

December 4, 2003

THE QUESTION

I recently became aware of this new policy within [a Northern Division] County Court.

“I (a judge) have also enclosed a form that I request be completed in the event of an attempted mediation which is unsuccessful in cases assigned to Division I. Each defendant or counterdefendant, or their authorized representative, will be required to complete the form which should be submitted to me along with the case file.” (See attached memorandum and form referenced.)

The form specifically asks these individuals to, “Briefly describe your basis for contesting the Statement of Claim or Counterclaim.”

I would appreciate your review of this matter and advice to mediators as it relates to their duties and responsibilities performing county court mediation in Florida. Thank you.

Sincerely,

Certified County Mediator
Northern Division

AUTHORITY REFERENCED

Rule 10.520, Florida Rules for Certified and Court-Appointed Mediators
Rule 1.730(a), Florida Rules of Civil Procedure
Rule 7.090, Florida Small Claims Rules
44.102(3), Florida Statutes
MEAC Opinion 2001-007

SUMMARY

A mediator does not commit an ethical violation by merely distributing, at the request of a judge, a form to parties requiring them to describe the basis for contesting the claim or counterclaim so long as the mediator plays no role in assisting the parties in completing the form, and there is a clear distinction between the end of the mediation and the completion of the form.

OPINION

Initially, the Committee notes that the memorandum from the judge,¹ which you included with your question, references three forms, but you only attached one form, entitled “Pretrial Conference Form for Unsuccessful Mediation.” That form indicates that it is to be completed by the parties to a dispute which did not result in a mediated agreement. The memorandum references another form, which the mediator is asked to complete. However, since it was not attached to the question, the Committee will restrict its answer to the form which was attached.

According to the procedural rules which govern small claims cases, “unless required by order of court, written pretrial ... defensive pleadings are not necessary.” See rule 7.090, Florida Small Claims Rules. The form, which asks the parties to “describe [the] basis for contesting the Statement of Claim or Counterclaim,” would be consistent with this rule and not violative of the spirit of mediation, so long as the parties do not disclose confidential information from the mediation in their description and the parties’ completion of the form is clearly separate from the mediation. See section 44.102(3), Florida Statutes.

Rule 10.520, Florida Rules for Certified and Court-Appointed Mediators, requires a mediator to “comply with all statutes, court rules... relevant to the practice of mediation.” Of particular relevance in this situation, the Committee would reference rule 1.730(a), Florida Rules of Civil Procedure, which states:

If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of agreement to the court **without comment or recommendation.** [emphasis added]

The Committee notes that there is no place on the form for the mediator to sign, nor does it appear that the mediator is obligated to participate in the completion of this form. Therefore, the Committee believes that the Judge’s request that the form be completed

does not present an ethical violation for a mediator, so long as the mediator plays no role in assisting the parties in completing the form, and there is a clear distinction

¹ As was stated in MEAC 2001-007, while the Committee does not have jurisdiction to comment on the propriety of judicial actions, it is appropriate for the Committee to provide guidance to you, the mediator, with respect to requests made by a judge.

between the end of the mediation and the completion of the form. As a practical matter, the mediator should comply with rule 1.730(a) by reporting the lack of agreement to the court, while the clerk or someone other than the mediator should provide the form and any assistance to the parties relating to the completion of the form. This division of responsibilities would further emphasize that the completion of the form is not part of the mediation, thus protecting the mediator from an ethical violation.

Date

Fran Tetunic, Committee Chair