

February 19, 2008

The Question

Is there any ethical obligation to Defendant Three under the following facts?

Although suit has not been filed, I shall use the words “Plaintiff” and “Defendants”. Plaintiff has a dispute with three Defendants and at the pre-suit mediation conference Plaintiff and all three Defendants entered into a written settlement agreement which states that the final settlement (as set forth in the written settlement agreement) between all of the parties is contingent upon an event happening before a future date certain. The event fails to occur and some number of months after the mediation conference, but prior to the date certain, Defendant One calls the mediator to communicate with the Plaintiff and Defendant Two (and not communicate with Defendant Three) to try to permanently settle the dispute between Defendants One and Two and the Plaintiff.

Defendant Three is not aware of the additional settlement negotiation/telephonic mediation which occurs after the initial mediation conference. The Plaintiff and Defendants One and Two reach a final oral settlement agreement after the date certain and are now drafting a written settlement agreement between them.

Does the mediator have any ethical or other obligations to notify Defendant Three?

Certified County, Family & Circuit Mediator
Northern Division

Authority Referenced

Rules 10.310, 10.330(a), and 10.620, Florida Rules for Certified and Court-Appointed Mediators
Committee Note to Rule 10.330

Summary

Conducting a second mediation with only three of the original four parties to a prior mediation agreement (the fourth party is not aware of the second mediation), which was based on the occurrence of a contingent event, prior to the deadline for the contingency to have occurred, would be inconsistent with your ethical obligations.

Opinion

The answers to questions submitted to MEAC depend on the facts and circumstances provided by the inquiring mediator. As the Committee understands the scenario, you mediated a presuit dispute among four parties. (We will refer to the parties as A, B, C & D). During the mediation, the parties reached an agreement, which contained at least one contingency that was required to occur by a specific date.

After conclusion of the mediation conference, but before the specific date, one of the parties (B) advises you that the event has not occurred and asks you to mediate the dispute further, but with only three of the parties (A, B & C) participating. You ask the Committee whether you have any ethical obligation to the excluded party (D), and specifically whether you have an obligation to notify the excluded party.

Conducting the mediation among A, B & C and intentionally excluding party D under the circumstances you describe would be inconsistent with your ethical obligations. A mediator is obligated not to “accept engagement, provide any service or perform any act which would compromise the mediator’s integrity or impartiality.” Rule 10.620. The Committee is concerned that mediating without party D violates rule 10.330(a) by not showing impartiality among the parties and by failing to exhibit a commitment to assist all parties, as opposed to one or some individuals. The Committee directs your attention to the following statement contained in the Committee Notes to rule 10.330: “In the event circumstances arise during a mediation that would reasonably be construed to impair or compromise a mediator’s impartiality, the mediator is obligated to withdraw.” In addition, the failure to include party D did not protect that party’s right to self-determination. Rule 10.310.

By participating in another mediation with selected parties before the first mediation agreement had expired, the mediator may have undermined the original agreement. While the parties are arguably entitled to take such action, the Committee does not believe the mediator should participate in the mediation. You do have an ethical obligation to party (D) for whom you mediated and wrote up an

agreement which apparently remained in effect until the occurrence (or the deadline for the occurrence) of the stated specific event. That party would reasonably expect that the agreement would remain in effect until the specific event failed to occur by the given date (unless otherwise agreed by the parties) and that the mediator would not participate in a further mediation which specifically and intentionally excluded one party. The Committee believes the best course of action was not to mediate for the three parties (excluding one party) while the first agreement was still in effect. By choosing not to mediate, you would not then have to decide whether to tell the excluded party about the additional mediation or agreement, because you would not have participated in either.

Date

Fran Tetunic, Committee Chair

Lou Ray, Dissenting

The majority opinion concludes that when the original mediator participates in the “second mediation” he/she could undermine the first agreement and, thus, violate mediation party self-determination and mediator impartiality requirements. Whether the second agreement undermines the first depends on the nature of the second agreement, not the identity of the mediator. It is not uncommon for some mediation parties, particularly the plaintiff and one or more but not all of the defendants, to make side agreements to guarantee a minimum recovery or limit their liability. How can the majority of the committee forbid the second mediation by the original mediator when, during the course of the original mediation, the original mediator could have facilitated a second, contingent settlement agreement (conditioned on the first one failing) without violating ethical rules? The opinion does not prohibit another mediator from undertaking such an endeavor. Such an agreement need not undermine the original agreement and I would not dissuade the original mediator from even attempting to facilitate such a further contingent resolution. I agree with the majority that the original mediator should not participate in a follow-up mediation that produces a second agreement which undermines the first.

Date

Lou Ray, Committee Member