

December 21, 2009

The Question

I am a new mediator volunteer and I've come across practices that I believe to be unethical.

Is it appropriate for certified county mediators in small claims cases to insert the original claim amount (in the complaint) in the final paragraph of the settlement form, awarding that as a judgment amount to the Plaintiff if the Defendant defaults, even when the parties have not agreed upon these terms? This practice seems to be inconsistent with the impartial process of mediation and in violation of ethics opinion 2004-004.

Is it appropriate for a mediator, upon agreement of the parties, to delete pre-printed court placed default language on a small claims stipulation form?

Submitted by Court-Appointed County Mediator
Northern Division

Authorities Referenced

Rules 10.230(a), 10.300, 10.310(a), 10.420(c), 10.500 and 10.520, Florida Rules for Certified and Court-Appointed Mediators

Summary

It is not appropriate for a mediator to insert the original claim amount (from the complaint) in a paragraph of a settlement form, awarding that amount as a judgment to the Plaintiff in the event of the default of the Defendant, if that has not been agreed to by the parties.

Consistent with applicable law, rules of procedure and local administrative rules, it is appropriate for a mediator, upon agreement of the parties, to delete pre-printed default language on a small claims stipulation form.

Opinion

No, it is not appropriate for a mediator to insert the original claim amount (from the complaint) in a paragraph of a settlement form, awarding that amount as a judgment to the Plaintiff in the event of the default of the Defendant, if that had not been agreed to by the parties. The mediator has the ethical obligation to see that the terms of any agreement reached by the parties are memorialized appropriately. Rule 10.420(c). If, in the course of mediation

negotiations, there was no agreement to default to an original claim amount in the event of non performance, a mediator may not ethically insert that amount in the settlement form. “Decisions made during a mediation are to be made by the parties.” Rule 10.310(a). A mediator is precluded from making substantive decisions for the parties. Rule 10.310(a). Therefore, a mediator, responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination, is ethically prohibited from adding terms to the mediated agreement that were not agreed to by the parties. Rule 10.310(a).

Yes, consistent with applicable law, rules of procedure and local administrative rules, it is appropriate for a mediator, upon agreement of the parties, to delete pre-printed default language on a small claims stipulation form. Party self determination is a foundational concept of mediation. Rule 10.230(a). A mediator’s obligation to the parties includes honoring their right of self-determination. Rule 10.300. Necessarily, decisions made during the mediation are made by the parties. Rule 10.310(a).

While a mediator is accountable to the court with authority over the case, that responsibility must be carried out in a manner consistent with the Florida Rules for Certified and Court-Appointed Mediators. Rules 10.500 and 10.520. Consistent with the applicable law, rules of procedure and local administrative rules, parties exercise self-determination in devising the terms of their mediated agreement.

Date

Fran Tetunic, Committee Chair