

September 12, 2000

THE QUESTION

Re: Some Questions Raised by the New Florida Rules

Rule 10.310(d) states: Postponement or Cancellation. If, for any reason, a party is unable to freely exercise self-determination, a mediator shall cancel or postpone a mediation.

The rule appears to present the following problems:

[In a Northern Division Circuit] the RESULTS of MEDIATION form (enclosed) has no provision for "Postponement or Cancellation" as determined by the Mediator. There is no problem if one or both parties agree among themselves that one of the parties is "unable to freely exercise self-determination." They would either Continue the process for another date or proceed to trial.

If the Mediator determines that a party is "unable to freely exercise self-determination" and further determines that the Hearing should be "postponed" or "canceled" and it is over the objections of one or both of the parties, how is it to be written up without the Mediator becoming improperly involved in the procedural or substantive aspects of the dispute?

The form problem is further compounded by Rule 10.360 Confidentiality. Can the Mediator make a determination of a party being "unable to freely exercise self-determination" without revealing a basis for the determination and so involving the Mediator in the Confidentiality aspects of the hearing? If it is determined that the law requires the Mediator to reveal the basis of the determination, should it further require that the determination be in writing? To what extent might this result in the Mediator becoming involved in an action against the mediator?

Certified County Mediator
Northern Division

AUTHORITY REFERENCED

Rules 10.310(d), 10.360, Florida Rules for Certified and Court-Appointed Mediators
Rule 1.730(a), Florida Rules of Civil Procedure
Rule 8.290(o)(2), Rules of Juvenile Procedure
Rule 12.740(f)(3), Family Law Rules of Procedure

SUMMARY

Pursuant to the rules, the reason for cancellation or postponement of a mediation should not be explained.

OPINION

Rule 10.310(d) requires a mediator to cancel or postpone a mediation upon determining that a party is unable to freely exercise self-determination. Your specific question involves how such an action is to be “written up.” The reason for cancellation or postponement should not be explained under the mediation rules. This conclusion is made clear in relation to county and circuit civil cases by rule 1.730(a), Florida Rules of Civil Procedure, which specifically provides that if there is no agreement, that shall be reported to the court “without comment or recommendation.”¹ The committee is of the opinion that such a conclusion is consistent with the confidentiality provisions of rule 10.360 requiring a mediator to “maintain confidentiality of all information revealed during mediation,” and is mandated in all areas of mediation (including family and dependency) by this latter provision.

Compliance with rule 10.310(d) must be consistent with confidentiality provisions and supercedes any requirements contained on a form (which form must in any case be consistent with the rules). With respect to the form you have attached to your question, the committee sees no problem in merely checking “No Settlement” and either “Set for Trial,” if the mediation has been canceled, or “Mediation Continued,” if it has been postponed. If an explanation for cancellation or postponement is requested, the committee would advise that no such information be given, as required in rule 1.730(a), Florida Rules of Civil Procedure for county and circuit case; rule 8.290(o)(2), Rules of Juvenile Procedure for dependency cases; and rule 12.740(f)(3), Family Law Rules of Procedure.

Date

Charles M. Rieders, Panel Chair

¹ The committee points out that rule 1.730(a) also contains a provision that with the consent of the parties, “the mediator’s report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of settlement.”