

I. Mediation

On two Wednesdays on March 18 and on May 20, 2009, the Insurance Law Committee of the Orange County Bar Association will make available Ethics CLE Credit of 1.0 hours apiece approved by the Florida Bar. When this article is published in *The Briefs*, the May 20, 2009, Seminar will soon be taking place. Those attending both Seminars will qualify for up to 2.0 Ethics or other CLE Credits from the Florida Bar. In addition, Continuing Mediator Education Credit will be available under the guidelines published online by the Florida



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Dispute Resolution Center at http://www.flcourts.org/gen_public/adr/CME/cleguide.shtml.

This is an expanded outline of the submission to the Florida Bar for the successful award of CLE Credit for both Seminars. Mediation provides an alternative means of dispute resolution. The purposes of Mediation are well-established. Mediation is defined by Rule 10.210 of the Florida Rules for Certified & Court-Appointed Mediators as “a process whereby a neutral and impartial third

person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.” The requirements imposed on a given case to qualify for Mediation and the behavior of participants in the Mediation process vary slightly from Court to Court. *See, e.g.*, Fla. R. Civ. P. 1.700 -1.750, inclusive; Local Rules of the United States District Court for the Middle District of Florida, 9.01 - 9.07, inclusive.

II. Considerations in the Fabric of Mediation

Ethical considerations are embedded in the fabric of Mediation. The first and foremost consideration is to tell the truth and not mislead. *See, e.g.*, Florida Bar Rule of Professional Conduct Rule 3-3(a)(1)(a lawyer shall not knowingly “make a false statement of material fact or law to a tribunal”); Florida Bar Rule of Professional Conduct Rule 4-4.1 (a)(a lawyer representing a client shall not knowingly “make a false statement of material fact or law to a third person”); Likewise, Rule 4-3.3(a)(3) addresses misleading arguments:

Misleading legal argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in subdivision (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been

disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

In Florida Mediations concerning insurance, it is essential to represent the insurance policy limits fully and truthfully so as not to impede or inhibit settlement. *See Davis v. Nationwide Mutual Fire Insurance Co.*, 370 So. 2d 1162, 1163 (Fla. 1st DCA 1979) (“In view of the allegations that the attorney represented both companies, that he misrepresented the coverage, and that there would have been an offer of settlement had the true liability limits been revealed, we consider that the complaint states a cause of action sufficient to withstand a motion to dismiss.”)

In addition, a Florida statute imposes additional requirements for insurance disclosures. Under Fla. Stat. § 627.4137, disclosure is mandated concerning these facts:

- a. Name of insurer.
- b. Name of each insured.
- c. Limits of the liability coverage.
- d. Statement of any policy or coverage defense which such insurer reasonably believes is available to such insurer at the time of filing such statement.
- e. ***A copy of the policy.***

In many situations throughout Florida, insurance companies and defense counsel have provided a copy of the *declarations page* of the policy, in accord with common practice throughout Florida. There is at least a question whether this practice can ever comply with Fla. Stat. § 627.4137, *supra*, and with ethical obligations and requirements.

III. The Insurance Good Faith Law of Florida and Considerations before and at the Mediation of the Underlying Case

A. *The Insurance Company*

It is settled in Florida that the insurance company has a multitude of obligations under Florida law, many of which call for certain behavior by the insurance company before the Mediation. Some of those obligations include 1) advising the insured of settlement opportunities; 2) advising as to the probable outcome of the litigation; 3) warning of the possibility of an excess judgment; 4) advising the insured of any steps she, he or it might take to avoid “same;” 5) investigating the facts; and 6) giving fair consideration to a settlement offer that is not unreasonable under the facts. *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980), *cert. denied*, 450 U.S. 922 (1981).

B. *Considerations applicable to Counsel*

Some of the obligations outlined above may apply to defense counsel and the insurance company’s coverage counsel.

C. Considerations applicable to Mediators

Mediators are governed by specialized Rules including Rules of Ethics. They are contained in Florida Rules for Certified & Court-Appointed Mediators. In particular, Rule 10.370, "Advice, Opinions, or Information," provides:

- (a) Providing Information. Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.
- (b) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.
- (c) Personal or Professional Opinion. A mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct resolution of any issue. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.



Conclusion

The Insurance Law Committee began considering similar issues concerning Mediation at its January, 2009 meeting. The context was an outstanding discussion led by Brian Wilson, Esquire, past president of the OCBA and a member of the Insurance Law Committee. Mr. Wilson kindly consented to lead the discussion on issues of concern to counsel representing Policyholders at Mediation.

The discussion continues on May 20, 2009, particularly from the defense perspective, i.e., the perspective of the insurance company and the defense counsel. Bill Davis, Esquire, the most senior and experienced in-house counsel at Nationwide Insurance Companies, will present the defense perspective at Mediation Conferences. In addition, the perspective of Insurance Coverage Counsel, both for the Policyholder and for the insurance company, will be discussed at appropriate junctures. At the time that this article is printed, the May 20, 2009 Seminar will be on the horizon. Plan on attending at the Headquarters of the OCBA in Orlando!

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