

April 22, 2003

THE QUESTION

I am a certified circuit and county court mediator. I mediate workers' compensation cases under Florida Statutes Chapter 440 and Chapter 60Q-6 Florida Administrative Code.

As I understand it, the current Florida Rules for Certified and Court-Appointed Mediators were adopted February 3, 2000 in Supreme Court Opinion SC 95491.

Rule 10.420 reads:

Rule 10.420. Conduct of Mediation

- (a) Orientation Session. Upon commencement of the mediation session, a mediator shall describe the mediation process and the role of the mediator, and shall inform the mediation participants that:
 - (1) mediation is a consensual process;
 - (2) the mediator is an impartial facilitator without authority to impose a resolution or adjudicate any aspect of the dispute; and
 - (3) communications made during the process are confidential, except where disclosure is required by law.
- (b) Adjournment or Termination. A mediator shall:
 - (1) adjourn the mediation upon agreement of the parties;
 - (2) adjourn or terminate any mediation which, if continued, would result in unreasonable emotional or monetary costs to the parties;
 - (3) adjourn or terminate the mediation if the mediator believes the case is unsuitable for mediation or any party is unable or unwilling to participate meaningfully in the process;
 - (4) terminate a mediation entailing fraud, duress, the absence of bargaining ability, or unconscionability; and
 - (5) terminate any mediation if the physical safety of any person is

endangered by the continuation of mediation.

- (c) Closure. The mediator shall cause the terms of any agreement reached to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement.

Specifically, section 10.420(b) reads in pertinent part:

- (b) Adjournment or Termination. A mediator shall:
 - (3) adjourn or terminate the mediation if the mediator believes the case is unsuitable for mediation or any party is unable or unwilling to participate meaningfully in the process;
 - (4) terminate a mediation entailing fraud, duress, the absence of bargaining ability, or unconscionability; and...

Within the Florida workers' compensation system, settlements are strictly voluntary. There is never a discussion concerning "policy limits." Adjusters and employer representatives seldom, if ever, attend mediation in person. By this I mean that adjusters are almost universally "unable or unwilling to participate meaningfully in the process." Adjusters appear to be given a pre-set amount of settlement authority. The injured worker appears to have no meaningful "bargaining ability."

Although there are mediators paid by the state in each district where there is a judge of compensation claims, many cases are given to private mediators.

For all practical purposes, the carrier and their adjusters and counsel have selected a handful of mediators to whom they refer their private mediation business.

It is perceived that mediators that do not "please" a carrier, adjuster or counsel does not get mediation referrals.

Notwithstanding all of the above, state and private mediators do not seem to be constrained by the language of Rule 10.420 and I have heard of no case where a mediator "terminated a mediation by virtue of the absence of bargaining power in the injured worker or by the unwillingness of insurers to appear in person and otherwise participate meaningfully in the process."

May a Florida Supreme Court certified mediator providing services in a Florida workers' compensation setting continue to provide mediation services where there is a complete absence of bargaining ability on the part of the injured worker as I believe is true in the Florida workers' compensation setting?

Is there "meaningful participation" by an insurer when their adjusters will only appear by telephone?

Certified County and Circuit Mediator
Southern Division

AUTHORITY REFERENCED

Rules 10.200, 10.310, 10.410, 10.420(b)(3) and (b)(4), 10.330(b), 10.340(b) and (c), 10.520 and 10.650, Florida Rules for Certified and Court-Appointed Mediators
Sections 440.25(3)(a)2 and 44.106, Florida Statutes
Rule 1.720, Florida Rules of Civil Procedure
Rules 4.300(b) and 4.361(d), Florida Rules of Workers' Compensation Procedure
Rule 60Q-6.110(3), Florida Administrative Code

SUMMARY

Pursuant to rule 10.420(b)(3) and (b)(4), a mediator shall adjourn or terminate a workers' compensation mediation where there is a complete absence of bargaining ability. This determination must be made on a case by case basis since the Committee does not accept the premise that workers' compensation mediation necessarily automatically results in an absence of bargaining ability on the part of the plaintiff. Further, while there are challenges associated with a telephonic mediation, its use does not automatically render the mediation inappropriate. Finally, a mediator should be mindful of the extent of the relationship between the mediator and particular carrier or adjuster which must, at a minimum, be disclosed and may become a clear conflict of interest which is not waivable.

OPINION

Jurisdictional Statement

The question you raise deals with workers' compensation mediation, a type of mediation which is subject to specific statutes, court rules, and regulations. Nevertheless, the Committee believes that mediation performed in this type of case is subject to the Standards of Professional Conduct contained in the Florida Rules for Certified and Court-Appointed Mediators.

Section 440.25(3)(a)2, Florida Statutes, states that workers' compensation mediation conferences "shall be conducted by a mediator certified under s. 44. 106." [Note: see also rule 60Q-6.110(3), Florida Administrative Code, which provides that a private mediator shall be bound by rules and statutes applicable to state mediation.] By mandating that these mediators shall be certified, the Legislature has thereby subjected them to the mediator standards, pursuant to the authority of rule 10.200, Florida Rules for Certified and Court-Appointed Mediators, which states that the standards apply to certified mediators. More specifically, Part II of the Florida Rules of Workers' Compensation Procedure, which deals specifically with such mediations, establishes detailed procedures for conducting mediation sessions. See rule 4.300(b). Rule 4.361(d)

establishes the guide for mediator conduct in workers' compensation mediation and provides as follows:

A mediator's conduct in discharging the professional responsibility in mediating workers' compensation matters should be guided by the Standards of Professional Conduct found in Part II of the Florida Rules for Certified and Court-Appointed Mediators as approved by the Supreme Court of Florida.

Thus, it is the Committee's view that the standards of conduct for mediators apply to a mediator conducting a workers' compensation mediation, consistent with the requirement that mediators comply with "all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation." See rule 10.520. This general provision is, of course, subject to the provisions of rule 10.650, which requires mediators to observe other ethical standards. However, when rendering mediation services in the case, a mediator's standards prevail over other standards in the event of a conflict.

Taken at face value, the question you posed to the Committee may be answered very simply in the negative. That is, pursuant to rule 10.420(b)(3) and (b)(4), a mediator shall adjourn or terminate a mediation where there is a complete absence of bargaining ability on the part of one of the parties. However, your question is premised on the assumption that an injured worker in a workers' compensation mediation by definition will have an absence of bargaining ability. The committee does not accept this presumption.

You state that since adjusters "seldom, if ever, attend mediation in person," they are almost universally "unable or unwilling to participate meaningfully in the process" in accordance with rule 10.420(b)(3). The Committee is not prepared to state that just because an individual does not attend in person, he or she is unable or unwilling to participate meaningfully in the process. While it is true that there are challenges and a different dynamic associated with the process when one party appears by telephone, it does not automatically render the mediation inappropriate. The Committee understands that there might be good reasons for a mediation to be conducted without all parties being physically present and encourages mediators to structure the mediation to ensure that meaningful participation is possible in all cases.

Another concern you raise is that the adjusters "appear to be given a pre-set amount of settlement authority," rendering the other side with no meaningful "bargaining ability." Again, the Committee does not believe that this necessarily follows. In fact, the dynamic you describe is similar to the situation with personal injury cases involving adjusters. While the mediation rules require the appearance of a representative of the insurance company with authority to resolve the dispute up to plaintiff's last demand or policy limits (see rule 1.720, Florida Rules of Civil Procedure), the Committee recognizes that the adjusters often have a target range in mind for settlement. It is the responsibility of the mediator to conduct the mediation in such a manner as to preserve the parties' right

to self-determination (rule 10.310) and to “encourage the participants to conduct themselves in a collaborative, non-coercive, and non-adversarial manner.” Rule 10.410. The Committee believes that it is possible to accomplish this in a workers’ compensation mediation. However, as you correctly state in your question, when a party is unable or unwilling to participate meaningfully in the mediation process or there is an absence of bargaining ability, the mediator is obligated to adjourn or terminate the mediation.

Finally, you raise an issue regarding conflicts of interest and impartiality. Pursuant to rule 10.340, a mediator “shall not mediate a matter that presents a clear or undisclosed conflict of interest.” The Committee believes that a mediator who is routinely selected by a particular carrier or adjuster, is obligated to disclose this to the other side pursuant to rule 10.340(b) and may only continue to serve if all parties agree pursuant to rule 10.340(c). Further, the mediator should be mindful that the extent of the relationship may be such that it is a “clear” conflict which is non-waivable. See Committee Note to rule 10.340 for further discussion.

While it may be possible for mediators to maintain their impartiality as required pursuant to rule 10.330, even if paid by only one side, they are obligated to withdraw from mediation if no longer impartial. Rule 10.330(b). Allowing one party not to appear at the mediation merely because that individual is paying for the mediation is not an impartial act, and therefore, is not appropriate.

Date

Fran Tetunic, Committee Chair