Advisory Opinion

August 7, 1998

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

THE QUESTION:

RE: Question for Panel's Opinion

Dear Panel Members

My inquiry concerns the acts of an attorney, that is representing one of the parties.

On, March 24, 1998, I was assigned to mediate a case, for the judge of the Small Claims Court. Each mediator is assigned to a case, by the rotation process.

After receiving the case file, the parties and myself went to a designated room in the courthouse. The plaintiffs were represented by counsel. The defendants were not. Before I could make my "opening statements", the attorney for the plaintiffs announced that he had another hearing to attend in about ½ hour. I then asked the attorney, if he would like for me to wait until he was done with his other hearing. I further expressed to him, that I would be available to mediate this case, no matter how long it would take. The attorney then responded, by saying, that I could proceed with the mediation, because, he felt that the session would not take the full 30 minutes that he had available to him. I then completed my "opening statement" and proceeded with the mediation session. After about 25 minutes into the session, the attorney requested that I stop the mediation, so that, he could attend the other hearing he was scheduled for. He also acknowledged to me and the parties, that when he was done with the other hearing, he would come and find us; so that, we could resume the mediation session.

The plaintiffs stayed in the assigned room, and the defendant left the room and went out into the hallway. I went back to the courtroom. After approximately 20 minutes (or so), I went back to the assigned room, to see if the parties were comfortable and to wait for the attorney to return. Upon entering the room, the attorney was already present. He made the comment to me, of, "well you did a great job, the case is settled." I then advised the attorney, that this is not how the mediation process works. I advised him, that the settlement had to be reduced to writing. I also advised him, that he did not have the authority to conduct the mediation session. He then asked me, what did an agreement or stipulation look like, and did I have one with me? I informed him that I did have one with me, and that it needed to be filled out, and copies needed to be given to the parties and into the case file. The defendant was totally confused, and apparently under duress from what the attorney said to him, while I was not present. The attorney then took the "agreement" paperwork from me, and started to fill in the case information, and the words of the agreement itself. He said, that he just wanted to go to the judge and announce that the case was settled. I then advised him, again, that the mediation process does not work in that fashion. After looking at the "agreement", I asked the defendant if he would like to read it, before he signed it. After reading it, the defendant asked me if he could write an addition into the "agreement." I then told him, that the "agreement" was between the parties, and that either party or myself could reduce it into writing. I then asked the attorney if he had any objection to the defendant making an addition into their "settlement agreement." The attorney responded, by saying, that it was o.k. with him. The defendant then made the additional entry into the "agreement" (in his own handwriting). I then signed the "agreement", as did the

parties. I then closed the mediation session, and gave copies of the "agreement" to the parties; and inserted a copy into the case file.

I would be very appreciative if you could give me your opinion, of how a mediator should handle such a situation as this. I hope that I did everything properly, as I think that I did.

I have been a mediator since 1993, and I think the process is a great benefit to the court, and the parties that are involved. I would, though, like to see that the attorneys in this state, become better educated with the mediation process and how it works. The attorneys need to realize, that the mediators are the ones who were trained and "certified" to implement the mediation process. The authority to mediate a case is placed with the mediator, and not with the attorneys.

Thank you for your kind consideration, time, and cooperation, in trying to give me an opinion concerning this matter.

Yours truly

Certified County Mediator
Central Division

AUTHORITY REFERENCES:

Florida Rules for Certified and Court-Appointed Mediators - 10.110(a)(3).
Florida Rules of Civil Procedure - 1.720(c), 1.720(d).

SUMMARY OF THE OPINION:

It is clear to the panel that although the mediator was present for and facilitated a portion of the session, the mediator did not facilitate the agreement between the parties. Since the presence and involvement of a mediator is required in order to have a mediation, and since no mediator was present upon the reconvening of the meeting between the attorney and the parties, the panel is of the opinion that the process which took place is something other than mediation.

OPINION:

The crux of the question is control of the mediation session. Rule 1.720(c) and (d) specifically refer to the mediator's discretion to adjourn and reconvene at a later time, and rule 1.720(d) states in part that the "mediator shall at all times be in control of the mediation and the procedures to be followed in the mediation." It is clear to the panel that although the mediator was present for and facilitated a portion of the session, the mediator did not facilitate the agreement between the parties. Following the adjornment (during which the attorney attended a hearing and then returned to the mediation conference room), the attorney served as facilitator in the absence of the mediator. Since the presence and involvement of a mediator is required in order to have a mediation, and since no mediator was present upon the reconvening of the meeting between the attorney and the parties, the panel is of the opinion that the process which took place is something other than mediation.

The mediator further indicates that there seemed to have been some degree of duress on the unrepresented party. This brings in additional concerns, to wit, an imbalanced process and an agreement which for reasons such as fraud, duress, overreaching, absence of bargaining ability may be uneforceable. See rule 10.110(a)(3). Being signatory on a agreement as mediator without actually being present for the session is inappropriate. When combined with the certified mediator's belief that one party is operating under duress the situation becomes even more troubling. For these reasons, and those in the above paragraph, the panel believes that the mediator should not have been a signatory on the agreement. For clarity, the panel would also note that the mediator is not required to sign a mediation agreement.

Several actions would have resulted in a more palatable outcome. First, the mediator has the discretion to postpone or cancel mediation. This may have been done during the initial moments when it was clear that the session would likely be interrupted due to the attorney's schedule. This could also have occurred at the end of the initial 30 minutes, when the attorney indicated that he would have to leave to attend another committment. Secondly, the mediator may have withdrawn from the mediation session upon returning to the room and discovering that the attorney had negotiated a settlement while the mediator was out of the room. The mediator may also have indicated an unwillingness to be a part of a process that had gone awry by refusing to be involved in the proceedings and refusing to sign the agreement. The mediator may have done this by calling the attorney aside, or by simply indicating in the presence of all involved his or her discomfort with the circumstances.

Although the panel disagrees with the actions of the mediator in the above situation, it would like to differentiate between the above situation and a deliberate (and appropriate) procedural strategy in which the mediator chooses to leave the room, thereby allowing the parties to talk by themselves.

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Date Charles Rieders, Panel Chair