parties.

95-009B If the parties are unwilling to participate in the presentation phase of the process, the mediator may cancel the mediation, but may not report such to the court.

95-009C The alternative mentioned is one way of handling the situation; there are many others. The question as framed is couched in terms of mediator style rather than ethics.

95-009D The panel believes mediators can and should conclude the mediation session if one or more of the parties is unwilling to participate meaningfully in the process. There is no penalty for failure to reach agreement at mediation, and the mediator may not suggest otherwise.

95-009E No rule exists which requires a party to "negotiate in good faith."

AUTHORITY REFERENCED:

Rules: Florida Rules for Certified and Court-Appointed Mediators - 10.050(a), 10.050(b), 10.110(b)(1).

Florida Rules of Civil Procedure - 1.720(b), 1.720(d), 1.730(a), 1.740(d), 1.750(e).

OPINION:

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The underlying principal of mediation is that it is a consensual process whereby individuals in conflict arrive at an agreement which is mutually acceptable. It is not based on the power and authority of the mediator. Rather, the mediator must rely on strong communication and persuasion skills.

Attendance at mediation is either by agreement of the parties or by order of the court. If agreed upon by the parties, the mediator has the mutual consent of those involved to move forward with mediation. While it is difficult to imagine a situation in which parties would have agreed to mediation and then refused to participate, it may be necessary to remind the parties during the introductory phases of the session of their initial agreement to mediate.

If the mediation is court-ordered, the parties are required to appear at mediation. See rule 1.720(b), Florida Rules of Civil Procedure. "Appearance" at mediation, at least in terms of persons required to be present, is generally defined in the Florida Rules of Civil Procedure in rule 1.720(b) and then specifically outlined for family mediation in rule 1.740(d) [now Family Law Rules of Procedure 12.740(d)] and for county mediation in rule 1.750(e). The panel believes that appearance at mediation includes being present for the mediator's introductory orientation, (i.e. opening statement), because under rule 10.050(a), Florida Rules for Certified and Court-Appointed Mediators, a mediator is required to inform parties about the mediation process. If the parties display a reluctance to participate in the orientation phase of the process, and the mediator is unable to persuade the parties to participate, the mediator is not permitted to require the parties to remain at mediation; however, the mediator may report to the court the lack of appearance by the party or parties pursuant to rule 1.720(b).

Opinion 95-009B

In relation to the "power and authority" aspect of the question, the panel would refer the reader to its discussion on that matter in question 95-009A.

If the parties are willing to participate in the mediation but not in the presentation phase, the mediator may cancel the mediation pursuant to rule 1.720(d), which states that "the mediator shall at all times be in control of the mediation and the procedures to be followed in the mediation."

However, the panel believes that the refusal of a party to give a presentation or listen to the other party's presentation does not constitute a failure to appear, and therefore a mediator may not make a report on such a failure to the court.

Opinion 95-009C

There are as many methods of handling this situation as there are mediators; inquiring of the party and counsel whether they wish to proceed on the basis of a simple demand for money is certainly one alternative, but it is not the only option. This question as framed is couched in terms of mediator style (practice) rather than ethics.

Opinion 95-009D

No, the panel believes mediators are obliged to inform the parties of the consensual nature of mediation [rule 10.050(a)] and can and should conclude the mediation session if it becomes apparent that the case is unsuitable for mediation, if one or more of the parties is unwilling or unable to participate meaningfully in the process [rule 10.050(b)], or if it is clear a participant desires to withdraw [rule 10.110(b)(1)]. There is no penalty for failure to reach agreement at mediation, and the mediator may not suggest otherwise.

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No rule exists which requires a party to "negotiate in good faith." A mediator may report to the court a party's lack of appearance at mediation [rule 1.720(b)] or, in the alternative, may report the lack of an agreement to the court without comment or recommendation [rule 1.730(a)].

Date	**Charles Rieders, MQAP Chair**