

April 21, 2008

**The Question**

I would appreciate guidance on a court procedure in our local small claims and county courts:

For cases involving a debt collector as a plaintiff and a pro-se party as the defendant, judges have been orally referring the parties to mediation at the time of pre-trial and at the same time, ordering that the plaintiff provide discovery in advance of mediation.

When the parties appear for their scheduled mediation, the mediator is required to determine whether the plaintiff has complied with the judge's discovery order. If the mediator determines the plaintiff has not complied with the judge's order, the mediation is cancelled and the mediator reports the plaintiff's lack of compliance to the court via a written mediation outcome report. The court's mediation unit then drafts a Rule to Show Cause for the judge's signature based upon the mediator's written report.

- A. Is it appropriate for a mediator to determine if a plaintiff has complied with the judge's discovery order?
- B. Is it appropriate for a mediator to cancel the mediation if the plaintiff has not complied with a judge's discovery order?
- C. Is it appropriate for a mediator to submit a written mediation report to the court stating that mediation was cancelled by the mediator because the plaintiff did not comply with a judge's discovery order?
- D. Is it appropriate for a mediation unit to prepare a Rule to Show Cause for the judge's signature based upon an individual mediator's outcome report that states that the plaintiff did not comply with the judge's discovery order?

**Authority Referenced**

Rules 10.230, 10.310, 10.330(a), 10.360, 10.370(c), 10.420(b), 10.500, 10.620, and 10.900, Florida Rules for Certified and Court-Appointed Mediators Committee Note to rule 10.310, Florida Rules for Certified and Court-Appointed Mediators

Rule 1.730(a), Florida Rules of Civil Procedure  
Rule 8.290(o)(2), Florida Rules of Juvenile Procedure  
Rule 12.740(f)(3), Florida Family Law Rules of Procedure  
Section 44.401- Section 44.406, Florida Statutes  
MEAC Opinions 2000-003 and 2006-003

## **Summary**

A. No, it is ethically inappropriate for a mediator to make the determination as to whether a party has complied with a judge's discovery order.

B. It would be inappropriate for a mediator to cancel mediation merely because of the assertion that one party has not complied with a discovery order.

C. Since it is not appropriate for the mediator to make the determination to cancel the mediation, the mediator would not be in a position of filing a report with the judge stating that the mediator did so.

D. This question is beyond the jurisdiction of the MEAC; however, care should be taken to ensure that the unit does not provide any service that would cause mediators to compromise their integrity or impartiality.

## **Answer**

A. It is ethically inappropriate for a mediator to determine whether a party has complied with a judge's discovery order. While a mediator is accountable to the referring court, "[a]ny interaction discharging this responsibility shall be conducted in a manner consistent with [the] ethical rules." Rule 10.500. Making a determination such as that referenced in the question would run afoul of a mediator's obligation to maintain impartiality, which is defined as including "a commitment to assist all parties, as opposed to any one individual." Rule 10.330(a). Further, a mediator is prohibited from offering a personal or professional opinion "intended to ... direct a resolution of any issue." Rule 10.370(c).

B. It would be inappropriate for a mediator to cancel mediation merely because of the assertion that one party has not complied with a discovery order. The Committee notes that there may be reasons why parties wish to proceed with the mediation, even if discovery has not been completed. Of course, if one or both parties feel that they have insufficient information to proceed with the mediation, the mediator shall adjourn or terminate the mediation pursuant to rule 10.420(b). The decision whether to proceed rests

with the parties, not the mediator. Supporting this conclusion, rule 10.230 states that “mediation is based on concepts... that emphasize ... procedural flexibility.” In addition, the Committee Note to rule 10.310 states that “[a] mediator must not substitute the judgment of the mediator for the judgment of the parties...” Implicit in this note is the concept of party self-determination framed in rule 10.310, not only as it relates to the ultimate outcome, but also including whether and when to mediate.

C. Since it is not appropriate for the mediator to make the determination to cancel the mediation, the mediator would not be in a position of filing a report with the judge stating that the mediator did so. The Committee notes that if the parties decide not to proceed with the mediation, the mediator’s report must be consistent with applicable procedural rules<sup>1</sup> and ethical and statutory confidentiality requirements<sup>2</sup>. See also MEAC 2000-003, in which the MEAC opined that the reason for cancellation or postponement of a mediation should not be explained, and MEAC 2006-003, in which the MEAC stated that when mediation was terminated due to lack of settlement authority of the party, the mediator’s report to the court is limited to stating that no agreement was reached.

D. The MEAC’s jurisdiction is to provide advisory ethical opinions to “mediators subject to these rules,” rule 10.900. Therefore, the role of the mediation unit does not technically fall within the MEAC’s jurisdiction. However, the MEAC notes that individual parties may not draw clear distinctions between mediators and the mediation unit. Thus, care should be taken to ensure that the unit does not provide any service or perform any act that would cause mediators to compromise their integrity or impartiality. Rule 10.620.

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Date

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Fran Tetunic, Committee Chair

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<sup>1</sup> See rule 1.730(a), Florida Rules of Civil Procedure for county or circuit cases; rule 8.290(o)(2), Florida Rules of Juvenile Procedure for dependency cases; and rule 12.740(f)(3), Florida Family Law Rules of Procedure.

<sup>2</sup> See, The Florida Confidentiality and Privilege Act, sections 44-401 – 44.406, Florida Statutes, and Rule 10.360.