

March 18, 2005

### The Question

As a Mediator, I have an ethical concern about events that have occurred during Mediation Conferences where I was the attorney representing an injured workers involving a Workers' Compensation claim. I am a mediator and am quite certain that these same events will take place while I am serving as a mediator. Therefore, I seek your guidance only with respect to what I should do under the same circumstances as a Mediator. I will explain the setting and what I think I should do, but seek the committee's opinion about the appropriate ethical course I should follow as a mediator. For some of the committee members who are familiar with the workers' compensation law, I may be more verbose than necessary, but the entire circumstances will be needed to comprehend the depth of my concern for those who are not familiar with this law.

Florida Statutes, section 440.105 defines certain criminal acts. Herein, I will call a defense that is commonly asserted by the Employer/Carrier a "section 440.105 Fraud" defense. Essentially, this section of the law obligates a party who believes that another party who has committed any of the acts prohibited by section 440.105 to report the conduct to the Bureau of Fraud for criminal disposition. In fact, the statute states that anyone who believes such conduct has occurred "shall" report the conduct. Florida's First District Court of Appeals has also determined that a Judge of Compensation Claims and Florida's criminal courts have concurrent jurisdiction to determine whether such conduct has taken place. If either of these courts should make such a determination, the injured worker is to be denied all benefits being sought or otherwise due under Chapter 440, and potentially face criminal prosecution and sanction. Notwithstanding the statute's requirement that the conduct be reported for criminal investigation and disposition, it is almost always the case that the conduct of the employee this is believed to be fraudulent has not been reported to the Bureau of Fraud. Rather, the "section 440.105 Fraud" defense is not raised in the civil proceeding under the workers' compensation law, thereby serving as defense to the provision of any and all benefits being sought by the employee.

This is how the dilemma develops. A statement is made by the attorney for the Employer/Carrier that the injured employee's claim is being denied based on a "section 440.105 Fraud" defense during opening statements. Frankly, as an attorney, I advise my clients that entertaining an offer to settle his or her claims for a lump sum of money under those circumstances will not dispose of the right, or obligation, of the Employer or Carrier to report the accusation to the appropriate

authority for criminal prosecution and we should therefore not entertain settlement offers. For it seems to me, as the employee's attorney that were I to encourage my client to entertain such offers, my client and I would be participating in extortion, based on the implicit threat of the Employer/Carrier to prosecute my client criminally based on the express language of Florida Statutes, section 440.105. I am aware of Florida Bar Staff opinion 25110 prohibiting the direct or indirect threat of criminal prosecution.

As a final consideration, the committee should know that the Division of Workers' Compensation requires a mediation to be conducted prior to a Judge of Compensation Claims making a determination as to the merits of the Employee's claims at a Hearing. The state of Florida employs mediators within the Division of Workers' Compensation for that purpose, at no cost to the parties. I only serve as a mediator in workers' compensation proceedings when the attorneys for the parties find it appropriate to arrange for a private mediation at a cost, as opposed to the cost free mediation process provided by the Division of Workers' Compensation.

As a mediator, I am deeply troubled that delivering offers to employees under these circumstances would be participating in extortion, in its purest of definitions. I therefore seek your guidance and opinion in this regard. I look forward to hearing from you at your first available opportunity.

Certified Circuit Civil Mediator  
Central Division

### **Authority Referenced**

Rules 10.200, 10.410, and 10.420(b)(4), Florida Rules for Certified and Court-Appointed Mediators  
In Re: Florida Rules of Workers' Compensation Procedure, 891 So2d 474 (Fla. 2004)  
Rule 4.361(d), Florida Rules of Workers' Compensation Procedure (repealed December 2, 2004)

### **Summary**

While the Committee does not have jurisdiction to apply the Workers' Compensation statute to the specific facts in your question, the Florida Rules for Certified and Court-Appointed Mediators, to which all certified mediators must adhere, makes clear that if the mediator believes that the mediation entails fraud, duress, the absence of bargaining ability or unconscionability, the mediator is required to terminate the mediation. Rule 10.420(b)(4).

## Opinion

The Committee declines to engage in statutory interpretation to determine whether extortion may possibly occur in the scenario you describe since such a determination would be beyond its jurisdiction. The Committee does, however, have jurisdiction to address your ethical question. Specifically, the Florida Rules for Certified and Court-Appointed Mediators require that mediation be conducted as a balanced process. Rule 10.410. If the mediator believes that the mediation entails fraud, duress, unconscionability, or the absence of bargaining ability, the mediator is required to terminate the mediation. Rule 10.420(b)(4).

It is worth noting that, on December 2, 2004, the Florida Supreme Court repealed the Florida Rules of Workers' Compensation Procedure, 891 So.2d 474 (Fla. 2004). One of the repealed rules [rule 4.361(d)] required that a mediator's conduct in discharging professional responsibility in mediating workers' compensation cases shall be guided by the Standards of Conduct found in the state court mediation rules. Nonetheless, certified mediators are still bound by the Standards of Professional Conduct found in the Florida Rules for Certified and Court-Appointed Mediators when they are mediating. These rules provide ethical standards of conduct for **certified** and court-appointed mediators" [emphasis added]. Rule 10.20.

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Date

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Fran Tetunic, Committee Chair