

November 23, 2010

The Question:

I am the [title] for the [name of judicial circuit], and I have a question with which I hope you can assist me.

Historically, and after much debate and analysis, I have been reporting the outcome of mediation to the Court with the following categories:

Full settlement, partial settlement, adjournment (to let the Court know mediation is not complete), withdrawal (so the Court is aware that another mediator should or will be appointed), impasse, and for a termination we have been reporting “no agreement”.

My questions relate to the reporting of a termination for reason other than one party to a multi-party mediation terminates as to itself in writing. It seems that a fatal flaw in the process is the kind of report the Confidentiality and Privilege Act precludes. Since the Rules of Procedure require mediators to report agreement or no agreement, I have used no agreement for those kinds of terminations.

When SCA009-54 [sic] was published, our procedure came into question. If you will notice Exhibit 9, Mediation Report provides various results, none of which is “no agreement” and one of which is “Terminated.”

My questions are:

1. Are the above described results appropriate?
2. Should I report “no agreement” or “terminated” for those cases terminated under those provisions of Rule 10.420 (b) (2), (3), (4) or (5) of the Florida Rules for Certified and Court-Appointed Mediators?

Certified County, Family, Circuit & Dependency Mediator
Northern Division

Authorities Referenced:

AOSC09-54 In Re: Residential Mortgage Foreclosure Cases, Exhibit 9

AOSC10-57 In Re: Guidance Concerning Managed Mediation Programs for Residential Mortgage Foreclosure Cases

Rule 10.420 (b)(1-5), Florida Rules for Certified and Court-Appointed Mediators

Rule 1.730 (a)-(b), Florida Rules of Civil Procedure

Sections 401-405, Mediation Confidentiality and Privilege Act

Summary

At the completion of mediation, a mediator shall report “agreement” or “no agreement” without comment or recommendation as dictated by the Rule 1.730(a)-(b), Florida Rules of Civil Procedure. However, a mediator may report that a mediation was adjourned.¹

Opinion

At the completion of mediation, a mediator shall report “agreement” or “no agreement” without comment or recommendation as dictated by the Rule 1.730(a)-(b), Florida Rules of Civil Procedure (FRCP). The Committee is of the opinion that the analysis below will assist mediators, litigants and the courts in understanding the dynamics of reporting mediation outcomes.

Florida Statutes, Sections 401-406, Chapter 44, Mediation and Confidentiality and Privilege Act, attaches upon the beginning of the mediation and ends:

F.S. §44.404(1): “A court ordered mediation begins when an order is issued by the court and ends when (emphasis added):

(b) The mediator declares an impasse by reporting to the court or the parties the lack of an agreement”; (emphasis added).

Further, sections (c) and (d) give reasons a mediator may *terminate* a mediation.

These sections outline what a mediator may do, not how those actions are reported to the court. Reporting to the court is covered as follows and is very clear:

FRCP 1.730 Completion of Mediation:

(a): No Agreement. If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court *without comment or recommendation* (emphasis added). ...

(b): Agreement. If a partial or final agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any. ... By stipulation of the parties, the agreement may be electronically or stenographically recorded. In such event, the transcript may be filed with the court. The mediator shall report the existence of the signed or transcribed agreement to the court *without comment* within 10 days thereof (emphasis added). No agreement under this rule shall be reported to the court except as provided herein.

The terms “impasse” and “termination” are terms of art used to signal particular outcomes of a mediation. Those terms, according to FRCP 1.730, are not appropriate to be included in a mediation report to the court as they reveal information obtained in mediation communications.

Impasse signals that negotiations were had but were not fruitful and no agreement was reached (See §44.404 above). Therefore stating “no agreement” and “impasse” is redundant. “No agreement” is the proper designation as is stated in §44.404(1)(b).

Termination is used when something “other” than impasse occurred. Throughout the statute and rules [see F.S. §44.404(1)(c) and (d); Florida Rules for Certified and Court-Appointed Mediators 10.420 (b)(1-5)], there are several circumstances in which a mediator may postpone or *terminate* a mediation. Termination implies something other than failed negotiation stopped the mediation. To report “termination” to the court would communicate to the court that something “happened” in mediation to keep the parties from resolution. This would be, in effect, transmitting information gained during mediation, hence protected as mediation communications.

A mediator may report if the agreement is “full” or “partial” and whether it was “signed” or “transcribed”. Further, all mediations conducted pursuant to the Rules of Civil Procedure shall be likewise reported. [See FRCP 1.730(a)-(b)]

Recently released Supreme Court Administrative Order AOSC10-57, relating to the residential mortgage foreclosure program additionally endorses this position, and has amended the original Mediator Report (Exhibit 9 to the AOSC09-54) to reflect the positions expressed in this opinion.

The Committee does not find a conflict in reporting “adjournment” to the court as this option may not signal an end to mediation in the case.

Date

Beth Greenfield-Mandler, Committee Chair

ⁱ At its most recent meeting held on September 29, 2010, the Supreme Court Committee on ADR Rules and Policy discussed this same issue. The Committee voted to recommend a change to Exhibit 9 of AOSC09-54. In so doing, the Committee eliminated any references to anything other than “agreement” or “no agreement” (partial or full; signed or transcribed). As the discussion centered on the residential mortgage foreclosure mediation program (RMFMP), the Committee’s recommendation was limited only to reports in connection with the RMFMP.