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

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ONE: 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
FRCM 10.420 (b)(2)
FRCM 10.420 (b)(4)
**TWO:** One party insists that you report the other party's lack of authority or other misconduct to the court. Does it matter that the Court's mediation order requires you to do so?
FRCM 10.360
FRCM 10.500
MEAC 99-002
MEAC 2006-003
MEAC 2007-001
MEAC 2010-012
THREE: 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
FRCM 10.420 (b)(2)
FRCM 10.420 (b)(4)
FOUR: The parties in one caucus asks you, "Who is making decisions in the other room?"
FIVE: Midway during mediation a stranger joins one caucus, and that party insists that you not divulge to the other participants the newcomer's involvement in mediation.
FRCM 10.320
FRCM 10.330
FRCM 10.360 (a) and (b)
SIX: There are two parties on one side being represented by one attorney (e.g., husband and wife) and the two disagree strongly on whether or how to settle the 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.
FRCM 10.310
FRCM 10.360
FRCP 1.720(h)
SEVEN: In an automobile injury case, Plaintiff in caucus asks you to obtain from Defendant the results of a blood alcohol test performed on the Defendant ‘s driver. Plaintiff's attorney tells you that they have tried to get the blood alcohol results through discovery, but that the Defendant has been stonewalling. You ask Defendant in caucus for the test results, and they tell you that the result was a blood alcohol of 0.313. Defendant also cautions you that you may not divulge the results to the Plaintiff. When you go back into caucus with the Plaintiff, they ask for the answer to their question.
FRCM 10.360
EIGHT: One attorney is making clearly false or misleading statements of material fact, which statements could result in a settlement agreement voidable for fraudulent inducement. (e.g., misrepresenting the amounts of insurance coverage available).
• What if he asks you to convey the misleading information to the other party?

• What if the attorney in good faith believes the erroneous information, but you (having read the insurance policy) believe him to be wrong?
• What if the amount of coverage is debatable and the attorney wants you to convey his position?

• If you terminate the mediation because of fraud or unconscionability, do you tell the other parties why you did so?
NINE: At the conclusion of mediation, all parties orally agree to a settlement, and it is reduced to writing. All parties except one are present and sign late in the evening. The party attending by phone promises to sign and return the agreement the next day after it is faxed to him. The next day you report settlement to the court, then later learn that the non-attending party has refused to sign the agreement.
• May you now report to the court that the party refuses to sign after having agreed to do so?

• Should you as the mediator have reported to the court that the settlement agreement is awaiting one signature?
TEN: You are serving as a mediator for a party who, you learn during mediation, is the opposing party in a lawsuit being handled by your law firm. Does it matter if your law firm is representing the mediating party? Is the conflict susceptible of waiver?
ELEVEN: 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?
TWELVE: A party shows up at the opening session with a stranger to the litigation and insists that the stranger be allowed to attend. The other party objects. Does it matter whether the stranger may be affected by the outcome of the mediation?
THIRTEEN: 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?
FRCM 10.310 (a) and (d)
MEAC 95-005
MEAC 96-003
MEAC 2006-006
FOURTEEN: After opening session the attorney for one party is denying you access to his client. He has sequestered his client in another room and insists that all communications be routed through him.

● Does it matter that the other party is unaware of the sequestration?
● What if you believe that the process is adversely affecting his client's right to self-determination?
FRCP 1.720 (h)
FRCM 10.310
FIFTEEN: One party is entitled to attorneys fees, and she wants to save the issue of fees until the claim-in-chief has been settled. The other party insists on negotiating the claim-in-chief and the fees globally.
SIXTEEN: A party in caucus asks you what their next move should be in response to the opposing party's last proposal.
FRCM 10.310 (a)
FRCM 10.330 (a)
SEVENTEEN: A party in caucus asks you if the party in the other room is making telephone calls.
FRCM 10.360
EIGHTEEN: The participants in one caucus asks you to "kill some time" in their room before going back into the other caucus. They want the other party to think that they are having difficulty making further concessions.
FRCM 10.420 (b)(2)
NINETEEN: During the mediation one attorney repeatedly uses unprofessional, vulgar, abusive or derisive language toward the opposing party, his own client and you.
May you report the attorney’s conduct to:
the court?
the Florida Bar?
the senior members of the attorney’s law firm?
FRCM 10.410
MEAC 2001-002
MEAC 2011-003
MEAC 2011-007
MEAC 2012-002
TWENTY: One participant during mediation is constantly interrupting the process to receive and make cellular calls, most unrelated to the case being mediated. You believe this is interfering with resolution of the case.
MEAC 2011-012
TWENTY-ONE: You realize when you get to mediation that one party speaks only Spanish, but, luckily, you speak Spanish. May you serve as interpreter for the Spanish speaker?
"By God, for a minute there it suddenly all made sense!"