

August 8, 2007

The Question

I am a volunteer mediator in XXXX [county omitted] County Court. In addition, I serve as XXX [job title omitted]. The recent MEAC Advisory Opinion 2006-007 presents a concern which we are unable to resolve. Accordingly, your guidance is requested.

In XXX [county omitted], small claims mediation is conducted in the courthouse at the time of the pre-trial conference. Our county judges limit pre-trial activities to the named parties and their lawyers (if any). When a defendant does not agree with the allegation(s) the named parties and their lawyers are referred to mediation. Upon receipt of 2006-007 I met with each of the county judges and learned that the reason they limit the pre-trial activities and mediation to the named parties is to maintain focus and enhance the prospect of alternative resolution. Stated differently, too many cooks can ruin the broth.

Given the judicial limitation of named only parties in mediation, are the volunteer mediators at risk of failure to comply with 2006-007?

Your immediate reply would be greatly appreciated.

Certified County Mediator
Central Division

Authority Referenced

Rules 10.310(a), 10.500 and 10.520, Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinions 2001-007, 2003-007, 2003-008, 2004-006, 2006-002 and 2006-007

Summary

Following a judicial requirement limiting the participants in the mediation would not require the mediator to commit an ethical violation and therefore may be complied with without conflicting with the opinion rendered in MEAC 2006-007.

Opinion

The Committee does not believe that MEAC 2006-007 is controlling in the situation you describe. In that opinion, the issue was whether the mediator could dictate, over the parties' objections, who attends mediation. The Committee opined that this would be inappropriate since rule 10.310(a) leaves decision-making to the parties. However, in your scenario it is the judge who has limited participation in the mediation process. Pursuant to rule 10.520, a mediator is required to comply with administrative orders relevant to the practice of mediation. If an order is not of an administrative nature, it is covered by rule 10.500, which states that a mediator is accountable to the referring court with ultimate authority over the case. The Committee interprets these rules as requirements to act in compliance with judicial directives in relation to the procedures to be followed in mediation. This view is consistent with the Committee's opinion in MEAC 2001-007, where the issue was arbitrary time limits placed on mediation by judges. While observing that such time limits were inappropriate, the Committee nevertheless indicated that the mediator must comply with the judge's directive (although noting that such timed termination should be referred to as an "adjournment" rather than an "impasse"). More recently, the Committee has indicated that there is no ethical violation for a mediator to distribute at the request of a judge an informational form to be filled out by parties after an unsuccessful mediation, MEAC 2003-007, or to complete a judicially-required statistical sheet for each mediation, MEAC 2003-008.

The Committee is however, mindful that mediators must not abdicate their ethical responsibilities merely because a judge may have made compliance more difficult. See rule 10.500. In MEAC 2006-002, the Committee opined that a "second mediation," which occurs after specific instructions to the parties from the court regarding the merits of the case, must be conducted with full adherence to the party's right of self-determination (including the possible termination of the mediation). The Committee went even further in MEAC 2004-006, where a mediator was confronted with a court order requiring that mediation be conducted in "good faith," among other requirements. Therein, the Committee stated that if an order containing provisions contrary to ethical requirements was placed on mediators, the mediator should refuse to participate in the mediation.

The upshot of the foregoing analysis is that a mediator must comply with the directives of a trial judge, pursuant to rule 10.500 or rule 10.520, unless such compliance would require the mediator to violate an ethical provision. In the question you pose, the Committee does not believe that enforcing a judicial requirement on participation in the mediation would

require the mediator to commit an ethical violation and therefore should be complied with.

The Committee would note that the procedure you describe would not necessarily preclude the parties from requesting, either prior to or during the mediation, that the judge allow additional participation in the mediation. Any such request should, however, come from a party or parties, and not be initiated by the mediator.

Date

Fran Tetunic, Committee Chair