

THE QUESTION

Several problems have arisen from time to time with respect to: appearance by a party; authority of the party appearing; the content of the mediator's report to the court, consulting with a party.

a) With respect to a party's appearance, Rule 1.720(b) discusses what constitutes appearance by a party at a mediation conference. In particular (b) provides in part that, "a party is deemed to appear at a mediation conference if the following persons are physically present: (1) The party or its representative having full authority to settle without further consultation; (2) The party's counsel of record, if any; and (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle on to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation". A reading of the foregoing seemingly suggests that a party's appearance is satisfied if (1) or (2) or (3) are satisfied. In other words, is the foregoing to be read in the alternative, so that appearance by an attorney of record with authority to settle satisfies the "appearance" requirement? Or, does the foregoing rule require a party or representative having full authority to be present, irrespective of whether that person is represented by counsel?

b) With regard to the "full authority" issue, sometimes at the outset of the mediation conference a question arises as to whether a particular party has "full authority". Under these circumstances where an adverse party objects to the mediation going forward, it seems apparent that the mediation conference cannot proceed if the other party does not have full authority. However, after a mediation conference begins, sometime, during the course of the mediation process, it may become apparent to the mediator, (when meeting in a caucus with that party claiming to have "full authority"), that that party does, in fact, not have "full authority" because that person has indicated that they would have to consult with someone else either by telephone or at some later date for more authority. Under these circumstances, when the mediator learns of this information in a private caucus with that party, is it the mediator's duty and responsibility to inform the other party that the individual claiming to have "full authority" needs to consult with someone else? And, if the mediator is required to inform the other party, and the other party requests that the mediation either be continued or terminated, is the mediator required to comply with that request?

c) With respect to a mediator's written communication with the court in the form of an "agreement", a review of the applicable rules indicates that the rules are silent on what a mediator can memorialize in a written document short of the "partial or final agreement" referred to in Rule 1.730. Interestingly, the last sentence in the amended version of Rule 1.730 (b) states that, "no agreement under this rule shall be reported to the court, except as provided herein. Take for example, some of the incidents referred to above, such as where a party who must appear does not appear, or where a party who does appear does not have full authority. Is the mediator authorized

(or required if requested to do so by the adverse effective party) to file a written report which does not partake of a "mediated agreement", in order to indicate to the court the mediation could not commence because of the non-appearance of a party, or party with full authority, or that the mediation had to be terminated because the party claiming to have full authority did not have full authority? If the mediator is not required under the rules to file a report with respect to the foregoing, but an adverse aggrieved party requests such report for the purpose of seeking sanctions against the violating party, must the mediator comply with that request? One of the apparent problems facing a mediator who is not required to file such a report but is requested to do by an aggrieved party, is that the aggrieved party may be prohibited from seeking sanctions because in doing so the aggrieved party may have to unilaterally pierce the confidentiality of the proceedings to prove the existence of a violation.

d) Finally, one further matter of concern. Rule 1.720 (e) gives the mediator discretion to "meet and consult privately with any party or parties or their counsel". If a mediator determines that possibility of a successful resolution would be enhanced if the mediator met privately with a party or parties, but counsel objects to such private meeting, is the mediator nevertheless, authorized in the exercise of discretion to meet with that party or parties over the objection of counsel?

It is recognized that the questions presented are ones that are not easy to answer. But, some guidance would be helpful in addressing them so as to avoid any impropriety on the part of the mediator.

Thank you for your courtesy and consideration.

Very truly yours,

Certified County, Family & Circuit Mediator
Southern Division

AUTHORITY REFERENCES:

Florida Rules for Certified and Court-Appointed Mediators: 10.060, 10.070, 10.080(a), 10.080(b), 10.090, 10.110(b).

Florida Rules of Civil Procedure: 1.720(b), 1.720(e).

Chapter 44, Florida Statutes: 44.102(3).

SUMMARY OF THE OPINION:

a) The panel is of the opinion that the question you raise in (a) is legal in nature, and beyond the purview of the panel.

- b) The mediator may not reveal information learned in caucus which a party has not authorized the mediator to reveal to the other party. Either party can conclude the mediation at any time.
- c) [c₁] The mediator may report to the court that one or more parties did not appear at the mediation pursuant to rule 1.720(b). [c₂] The mediator may not reveal information learned in caucus without the consent of the revealing party. [c₃] When a party makes a revelation in front of the other party, it becomes a decision for that other party to determine how or whether to proceed with mediation. The mediator may make a report to the court that one or more of the parties did not appear at mediation, or a party may file an appropriate motion.
- d) While the strict reading of rule 1.720(e) does not prohibit a mediator's contact with a party over the objection of the party's counsel, a mediator should consider the potential impact such a decision would have on the mediator's perceived impartiality, the party's right to self-determination, and restrictions on professional advice.
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OPINION:

- a) Questions relating to construction of rules of procedure are legal in nature and thus, beyond the purview of the panel. The panel is of the opinion that the question you raise in (a) is such a question and therefore is outside its jurisdiction. It may be helpful to you to review the case law interpreting this rule.
- b) When the mediator learns any information in caucus which a party has not authorized the mediator to reveal to the other party, the mediator may not reveal that information pursuant to rule 10.080(b). This includes information regarding whether a party has full authority. Since mediation is in essence a consensual process, either party can conclude the mediation at any time. Thus, if either party requests that the mediation be terminated **for any reason**, the mediator is required to comply with such a request. Rule 10.110(b).
- c) The panel views this question as having three distinct parts, namely, the mediator's responsibility when 1) a mediation does not begin because of the absence of full authority by one or more of the parties; 2) a mediation is concluded based on either a revelation in caucus of absence of full authority or a mediator's belief that the party does not have full authority; and 3) the party's revelation in mediation in front of the other party(ies) of an absence of full authority.

In the first instance (the mediation does not begin because of the absence of full authority by one or more of the parties), the mediation never began and the mediator may report to the court that one or more of the parties did not appear at the mediation pursuant to rule 1.720(b), Florida Rules of Civil Procedure.

In the second instance (the mediation is concluded after it commenced because of perceived or actual lack of authority), as discussed in (b) above, information learned in caucus may not be revealed – to the court or to the other party without the consent of the revealing party. See rule 10.080(b). If the mediator has not been specifically told that a party lacks full authority, but somehow deduces that there is a lack of authority, the mediator may not reveal those perceptions to

the other party in light of the confidentiality provisions of the rules and statute. See section 44.102(3), Florida Statutes and rule 10.080(a).

Under the third scenario, when the party makes the revelation in front of the other party, it becomes a decision for that other party to determine whether to go forward with mediation, or under rule 1.720(b), the parties may stipulate to proceed with the mediation. If they choose not to go forward with the mediation, the mediator may make a report to the court that one or more of the parties did not appear at the mediation, or a party may file an appropriate motion.

d) The panel believes that the question you raise in section (d) raises legal and ethical questions. Questions relating to construction of rules of procedure are legal in nature and thus, beyond the purview of the panel. From an ethical standpoint, while the strict reading of rule 1.720(e) does not prohibit a mediator's contact with a party over the objection of the party's counsel, a mediator should consider the potential impact such a decision would have on the mediator's perceived impartiality (rule 10.070), the party's right to self-determination (rule 10.060), and restrictions on professional advice (rule 10.090). Your question lacks a fundamental factor in assessing the ethical propriety of meeting with the party alone over counsel's objection, namely, where the party stands in relation to this meeting. If the party does not want to meet with the mediator alone, the mediator could be violating the party's right to self-determination and could violate the prohibition against mediator coercion (rule 10.060). If the party has requested such a meeting with the mediator over the objection of the party's counsel, there would be little concern with violating the party's exercise of self-determination. However, a mediator should consider impartiality and professional advice concerns.

Date

Charles Rieders, Panel Chair