

June 18, 2004

THE QUESTION

I am a certified circuit mediator. I mediate, among other things, workers' compensation cases and have done so both as a state adjunct mediator and as a private mediator.

I know that the committee has previously considered ethical questions arising out of workers' compensation mediations (Advisory Opinion 2003-001), and that it is aware of the relevant statutes and rules that govern them. As one who is heavily involved in the process, I understand and am sympathetic to the concerns that prompted that advisory opinion. I agree with the committee's resolution.

I am constrained, though, to point out that there are other problems with workers' compensation mediations as state mediators typically conduct them. These problems go deeper than questions about whether an injured worker has bargaining power or whether insurance adjusters participate meaningfully in the process. These problems involve, ultimately, whether the process itself is meaningful.

It is clear from your earlier Advisory Opinion 2001-007 and rule 10.430 (cited therein) that it is inappropriate for a mediator to set arbitrary time limits for completing mediations and that sufficient time should be allotted for the parties "to fully exercise their right of self-determination."

Notwithstanding these precepts, the practice of many state mediators throughout the state appears to involve an across-the-board time limit (usually one hour) compounded by consistent double booking. The reason, I believe, for the time limit is so that the mediator can mediate as many as possible each day (and there are many, many state mediations to get done each day). Given that a certain number of mediations will cancel because the parties have resolved their differences before the scheduled mediation, similar considerations of efficiency lead to routine double booking.

The vices of these practices is that, when double (or even triple) booked mediations do not cancel, the result is catastrophic for the participants: they have only an hour and they have to share that hour with the other parties. It is not unusual, and in fact may be the norm, for state mediators to mediate several cases simultaneously.

The terms most often heard to describe the result are "farcical", "circus-like", "a complete waste of time", etc.

The professionals involved (the attorneys and insurance adjusters) are generally inured to this procedure and time wasted is written off as a "cost of doing business." The injured workers and employer representatives, on the other hand, find it hard to believe that the process is meaningful and are shocked at the dissipation of resources (including their own).

The questions for your consideration are: must a certified mediator employed by the state allow sufficient/appropriate time for completing mediations and may that mediator, as a matter of practice, double or triple book mediations?

AUTHORITY REFERENCED

Rules 10.300, 10.310(a), 10.380(b)(1), 10.400, 10.420, 10.430, 10.600, and 10.620, Florida Rules for Certified and Court-Appointed Mediators
Rule 4.361, Florida Rules of Workers' Compensation Procedure
MEAC Opinions 2001-007 and 2003-001

SUMMARY

A certified mediator must allow "sufficient" and "appropriate" time for completing mediation, and should not double or triple book mediations.

OPINION

The Committee has previously determined that it has jurisdiction to issue advisory opinions in response to questions relating to workers' compensation mediation. See MEAC 2003-001 and rule 4.361, Florida Rules of Workers' Compensation Procedure.

The specific procedures which you describe, time limitations and double bookings, cause the Committee concern not only for workers' compensation, but also for any other types of cases. It is not appropriate to impose arbitrary time limits on mediations. See MEAC 2001-007. This practice violates the parties' right to self-determination contained in rule 10.310(a) by essentially requiring the mediator to declare an impasse upon the passage of an arbitrary amount of time, rather than for any of the legitimate reasons contained in rule 10.420. Such a practice also presents possible violations of rule 10.430, which requires that mediation be scheduled to allow adequate time for the parties to exercise self-determination.

The practice of double booking, when it results in one mediator conducting two mediations simultaneously is similarly objectionable. The Committee assumes that this practice involves a mediator either leaving a caucus, in which case both parties are left with nothing to do, or leaving a joint session, in which case any unobserved interaction between the parties will be unknown to the mediator. In either case, such a practice not only violates the requirement in rule 10.430 that a mediator perform mediation services in a timely manner, avoiding delays whenever possible, but also strikes at the integrity of the mediator, as referenced in rule 10.620. If the parties are charged for time when the mediator is not conducting their mediation, the requirement in rule 10.380(b)(1) that charges be based on actual time spent or allocated is violated. In addition, the practice of double booking also appears to violate rules relating to the responsibility of the mediator to the parties (rule 10.300), to the mediation process (rule 10.400), and to the mediation profession (rule 10.600).

Date

Fran Tetunic, Committee Chair