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

Howard Marsee & Kimberly Sands

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

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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
TWO: The parties in one caucus asks you, "Who is making decisions in the other room?“

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THREE: 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

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FOUR: 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 – Promote awareness of the interests of affected non-participants

FRCM 10.330 – Mediator shall maintain impartiality

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

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• May you disclose the situation to the opposing party? They are asking what is taking so long in the other caucus.
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.
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.
SEVEN: 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?
FRCM 10.420 (b)(4) -- Terminate for fraud, duress, the absence of bargaining ability or unconscionability
EIGHT: 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?
FRCP 1.730 (b) – Settlement agreement shall be signed by the parties and their counsel, if any

MEAC 2012-010 – Breach of confidentiality to file a mediation report and agreement where one signature is missing. In the absence of all signatures, mediator should report “no agreement”

MEAC 2013-001 – Breach of confidentiality to report where telephone attendee failed to return signed agreement. Mediator cannot report that party agreed to sign but failed to return signed report. Breach of confidentiality to report that mediator is waiting for signatures.

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**NINE:** 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 its share of the mediator’s fee?
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.

FRCP 1.720 (c) – “Representative with authority” means final decision maker

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

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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: 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 -- Confidentiality
FRCM 10.500 – Mediator responsible to referring court, however, consistent with ethical rules
MEAC 99-002 – Mediator may not report to court information regarding authority if learned in caucus
MEAC 2006-003 – Unethical to report that a party did not have full authority
MEAC 2007-001 – Mediator may report a party’s failure to appear at mediation so long as based on physical observation and not a communication
MEAC 2010-012 – Mediator must decline to violate ethics rules if directed to do so by the court

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