

Advisory Opinion

MEAC 2012-009

Mediator Ethics Advisory Committee

Florida DRC, Supreme Court Building Tallahassee, FL 32399

March 11, 2013

The Question:

Over the past several years our court program has been reporting the outcome of mediation under the following categories:

- Agreement
- Partial Agreement
- No Agreement
- Continued until a specific date or a date to be determined by the program.

It was recently brought to my attention that one of our contract mediators, at the request of an attorney who was representing one of the parties in mediation, changed the standard outcome form to read:

- Full Signed Agreement
- No signed Agreement
- Partial Signed Agreement

My understanding is there was a verbal agreement but not enough time to prepare a written agreement before the courthouse closed. One of the parties later had a change of heart and refused to sign the written agreement. My concern is that by reporting the outcome in this manner, the mediator is providing comment therefore in violation of Rule 12.740 (f) (1)-(3) Florida Family Law Rules; basically communicating with the court that there was an agreement just not a “signed” agreement. It is understood the parties may stipulate to the agreement being electronically or stenographically recorded. If so, the mediator is to report the existence of the signed or transcribed agreement to the court without further comment. That was not the case in this mediation, there was no electronically or stenographically recorded agreement. Thus the mediator indicated on the outcome “No Signed Agreement”.

Finally, Rule 1.730 (a)-(b), Florida Rules of Civil Procedure reads that a mediator may report if the agreement is “full” or “partial” and whether it was “signed” or transcribed”. I believe that it was this rule that the mediator used in determining if he should file the outcome in the manner he chose. The rule applies to an agreement, however the outcome prepared reflected no agreement.

Questions:

Does the outcome form our circuit has been using to report an agreement, partial agreement, and no agreement or continued, meet the requirements of the Rules of Procedure?

Is it a violation of the rule by adding the term “signed” in the outcome if the outcome is No Agreement?

If mediation is conducted at the courthouse, and most of the program mediations are, on more than one occasion closing time arrives and the agreement has not been memorialized. Do I interpret Rule 12.740(f)(1) to read that it would it be permissible, with the consent of the parties to read aloud the agreement and record it on a digital recorder while in the presence of the parties, then transcribe the agreement and file with the court?

Submitted by
Certified County, Family & Dependency Mediator
Northern Division

Authorities Referenced:

Rule 10.420(c), Florida Rules for Certified & Court-Appointed Mediators
Rule 1.730 (a) & (b), Florida Rules of Civil Procedure
Rule 12.740 (f)(1)-(3), Florida Family Law Rules of Procedure
MEAC Opinion 2010-007
§44.404, Fla. Stat. (2012)

Summary:

Question one: Your circuit’s mediation report form which has the outcomes: “agreement,” “partial agreement,” “no agreement,” or “continuance” (adjournment), meets the requirements of the Florida Rules of Civil Procedure and the Florida Family Law Rules of Procedure.

Question two: It is a clear violation of Florida Rule of Civil Procedure 1.730(a) to add the term “signed” to a description of an agreement in a mediation report.

Question three: The interpretation of Florida Family Law Rule of Procedure 12.740(f)(1) on which this question is based is erroneous. Although rule 12.740(f)(1) allows the parties to agree to electronically or stenographically record an agreement, that agreement must be “made under oath or affirmed” and the transcript of such agreement must then be signed by all parties before being filed with the court.

Opinion

Question one: Only a mediation report form that has the outcomes “agreement,” “partial agreement,” “no agreement,” or “continuance” (adjournment) meets the requirements of the Florida Rules of Civil Procedure and the Florida Family Law Rules of Procedure.

Your current form containing only the outcomes:

Agreement

Partial Agreement

No Agreement

Continued until a specific date or a date to be determined by the program.

is correct and meets the requirements under the rules.

Question two: To add a descriptor to the word “agreement” is a clear violation of the rules. Both the Florida Rules of Civil Procedure and the Florida Family Law Rules of Procedure provide that a mediator shall report agreement or no agreement “without comment or recommendation.” To add the descriptor word “signed” is comment and therefore forbidden by the rules. Further, the Committee Note to rule 1.730(a), Florida Rules of Civil Procedure, states, “the reporting requirements are intended to ensure the confidentiality provided for in section 44.102(3), Florida Statutes, and to prevent premature notification to the court.” A report of “no signed agreement” implies there may be an unsigned agreement which would be a “premature notification to the court” and a violation of confidentiality.

Both the Florida Rules of Civil Procedure and the Florida Family Law Rules of Procedure require that an agreement be in writing and signed by the parties (and their counsel, if any), in order to constitute an agreement. Without meeting these requirements, there is no agreement.

Question three: The interpretation of Florida Family Law Rule of Procedure 12.740(f)(1) on which this question is based is erroneous. Although rule 12.740(f)(1) allows the parties to agree to electronically or stenographically record an agreement, that agreement must be “made under oath or affirmed” and the transcript of such agreement must then be signed by all parties before being filed with the court.

Rule 12.740(f)(1) requires that the parties must agree if they desire to record their agreement electronically or stenographically. In this event, the agreement would be electronically or stenographically recorded then it would be read out loud. At the conclusion of the reading, the parties would both be sworn in by a court reporter or other individual authorized to take oaths, then give their consent to the agreement on the record. Upon the transcription (typed version) of the agreement, under the requirements of rule 12.740(f)(1), the parties must sign the agreement before it is filed with the court.

It is the opinion of the MEAC that “electronically or stenographically recorded” as used in both the civil and family rules are terms of art commonly understood to mean a court reporter or other person authorized to take oaths is making the recording and transcribing the document that is recorded.

Rule 10.420(c), Florida Rules for Certified and Court-Appointed Mediators, directs mediators to “cause the terms of any agreement reached to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement.” As a best practice, a mediator should review the process for signing an agreement and reporting the outcome to the court with the participants so that everyone knows what to expect.

March 11, 2009
Date


Beth Greenfield-Mandler, Committee Chair