

HOW DO YOU DEAL WITH THIS? Ethical Dilemmas and Practical Quandaries During Mediation

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A surface reading of a MEAC opinion can lull us into a false sense of security.

The MEAC opinion follows hard on the heels of the fact scenario, and this relieves us of the task of ourselves confronting the problem in real time.

Today, we are going to do what we do as mediators every day – we are going to work without a net.

R.A.I.D.

- **RECOGNIZE** that an ethics problem exists.
- **ANALYZE** the situation. Small situational changes can alter the problem and solution.
- **IDENTIFY** the specific problem or problems.
- **DETERMINE** how to balance your ethical obligations

Caveat –

Often today, there will be no clear-cut answers.

The citations following each scenario are resources to aid in the search for answers – not necessarily the answers themselves.

Our focus today is on identifying and analyzing the problems before they bite us in the behind.

One: Husband vs wife mediation. After two hours of mediation, the attorney for the wife confides to the mediator, in the hall, that his client has been eavesdropping on the husband's caucus. The caucus rooms are far apart, so eavesdropping is not inadvertent.

FRCM 10.360 (a) and (b) – Confidentiality. Mediator may not disclose information obtained during caucus

FRCM 10.420 (b)(4) – Terminate for fraud, duress, the absence of bargaining ability or unconscionability

FRCM 10.330 – Mediator shall maintain impartiality

FRCM 10.230 (c) – Concept of fairness

FRCM 10.400 – Mediator responsible for safeguarding mediation process

Two: You become aware during mediation that one party has come to mediation without settlement authority. What do you do?

a. Does it matter how you learned of the absence of authority?

- The offending party told you in caucus?

- You overheard a person-to-person or phone conversation in the hall?

- The party's attending representative has to make a phone call before every decision?

- You deduced the fact from the totality of the circumstances?

b. Do the motives of the offending party enter into your decision?

- They admit in caucus that they are using mediation only for discovery?

- Their only purpose is to test the limits of the opposing party?

FRCM 10.360 – Confidentiality

FRCM 10.420 (b)(2) – Adjourn or terminate mediation if continuing would result in emotional or monetary cost to parties

FRCM 10.420 (b)(4) – Terminate for fraud, duress, the absence of bargaining ability or unconscionability

MEAC 2006-003 – Ethical violation to report that a party did not have full settlement authority.

MEAC 2005 – Mediator may report non-appearance at mediation, but may not state the reason for non-appearance.

Three: Multi-party civil case. In caucus with the Plaintiff, with the mediator present, the Plaintiff's attorney and the Plaintiff have a heated disagreement. The attorney believes the Plaintiff is perpetrating a fraud on the Court, and he decides he can no longer represent her. He asks her consent to withdraw as counsel. She refuses. Over her objections, the attorney leaves the mediation. The Plaintiff wants to continue mediation without her attorney.

- Should/can the mediator continue the mediation?
- Should/can the mediator tell the remaining parties that the Plaintiff's attorney has gone?
- Can the mediator tell the remaining parties that Plaintiff's attorney is withdrawing? Or divulge the reason?
- What should the mediator do?
- Does it matter if the mediator also feels the Plaintiff is perpetrating a fraud?
- What are some risks for the mediator?

FRCP 1.720(h) – In the discretion of the mediator and with the agreement of the parties, mediation may proceed in the absence of counsel—unless otherwise ordered by the court.

FRCM 10.360 (a) and (b) – Confidentiality. Mediator may not disclose information obtained during caucus

FRCM 10.420 (b)(4) – Terminate for fraud, duress, the absence of bargaining ability or unconscionability

FRCM 10.230 (c) – Concept of fairness

FRCM 10.310 (a) and (d) – Self-determination. Mediator shall not make substantive decisions for the parties. Postpone or cancel if party unable to exercise self-determination

MEAC 2006-006 – Mediator prohibited from giving professional opinions to direct a resolution of any issue

Four: You realize that a party's attorney is committing malpractice. What do you do?

Does it matter that the attorney's malpractice might affect his client's ability to make an informed self-determination?

- If you terminate, may you report to the opposing party the reason for termination?

- May you report the reason for termination to the attorney's client?

- Does it matter that the attorney's malpractice may affect the interests of third persons not participating in the mediation?

FRCM 10.310 (a) and (d) – Self-determination. Mediator shall not make substantive decisions for the parties. Postpone or cancel if party unable to exercise self-determination.

FRCM 10.320 – Promote awareness of the interests of affected non-participants

MEAC 95-005 – Mediator precluded from pointing out missed causes of action.

MEAC 96-003 – Mediator may not inform of right to make consortium claim

MEAC 2006-006 – Mediator prohibited from giving professional opinions to direct a resolution of any issues

Five: Midway during a divorce mediation a stranger joins one caucus, and that party insists that you not divulge to the other participants the newcomer's involvement in mediation. The stranger is the husband's mistress.

(Does it matter whether the wife knows the husband has a mistress?)

FRCM 10.320 – Promote awareness of the interests of affected non-participants (mistress??)

FRCM 10.330 – Mediator shall maintain impartiality

FRCM 10.360 (a) and (b) – Confidentiality. Mediator may not disclose information obtained during caucus

MEAC 2008-006 – Not permissible for mediator to dictate who attends mediation. If the parties disagree on who may attend, mediator may not allow non-party to participate, but, in that event, the party wishing the non-party's participation may not be forced to continue without the non-party.

MEAC 2007-004 – Judge may limit who attends mediation, and mediator must comply unless such compliance requires the mediator to violate an ethical provision

MEAC 2006-007 – Non-party participants should be told they are bound by confidentiality.

Six: Divorce mediation with child support as a major issue. In caucus with the husband, he inadvertently discloses that in two weeks he will be taking a new job that will substantially increase his income. His attorney tells you that you may not disclose this to the wife because child support is to be determined on the husband's current income, not his prospects. Anyway, he says, the wife can always seek to modify later when she learns of the new income – and prospects sometimes fail to materialize.

FRCM 10.360 – Confidentiality

FRCM 10.230 (c) – Concept of fairness

FRCM 10.420 (b)(4) – Terminate for fraud, duress, the absence of bargaining ability or unconscionability

MEAC 95-005A – A family mediator who is informed that one party possesses an asset not disclosed to the other party cannot disclose to the other party – but the mediator must withdraw unless the concealing party discloses the asset. (but what about prospective assets or income?)

Seven: There are two parties on one side being represented by one attorney (e.g., estranged husband and wife) and the two disagree strongly on whether or how to settle the case. The claim arises from the couple's brain-damaged baby in a medical malpractice case. Their attorney is now caught in the middle and cannot adequately represent either without a conflict of interest. She asks you to mediate between them while she steps out of the room.

- **May you disclose the situation to the opposing party?**
They are asking what is taking so long in the other caucus.
- **Risks for the mediator?**
- **Risks for the process?**

FRCM 10.310 – Self-determination.

FRCM 10.360 – Confidentiality

FRCP 1.720(h) – In the discretion of the mediator and with the agreement of the parties, mediation may proceed in the absence of counsel—unless otherwise ordered by the court.

FRCM 10.310 (a) and (d) – Self-determination. Mediator shall not make substantive decisions for the parties. Postpone or cancel if a party is unable to exercise self-determination.

MEAC 2006-006 – Mediator prohibited from giving professional opinions to direct a resolution of any issues

Eight: You are mediating a case with one plaintiff and six defendants. The court has entered an order for mediation, but one corporate defendant has prior to mediation told the plaintiff and the other five defendants that it will not attend. On the morning of mediation, the attorney for defendant six appears—without a client representative—for the opening session. He says that he intends to “monitor” the mediation. When asked by the mediator, he concedes that he has no authority to settle. The plaintiff objects strongly to his attending, but the other five defendants voice no objection.

- Does it matter whether defendant has filed a certificate of authority pursuant to FRCP 1.729 (e)?
- Does it matter that defendant is willing to pay it's share of the mediator's fee?
- Has Defendant “appeared” at the mediation pursuant to the Court's order?
- Should the mediator report that Defendant did not appear at the mediation?

FRCM 10.380 (b)(3) – Fees and costs to be equally divided

FRCM 10.400 – Mediator responsible for safeguarding mediation process

FRCM 10.230 (c) – Concept of fairness

FRCP 1.720 (b)(1), (2) and (3) – A party is deemed to appear if the following are present: Party or party’s representative, AND party’s counsel of record, AND representative of insurer, if any.

MEAC 2008-006 – Not permissible for mediator to dictate who attends mediation. If the parties disagree on who may attend, mediator may not allow non-party to participate, but, in that event, the party wishing the non-party’s participation may not be forced to continue without the non-party.

FRCP 1.720 (e) and (f) – Certificate of authority 10 days prior

Nine: Domestic mediation. After a few hours, it becomes obvious to the mediator that the husband is not really interested in child visitation, but he is demanding several days each month merely to reduce the child support he may have to pay. What are the mediator's considerations? Options? Does it matter how the mediator came to the conclusion that the husband was interested only in minimizing support payments?

FRCM 10.320 – Promote awareness of the interests of affected non-participants.

FRCM 10.360 – Confidentiality

FRCM 10.230 (c) – Concept of fairness

FRCM 10.420 (b)(4) – Terminate for fraud, duress, the absence of bargaining ability or unconscionability

FRCM 10.310 (c) – Mediator must not intentionally or knowingly misrepresent any material fact or circumstance in a mediation.

FRCM 10.400 – Mediator responsible for safeguarding mediation process

Ten: Just prior to court-ordered mediation, one party complains that the opposing party has not complied with several discovery orders, and he asks you to cancel the mediation. The other party objects to cancellation.

- May you cancel?
- May you report the reason for cancellation to the court?

FRCM 10.360 – Confidentiality

MEAC 2008-001: Unethical for mediator to determine whether a party has complied with the court's discovery order.

Inappropriate for mediator to cancel mediation based on party's assertion that other party has not complied.

Inappropriate for mediator to report that he/she canceled because of failure to comply with discovery order

Eleven: An important participant is attending by phone, and during caucuses with that party, you are unable to reach them for long periods of time. The other party wants to know why you are spending so much time in the other caucus.

● Does it matter whether the phone attendance has been agreed to by the inquiring party?

● Does it matter that revealing the phone calls will telegraph the offending party's lack of settlement authority?

FRCM 10.360 – Confidentiality

FRCM 10.420 (b)(2) – Adjourn or terminate mediation if continuing would result in emotional or monetary cost to parties

FRCM 10.420 (b)(4) – Terminate for fraud, duress, the absence of bargaining ability or unconscionability

Twelve: The domestic mediation has resulted in full settlement. While the attorneys draft the lengthy settlement agreement, the husband is, at his request, released to go to dinner. After two hours he returns with slurred speech and a strong smell of alcohol on his breath. The wife wants both parties to sign the agreement now. She is afraid that the husband will have buyer's remorse if he waits until the next day.

FRCM 10.310 (a) – Mediator is responsible for assisting the parties in reaching informed and voluntary decisions.

FRCM 10420 (b)(3) – Adjourn or terminate a mediation if the mediator believes any party is unable or unwilling to participant meaningfully in the process. (But, what if the only thing left to do is sign the agreement already reached?)

FRCM 10.420 (c) – Mediator shall cause the terms of any agreement to be “memorialized appropriately.”



“By God, for a minute there it suddenly all made sense!”