

Florida Dispute Resolution Center
THE RESOLUTION REPORT ONLINE

December 2006 - Volume 21, Number 4
News on Dispute Resolution trends, laws and ethics

Case and Comment

By Perry Itkin

“But, You Shouldn’t Have Done That! Pay the Mediator Anyway!”

The appellant in *Areizaga v. Board of County Commissioners of Hillsborough County, et al.*, 935 So.2d 640 [Fla. 2nd DCA 2006] failed to appear at a court ordered mediation [actually, an oral court order not reduced to writing – not that it made a difference here]. The trial judge ordered him to pay the bill of the mediator [a very good move!] as a sanction.

Florida Rule of Civil Procedure 1.720(b) allows the court to impose the sanction of payment of the mediator’s bill when a party fails to appear for a scheduled mediation without good cause. Among appellant’s defenses were the lack of a written order [not so fast held the Second District Court of Appeal!] and that the County failed to coordinate the date and time of mediation with him [the evidence showed otherwise – but, in any event, what’s the mediator’s coordination responsibility, if any? **Hint**: take a look at *MEAC Opinion 2005-007* summarized below.]

Appellant also argued that in light of Florida Rule of Civil Procedure 1.710(b), which prohibits mediation of extraordinary writs, mediation should never have been ordered. Yes, agreed the appellate court, but [and you know what that means!] appellant should not have ignored the court order and should have brought the issue to the attention of the trial court **before** the mediation – not afterward. All to say, ultimately the order to mediate the extraordinary writ was quashed and appellant still had to pay the mediator.

In summary, *MEAC Opinion 2005-007* provides:

1. 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 Rules for Certified and Court-Appointed Mediators, 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 Florida Family Law Rule of Procedure 12.741(b)(2), the party may be subject to sanctions by the court for “nonappearance.” [Note: The question addressed in the opinion was raised in the context of a family mediation, thus the cite to the family rules. See also rule 1.720, Florida Rules of Civil Procedure and rule 8.290, Florida Rules of Juvenile Procedure.]

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

3. 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.

4. 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.

Good guidance here for *all* cases!

“Remember: A Mediator Is Responsible!”

Katz v. Progressive Express Insurance Company, Case Number 2005-CA-1000 [2nd Judicial Circuit, In and For Leon County, FL].

This is an important, unreported circuit court judge’s order [quoted in full except for the italicized commentary] dismissing a case with prejudice which contains a valuable lesson for mediators.

“THIS CAUSE was considered at a noticed case management conference at which counsel for the parties failed to appear and after reviewing the court file and being otherwise advised in the circumstances I find, and it is

ORDERED AND ADJUDGED that this case is DISMISSED WITH PREJUDICE.

The court file reflects that a mediation report was filed by mediator, *[named]*, that states in relevant part: “The parties amicably settled all issues in this case.” However, the report does not comply with rule 1.730(b), Fla. R. Civ. P. in that it does not indicate the existence of a signed or transcribed agreement nor has a stipulation of dismissal been filed in the absence of the existence of a signed or transcribed agreement. *[COMMENT: In your mediation practice, how do you report to the Court that a settlement has been reached in mediation?]*

Moreover, neither counsel for the parties have to this date and time notified the court that the case management conference previously scheduled and noticed was no longer necessary. Counsel are reminded of their professional

and ethical responsibilities to the courts under the Rules Regulating The Florida Bar, Ideal 6 and Goal 6.8 of the Ideals and Goals of Professionalism, "Respect for the Time and Commitment of Others: A lawyer should promptly notify the court or tribunal of any resolution by the parties that renders a scheduled court appearance unnecessary," and the Guidelines for Professional Conduct adopted by the Trial Lawyers Section of The Florida Bar and the Florida Conference of Circuit Court Judges. In addition to the preceding references, *[the mediator]*, also a member of The Florida Bar, as a Florida Supreme Court Certified Mediator is reminded of his duties, obligations and responsibilities not only under the rules of civil procedure but under the Rules for Certified and Court-Appointed Mediators and, in particular, rules 10.400, 10.420(c), 10.500, 10.510 and 10.600.

Therefore, based on all of the foregoing, sanctions are imposed and the case dismissed with prejudice. No motion for rehearing or reconsideration is allowed."

COMMENT: Here's a quick review of the Rules cited in the court order:

Rule 10.400	Mediator's Responsibility to the Mediation Process
Rule 10.420(c)	Conduct of Mediation; Closure
Rule 10.500	Mediator's Responsibility to the Courts
Rule 10.510	Information to the Court
Rule 10.600	Mediator's Responsibility to the Mediation Profession

Please take some time to review these rules which you'll find in the October, 2006 issue of *The Resolution Report* [previously mailed to you and which you can also access on line by clicking [here](#)].

"Go Directly to Jail; Do Not Pass Go; Do Not Collect \$200.00!"

The case of *Higgins v. Higgins*, 2006 Fla. App. LEXIS 20867 [Fla. 2nd DCA 2006] is illustrative of the relationship between being jailed by a trial judge who

later orders the same party to mediation [on the very same day, no less]!

The former wife in this post divorce case was held in direct criminal contempt of court during a hearing, summarily sentenced to jail for 6 months, actually jailed and then returned to court later the same day when the same judge ordered her and her former husband to mediation in the office of the court mediation program. [COMMENT: Any problems that you see so far? Okay, how about prior to ordering the parties [who were pro se] to mediation, the judge had announced to the former wife that her attempt to relocate with the parties' minor child was barred by court order [which it wasn't] and unlawful and that was one of the reasons for the contempt conviction? It's not getting better, is it?!?]

As a result of the mediation, the parties signed a document entitled "Order" as did the "Mediator[,] Preparer of Order of Court." [COMMENT: Mediators as "Guardians of the Process" - o.k.; mediators as "Agents of Reality" - o.k.; but mediators as "Preparers of Order of Court"????] This order transferred custody of the minor child from the mother to the father. You guessed it – the former wife/mother appealed the order of contempt and the order modifying custody.

How significant were the "highly coercive circumstances", devised by the trial judge, to the appellate court which reversed the trial judge? What about party self-determination? Another valuable resource is *MEAC Opinion 2006-002* which predates the opinion in *Higgins* and provides, in summary, that:

Given the judge's intervention, the mediator must carefully monitor the parties' participation in the mediation to ascertain the parties' ability to exercise self-determination and must be prepared to terminate the mediation if any party is unable or unwilling to participate meaningfully in the process. A mediator is not relieved of ethical responsibilities by writing the "agreement" up as a "scrivener."

My best wishes to you for a Happy, Healthy, Prosperous and Safe New Year!

© 2006 Perry S. Itkin All Rights Reserved. [Used with permission of the author.]

CASE AND COMMENT

By Perry S. Itkin, Esquire
Dispute Resolution, Inc.
2200 NE 33rd Avenue, Suite 8G
Fort Lauderdale, FL 33305-1889
954-567-9746

E-mail: PerryItkin@MediationTrainingCenter.com

Florida Mediator Blog: <http://floridamediator.blogspot.com/>