

September 26, 2001

THE QUESTION

Dear Committee Members:

Rule 10.420(b) of the Rules for Certified and Court-Appointed Mediators provides five conditions, any one of which, if satisfied, requires the mediator to adjourn or terminate the mediation. None of the conditions relates to parties not involved in the mediation.

The Committee Note to Rule 10.310 emphasizes that it “is critical that the parties’ right to self-determination (a free and informed choice to agree or not to agree) is preserved during all phases of mediation.”

Rule 10.430 states that a “mediator shall schedule a mediation in a manner that provides adequate time for the parties to fully exercise their right of self-determination.”

With this as a background, I pose the following question. May a judge using his bailiff, interrupt the mediation process after a specific period of time has elapsed, based on the judge’s conviction that, if a dispute is not resolved within a period defined by him, it is time to declare an impasse, and have the parties sign a statement of non-agreement?

The particular judge who prompted this question believes that 45 to 60 minutes ought to be the allowable limit.

Sincerely,

County Mediator
Central Division

AUTHORITY REFERENCED

Rules 10.230, 10.310(a), 10.420(b), 10.430 and 10.500, Florida Rules for Certified and Court-Appointed Mediators

SUMMARY

It is not appropriate for an arbitrary time limit to be imposed for mediation services. While a judge may interrupt the mediation and request that it be concluded, impasse should not be declared if the parties have not reached impasse.

OPINION

Pursuant to rule 10.500, “a mediator is accountable to the referring court with ultimate authority over the case.” However, “this responsibility ... shall be conducted in a manner consistent with these ethical rules.” See rule 10.500. This Advisory Committee does not have jurisdiction to comment on the propriety of judicial actions; however, it is appropriate for the Committee to provide guidance to you, as the mediator, with respect to requests made by a judge.

One of the fundamental aspects of mediation is the parties’ right to self-determination. See rule 10.230. Specifically, rule 10.310(a), entitled “Self-Determination” states:

Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination.

The Committee opines that the “decision” to terminate the mediation is a “substantive decision” within the context of rule 10.310(a) since it affects the right of the parties to engage in the mediation process. Therefore, it violates the parties’ self-determination and the mediator’s responsibility to protect such self-determination if the mediator were to declare an impasse upon the passage of a specified amount of time, rather than deferring to the parties’ desires. In addition, rule 10.310(a) stresses the importance of informed and voluntary decisions within mediation and implicitly seems to allow for the use of as much time (within reason) as is necessary to reach an agreement. See also rule 10.430, which requires a mediator to “schedule a mediation in a manner that provides adequate time for the parties to fully exercise their right of self-determination.”

There are conditions when a mediator is required to terminate or adjourn a mediation. See rule 10.420(b). However, the Committee does not believe this is the exclusive list of such reasons. Therefore, while ending a mediation upon the direction of a judge is not a listed reason, it may nevertheless be a valid reason to terminate or adjourn the mediation. For example, if the mediation is still in progress and it is past the court’s regular hours, it may be appropriate for the judge to require the mediation to conclude at that time and resume at a future date. In the event that a mediator is required to terminate or adjourn the mediation, it should not be reported as an impasse since that would be an inaccurate description of the disposition.

With respect to your specific question, the Committee opines that it is not appropriate for an arbitrary time limit to be imposed for mediation services, regardless of the source of such limitation. While a judge (personally or through a bailiff) may interrupt the mediation and request that it be concluded at that time, neither the judge nor the mediator can declare an impasse if the parties have not reached impasse. The appropriate report to the court should be an “adjournment” if the parties will return at a future time, or “termination by the court” if the parties will not return to mediation. In addition, with the consent of the parties, the mediator may report to the court that they wish to return to mediation, if such is the case.

Date

Charles M. Rieders, Committee Chair

