MQAP
96-001

Advisory Opinion

August 14, 1996

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

THE QUESTION:

I am sure that you have now had contact concerning the activities of "Out of Court" which is apparently a networking organization operating out of Singer Island, Florida. I enclose a video tape and a booklet which I recently received in the mail, unsolicited, followed up by a telephone call from a person identified himself as "Mr. Goossen". Mr. Goossen called to inquire as to whether or not I have viewed the tape which, at that time, I had not. He wanted me to get back in touch with him after I had done so.

I am concerned about the activities of Out of Court if, indeed, their advertising and marketing gets anywhere here in Florida. I have no idea what the mailing to me was suppose to lead to, whether I was to consider being a "C.O.O." or a person who would work as a mediator for the C.O.O. I urge you to view the tape and look through the booklet if you haven't already been exposed to these materials. It appears to me that any certified mediator who undertook to work through Out of Court would likely be violating most of the provisions of Rule 10.100 and, particularly, (c). The several references in the pamphlet to having video tapes prepared that "are made to glorify you and your accomplishments" runs against the grain of all ethic [sic] principles of proper mediation. I found it of concern that this company might sign up a number of businesses and small corporations who would then by their contract be obligated to go to Out of Court for any disputes that might arise. These companies would in all probability not recognize the questionable ethics of the rather involved referral service and splitting of fees.

If nothing more, I would urge the Resolution Center to have staff review the propriety of this operation and, if I am correct in my observations, alert all the certified mediators to the problem and ask that they not accidentally be caught up in this operations [sic]. I also think consideration should be given as to whether this may in some way violate statutes and rules relating to mediation.

I am showing a copy of this letter to Mr. Goossen, but I have no address for him. I have no intention of contacting him again, but if he contacts me, I will tell him of this letter and offer to send him a copy if he gives me his address. Any comments that the Center or staff may have concerning this would be interesting to me.

Yours very truly,

Certified Circuit Civil Mediator
Central Division

SUMMARY OF THE OPINION:

Out-of-Court's tape raises concerns for a certified mediator in several areas, including truth in advertising, mediator impartiality, fee arrangement and integrity. Involvement in any arrangement which walks such an obvious fine line with regard to the Florida Rules for Certified and Court-Appointed Mediators is troubling and should be considered thoughtfully and earnestly by a certified mediator before a commitment is made.

AUTHORITY REFERENCED:

Rules: Florida Rules for Certified and Court-Appointed Mediators - 10.030(a), 10.030(a)(1), 10.070, 10.070(b)(1), 10.100(c), 10.130.

OPINION:

GENERAL

Out-of-Court's promotional video is really a tape within a tape. The main portion of the tape is used as a recruitment tool to attract mediators to work through Out-of-Court. The tape within the tape is directed at businesses and attorneys to attract business for the Out-of-Court purveyor. The Mediator Qualifications Advisory Panel confined its review and opinion to the latter insofar as the Florida Rules for Certified and Court-Appointed Mediators do not address conduct by those not subject to the rules, namely, those who are neither certified nor court-appointed mediators. The rules do apply, however, to certified mediators who may join Out-of-Court and thus utilize the custom-made marketing tape directed at businesses and attorneys. The panel also confined its review and analysis to the descriptions of mediation, although the tape does use the terms mediation and arbitration.

ADVERTISING

A Supreme Court certified mediator is bound by rule 10.130 to ensure that "all advertising... represent[s] honestly the services to be rendered. No claims of specific results or promises which imply favoritism to one side should be made for the purpose of obtaining business. A mediator shall make only accurate statements about the mediation process, its costs and benefits, and the mediator's qualifications." It is under the provisions of this rule that the panel has the most concerns about the use of this tape by a Supreme Court certified mediator.

In particular, the marketing tape begins with a picture of the mediator and a description of the mediator's qualifications and credentials. The mediator is described as being multi-

lingual and serving on various Out-of-Court committees. In print on the screen, the tape informs mediators who are being recruited that their pictures will be inserted and that their qualifications will be "glorified." In addition, there is a statement that the mediator will serve on all of the committees mentioned. While it is unclear what the meaning of the term "glorified" is within the context of the tape, it certainly gives the impression that the promotional tape may stray from the admonition of a mediator making "only accurate statements about... the mediator's qualifications." Without seeing the final version of the tape made exclusively for the mediator who joins Out-of-Court, it is impossible to say definitively that the rule would be violated; however, there are indications that such advertising likely would violate the ethical constraints on advertising contained in rule 10.130. There are several other examples of hyperbole in the tape which may cross the line from acceptable "puffing" into unacceptable false advertising. For example, in the tape, there is a statement that "we are better" without indicating better than whom.

IMPARTIALITY

Another troubling aspect of this promotion is that it is directed at attorneys, businesses, insurance companies, etc. in the hopes of having them enter into a contractual relationship with the Out-of-Court program, which will be the exclusive purveyor of ADR services (both mediation and arbitration). This raises the issue of potential impartiality problems under rule 10.070, which requires a mediator to be "impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality." Specifically, the panel cautions a mediator from entering into a contractual arrangement with an entity which would result in a financial connection such that the mediator may lose objectivity and impartiality. At a minimum, if a mediator was to enter into such a relationship, the mediator must make full disclosure of the relationship to the other party to the dispute pursuant to rule 10.070(b)(1).

FEE ARRANGEMENT

A further area which was discussed by the panel dealt with the financial arrangements of Out-of-Court in relation to the mediators who sign up to work with a Chief Operating Officer. It is unclear from the tape if the fee arrangement of the program described comports with rule 10.100(c) which states that "no commissions, rebates, or other similar remuneration shall be given or received by a mediator for referral of clients for mediation or related services." While the panel recognizes the use and acceptability of administrative fees which mediation associations or companies charge their mediators, it is unclear whether Out-of-Court's arrangement is an 'administrative fee' or a prohibited 'referral fee.' Based on the information contained in the pamphlet accompanying the tape, it appears to be an unacceptable referral fee in violation of rule 10.100(c).

INTEGRITY

Finally, a mediator "shall adhere to the highest standards of integrity" according to rule 10.030(a) and "shall not ... undertake any act which would compromise the mediator's integrity." Rule 10.030(a)(1). Many of the specific examples listed above call into question the integrity of the mediator who would utilize a marketing strategy which is so derogatory towards the traditional court system.

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Date **Charles Rieders, MQAP Chair**