Advisory Opinion MEAC 2005-007

April 6, 2006

The Question

I am a certified family and certified circuit civil mediator. My question concerns the following situation:

I was chosen as mediator in a court ordered family mediation by one of the party's attorneys who set a mediation date and time with my office. After learning of the mediation date, the other party, who said he was unrepresented, called my office and announced that he was canceling the mediation. I informed the opposing party's counsel of the cancellation, and when I did, he questioned under what authority I cancelled the mediation session upon the unilateral request of the other party.

Rule 10.310 Self Determination (b) says that "A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation."

Question A: If a party calls and cancels a mediation session, does the mediator have any authority to do anything other than cancel the mediation? (Presumably leaving the parties to seek resolution of that issue in the court). If the mediator does not cancel the session, does the mediator "…improperly influence any party to…unwillingly participate in a mediation".

Question B: MEAC Opinion 2000-003 says "Pursuant to the Rules, the reason for cancellation or postponement of a mediation should not be explained". If I cite Rule 10.310 as the authority for the session being cancelled, am I not then disclosing a determination of an inability of a party to exercise self-determination, in violation of MEAC Opinion 2000-003? Likewise, if the act of simply cancelling a mediation session by a party is not, in itself, an expression of self determination, what is the authority for cancelling the session?

Question C: If a party calls me to cancel a mediation session, am I violating the party's right to self determination if I refuse to cancel the session?

Question D: Is the advance concurrence of both parties needed to set a mediation session date?

Question E: If the mediator refuses to cancel the session, and the party who called to cancel does not show up, can the mediator report that the party did not appear for mediation?

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The prior Opinions on this subject seem to deal only with mediation sessions that are already in progress. Thank you for your assistance.

Submitted by a Certified Family and Circuit Mediator
Northern Division

Authority Referenced

Florida Rules for Certified and Court-Appointed Mediators: 10.310, 10.330(a) and 10.520
Florida Rules of Civil Procedure: 1.720(f)
Florida Family Law Rules of Procedure: 12.740(f) and 12.741(b)(6)
Florida Rules of Juvenile Procedure: 8.290(e)
MEAC Opinion: 2000-003

Summary

A and C: If a party is requesting that the mediation be rescheduled for "good cause," the mediation should be rescheduled to a mutually convenient time consistent with rule 10.330(a). If the party is objecting to attending mediation, the mediator cannot compel attendance, however, the party should be advised that pursuant to rule 12.741(b)(2), the party may be subject to sanctions by the court for "nonappearance."

B: A report to the court regarding nonappearance should not include any reason for the nonappearance.

D: A date for mediation may be set without the advance agreement of all parties, but then any party would be permitted to request that it be rescheduled.

E: A mediator may report non-appearance at a mediation if the mediator gave the non-appearing party due notice of the date and time for the mediation session and good cause was not shown for rescheduling.

Opinion

The Mediator Ethics Advisory Committee answers questions based on the specific factual settings described in the questions. The factual setting in your question states that you were "chosen" by one of the parties, "who set a mediation date." Upon learning of the date, the other party (who was unrepresented) "announced that he was cancelling the

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mediation."[1]

The order of referral in this case was reviewed by the Committee. It is a "referral to [the] family mediation unit," rather than a generic order to mediation. However, irrespective of the existence of an administrative order, the procedure established in rule 12.741(b)(6), Florida Family Law Rules of Procedure, would apply, that is, the parties have ten days after issuance of the order to agree on a mediator (after which the court, or the family mediation unit on behalf of the court, would appoint a mediator).[2] The referenced order contains no provision for the parties to have ten days to agree on a mediator. Instead, it sets up a procedure whereby the attorneys or the parties, if not represented, are required to contact the Director of Mediation Services for the purpose of "being assigned a mediator." Once the case is assigned a mediator, it appears that the attorneys, or the parties, if unrepresented, are required to contact the mediator "to arrange the mediation conference."

The Committee does not believe that there is any problem with a court order to mediation which directs the parties to a court program if they are eligible for subsidized services. It should be noted, however, that, even if not explicitly stated in the referral order, the parties have ten days to agree on a mediator or to be referred to a mediator by the mediation unit. If the parties select a private mediator, they would, of course, not be eligible for the statutory subsidized fee schedule.

In light of the foregoing, the Committee must determine if the mediation was "properly" scheduled by the mediator before it can answer your questions. In order to determine if the mediation was properly scheduled, the Committee must determine if the mediator was appropriately appointed. Under the Administrative Order provided, the mediator would either have to be selected by both parties or appointed by the court because the parties did not agree on a mediator. If the mediator was neither appointed by the court nor selected by both parties, the mediator was not appropriately appointed and should not have scheduled the

mediation, and therefore there was no mediation to "cancel." The Committee will assume that the mediator was appropriately appointed in order to answer your remaining questions.

Questions A and C both ask whether a mediator is required by rule 10.310, dealing with self-determination, to cancel the mediation if one party has specifically requested that the mediation be cancelled. The answer to this question is dependent on what is meant by "cancelling" the mediation. What remains unclear is whether the party was objecting to attending the mediation on that date or attending a mediation under any circumstances. If a party is unable to attend the mediation on the date scheduled by one party or is merely requesting that the mediation be rescheduled for "good cause," the mediation should be

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[1] This question was asked and is being answered in the context of a court-ordered mediation. Some of these responses may not apply in the absence of a court order.

[2] The Committee notes that this question was raised in reference to a family mediation. If it had been a circuit civil or county court action over small claims, or a dependency action, a ten day period would also arise pursuant to, respectively, rule 1.720(f), Florida Rules of Civil Procedure, and rule 8.290(e), Florida Rules of Juvenile Procedure.

rescheduled to a mutually convenient time, in a manner consistent with a mediator's obligation to maintain impartiality. The committee believes that this is suggested by rule 10.330(a), which requires a mediator to exercise a commitment to assist all parties, as opposed to any one individual. The Committee is of the opinion that a failure to take the needs of both parties into consideration when scheduling a mediation could violate this requirement.

If the party is objecting to attending any mediation, and has no desire to reschedule, the mediator cannot compel a party's attendance at a mediation; however, a party should be advised that pursuant to rule 12.741(b)(2), the party may be subject to sanctions by the court for "nonappearance."[3] Thus, before "cancelling" a mediation, the mediator should attempt to determine why the party has indicated that s/he will not attend.

The answer to Question B is that a report to the court regarding nonappearance should not include any reason for the nonappearance. Rule 12.740(f)(3), as incorporated through rule 10.520.

Question D asks whether the advance agreement of both parties is needed to set a mediation date. In light of the provision of rule 12.741, the Committee believes the answer is a qualified no. The Committee opines that a mediation should not be set at the convenience of only one party. In addition, if the mediator sets the mediation date and time in an effort to expedite the scheduling process, the mediator must be open to re-setting the date. However, the Committee notes that pursuant to rule 12.741(b)(2), the court may impose sanctions if a party fails to appear at a "duly noticed mediation conference without good cause…." Thus, the mediation date may be set without **advance** concurrence, but both parties would then be permitted to request that it be rescheduled.

Question E posits the issue of whether the mediator who refuses to cancel the session at the request of a party may proceed with the mediation and report a non-appearance to the court. As we have discussed above, a mediator cannot compel attendance at a mediation; however, the mediator may report the non-appearance, assuming that the mediator gave the non-appearing party due notice of the date and time for the mediation session and good cause was not shown for rescheduling. [4]

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Date   Fran Tetunic, Committee Chair

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[3] While the other party may wish to pursue sanctions, the mediator should not be involved in seeking sanctions.
[4] The Committee is aware that the "good cause" standard in rule 12.741(b)(2) is technically only applicable to the trial court; however, in the absence of a standard specifically applicable to the mediator, the Committee believes that the same test should apply.