

October 12, 2010

**The Question**

I have several questions regarding the application of Rule 10.370(b) in the course of conducting court-ordered small claims mediations. The rule provides that “(w)hen 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.”

**Question One:**

If a mediator asks a party if he understands the terms of a potential agreement and he hesitates before responding in the affirmative, should the mediator interpret his hesitation in answering as an indication that he “does not understand or appreciate how an agreement may adversely affect legal rights or obligations” and therefore would the mediator be required [emphasis added] “to advise the party of the right to seek independent legal counsel?”

**Question Two:**

If a mediator asks a party if he understands the terms of a potential agreement and he affirmatively announces that he understands and wants to sign the agreement, but the mediator does not believe that he understands the terms of the agreement or appreciate how the agreement may adversely affect legal rights or obligations, is the mediator required [emphasis supplied] to advise him of his right to seek independent counsel?

**Question Three:**

If a mediator believes that a party does not understand the terms of the agreement or appreciate how the agreement may adversely affect legal rights or obligations, but the party affirmatively states that he understands and wants to sign the agreement, should the mediator honor his right to self-determination and memorialize the agreement for his execution?

Certified County and Family Mediator  
Northern Division

**Authorities Referenced**

Rules 10.310(a), 10.330(b), 10.370(b), 10.420(b)(2-4), Florida Rules for Certified and Court-Appointed Mediators  
Committee Note to Rule 10.370, Florida Rules for Certified and Court-Appointed Mediators

## Summary

Answer to Questions One and Two: It is up to the mediator to decide how to interpret the hesitation of the party. If, after further inquiry, the 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 counsel, therefore making this a requirement.

Answer to Question Three: The mediator should honor the party's right to self determination after assessing the party's ability to participate meaningfully and with understanding of the terms. If however, the mediator believes the party is unable to rationally and intelligently assess the terms of the agreement or the mediator is no longer impartial, then the mediator must adjourn, terminate or withdraw from the mediation.

## Opinion

Answers to Questions One and Two have been combined as the Committee believes the answers to both are so similar as to be considered one response.

Answers to Questions One and Two: A hesitation by a party in the course of responding to whether the party understands the terms of a potential agreement may or may not reflect that party's understanding of how an agreement may adversely reflect legal rights or obligations. A mediator needs to make an additional inquiry to inform his/her own belief and should err on the side of caution in determining if the hesitation reflects a lack of understanding or appreciation of the consequences of the agreement. Asking the party open ended questions (in caucus) about the agreement and its effects may assist in revealing the true nature of the understanding of the party. Once the reason for the hesitation is more clearly ascertained, if the mediator believes there is a lack of understanding or appreciation of how the agreement may adversely affect legal rights or obligations, the mediator **shall** (emphasis added to denote language of the rule) advise the party of the right to seek independent legal counsel. Rule 10.370(b). In using the word "shall" in drafting the rule, the committee intended for this to be a requirement of the mediator.

Further, while a mediator has a duty to respect a party's self-determination, that duty implies the mediator will have a comfort level with the party's understanding of the agreement to which he/she is acquiescing. If the mediator is unconvinced the party understands how the agreement will adversely affect legal rights or obligations, the mediator **shall** advise the party of his right to seek independent counsel. Again, in this circumstance, this is a requirement of the mediator.

As stated in the Committee Notes to Rule 10.370, "while a mediator has no duty to specifically advise a party as to the legal ramifications or consequences of a proposed agreement, there is a duty for the mediator to advise the parties of the importance of understanding such matters, and giving them the opportunity to seek such advise if they desire."

Answer to Question Three: The mediator must respect the party's right to self-determination. However, this statement cannot be considered in a vacuum. Both the party's rational and reasoned decision and the mediator's comfort level with the situation must be assessed. If a mediator, after due diligence, believes the party has the ability to "participate meaningfully in the process" and believes the party to understand the pros and cons of the agreement, no matter how distasteful to the mediator, he/she must respect a party's right to "make a bad deal" (which in itself is a judgment on the part of the mediator calling for caution) and assist the parties in memorializing the agreement. Rule 10.310(a).

If, however, the mediator, after he/she has advised the party to seek counsel and has performed further inquiry of the party, is still convinced of the party's need to seek counsel before agreeing to the terms, the mediator is bound to follow the dictates of Rule 10.420(b)(2-4) and either adjourn or terminate the mediation. Additionally, if the mediator's own comfort level with the terms of the agreement has reached a point where he/she can no longer be impartial, the mediator is bound to withdraw from the mediation. Rule 10.330(b).

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Date

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Beth Greenfield-Mandler, Committee Chair