MEDIATOR ETHICS ADVISORY COMMITTEE c/o Dispute Resolution Center P Supreme Court Building P Tallahassee, FL 32399

March 22, 2002

THE QUESTION

According to the provisions of Fla. R.Civ.P. 1.720(b)(1), "the party or its representative having full authority to settle without consultation," is required to be physically present at the mediation.

The question represented for consideration is whether that section is satisfied if the "representative" is the party's attorney or the in-house counsel of an entity, both of whom represent to the mediator that they have "full authority to settle without further consultation?"

There have been instances where the party has not appeared and counsel of record has represented as "having full authority to settle without further consultation." There have also been instances where the party is a corporation and has not sent a corporate officer, but instead, has sent their general counsel or in-house counsel who have made the representation that they have "full authority to settle without further consultation."

Since the rule already requires the presence of "the party's counsel of record, if any," it would seem that if the party is an individual and is represented by counsel and such party does not appear, the rule is not satisfied by the party's counsel of record appearing and representing having full authority to settle. Additionally, it is counter-productive when the corporation's counsel of record appears and the corporation also sends its general counsel or in-house counsel as its representative, claiming to have full authority to settle. Even if such authority representation is accurate, the mediation process is undermined and/or defeated, if the entity sends a general counsel or in-house counsel because, invariably, that individual cannot separate his/her advocacy from the "business decision" that can only be made by an officer of the corporation.

Thank you for your consideration of this request.

Very truly yours,

County, Family, Circuit Mediator
Southern Division

AUTHORITY REFERENCED

Rules 10.420(b)(3) and 10.420(b)(4), Florida Rules for Certified and Court-Appointed Mediators
Rule 1.720(b), Florida Rules of Civil Procedure
MQAP Opinion 99-002(a)
Florida Supreme Court *Rules of Procedure Style Guide*
In re: Amendments to the Florida Rules of Civil Procedure, 604 So. 2d 1110 (Fla. 1992)

In re: Florida Rules of Civil Procedure , Florida Rules for Certified and Court-Appointed Mediators, and Proposed Florida Rules for Court-Appointed Arbitrators, 641 So. 2d 343 (Fla. 1994)
Carbino v. Ward, 801 So. 2d 1028 (Fla. 5th DCA 2001)

SUMMARY

The requirements of 1.720(b)(1), Florida Rules of Civil Procedure, regarding appearances cannot be satisfied by the physical presence of the party's attorney or
in-house counsel of an entity without the named party.

OPINION

The question you raise regarding the interpretation of rule 1.720(b), Florida Rules of Civil Procedure, is essentially a legal question. See MQAP 99-002(a). However, given the mediator's responsibility to adjourn or terminate a mediation under the circumstances described in rule 10.420(b)(3) and (b)(4), the Committee believes that it is appropriate to provide some additional guidance on the issues of "appearance" and "full authority to settle."

When the rules governing mediation were initially adopted in 1987, rule 1.720(b) read as follows:

> The court, upon written notice from the mediator that any party has failed to appear after receiving written notice and without good cause, may apply appropriate sanctions as provided by the Florida Rules of Civil Procedure, including taxing of the fees and costs of the mediator.

The Supreme Court of Florida's first Standing Committee on Mediation and Arbitration Rules submitted major revisions to the rules of procedure in December 1989 including the language which is the subject of this question, specifically,

> Otherwise, unless stipulated by the parties or changed by order of the court[1], a party is deemed to appear at a mediation conference if the following persons are physically present:
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> (1) the party or its representative having full authority to settle without further consultation; and
>
> (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 without further consultation. [emphasis added]

[1] The Committee submitted the following recommended opening phrase: "Unless otherwise stipulated by the parties..." The Court, in adopting the rules, revised it to "Otherwise, unless stipulated by the parties..."

In the Committee's petition to the Court, the following rationale for the proposed revision was provided in the "Reason for Change" column:

> Clarifies process for imposition of sanctions upon a failure to appear by either party. Defines "failure to appear" in light of experience from the field as to parties who must necessarily be present to make settlement possible. With respect to insurance carriers, the rule requires the physical presence of a direct representative of the carrier who has the ability to enter into a settlement pledging the full benefits of the policy involved. The intent is to avoid situations in which insurance representatives appear at mediation sessions with limitations on their authority which serve to place an absolute, unconditional barrier on settlement. While there is no intent in this rule to mandate any party to settle any case in mediation, it is the intent to have each party participating in mediation directly vested with the ability to resolve the dispute...

In order to understand the grammatical changes in rule 1.720 and their substantive, if any, effect it should be noted that in 1992, the Supreme Court revised the *Rules of Procedure Style Guide.* Of particular relevance to this issue was the following addition:

> D. Lists
>
> 1. If items in a list could stand alone as sentences, begin each with a capital letter and end with a period. Insert needed language into the introduction of the list to ensure clarity on whether all items in the list apply or whether any one of the items may apply, *e.g.*, "The court shall consider <u>all of</u> the following."

In response to the revised *Style Guide*, the Florida Bar included style amendments, as well as substantive amendments, in its 1992 quadrennial report of proposed rule changes to the Florida Rules of Civil Procedure. The Court's opinion, in response thereto, includes an explanation of all "substantive changes to the rules." See *In re: Amendments to the Florida Rules of Civil Procedure*, 604 So. 2d 1110 (Fla. 1992). Significantly absent from this list is the revision made to rule 1.720(b), which called for the deletion of the semicolons and the word "and" following (1) and (2) and replacing them with periods. This lends further support to the view that this change was not a retreat from the initial intention that all of the listed individuals were to be present at the mediation.

Finally, in 1994, the Supreme Court Standing Committee on Mediation and Arbitration Rules recommended that rule 1.720(b) be amended to bring it to its present status [proposed additions are indicated by <u>underline</u>]:

> Otherwise, unless stipulated by the parties <u>or changed by order of the court,</u> a party is deemed to appear at a mediation conference if the following persons are physically present:
>
> . . .
>
> (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 <u>up to the amount of the plaintiff's last demand or policy limits, whichever is less,</u> without further consultation.

In accepting these recommendations, the Court's opinion accompanying the rule changes stated as follows:

> The Committee recommends that Florida Rule of Civil Procedure 1.720(b) be amended to more narrowly define the scope of settlement authority a representative of an involved insurance carrier must bring to the mediation conference. The insurance carriers who commented on the amendment argue that it is both cost prohibitive and logistically impractical for insurance companies to send their highest level decision makers to every mediation proceeding involving a company policy. We believe, however, that the insurance companies' concerns are partially allayed by the provision which allows the court to provide relief from the appearance requirement upon proper motion. Because the mediation process has proven to be most successful when the parties are physically present and fully prepared to settle, we adopt the Committee's amendment to rule 1.720(b). at 641 So.2d 343.

Regarding your specific question as to whether a party must appear at mediation if counsel for the party appears having "full authority to settle without further consultation," the Committee directs your attention to *Carbino v. Ward*, 801 So. 2d 1028 (Fla. 5th DCA 2001), in which the Fifth District Court of Appeals was confronted with the question of whether the defendant was required to personally appear at the mediation when the insurance company sent a representative who had full authority to settle the matter up to the policy limits. In answering the question in the affirmative, the court held "that the phrase 'its representative' in subsection (b)(1) relates to a party such as a corporation, partnership, incapacitated person, or minor which must appear through a duly authorized representative." Under the rule, the trial court was required to impose sanctions against the party who failed to appear at the mediation without good cause.

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Date Charles M. Rieders, Committee Chair