

Cancellation Fees – The Mediator’s Perspective
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My original plan for this article was to write about some *exciting* caselaw about essential terms in a mediation settlement agreement. I’m sorry to disappoint you, but that topic will have to wait. Instead, I want to publicly respond to a letter that I received from a Miami attorney, as I believe the response may be helpful to my local colleagues as well.

I have recently experienced a rash of late cancellations and am no longer timid about sending cancellation fee invoices. In response to one such invoice, said attorney shared his “shock”, given that my “income depends on the good will of lawyers” in my community. He further ranted that he never agreed to, is not liable for, and would not pay my cancellation fee.

First, let me dispel the myth that cancellation fees are not enforceable. Our judicial circuit uses a Standard Mediation Order which includes references to the mediator’s cancellation fees. This order, like any other, is enforceable by the court. I know that the general sentiment among our local judges is respect and gratitude toward the mediators who help them control their otherwise impossible dockets, and I would be disappointed and surprised if any were hesitant to enforce the terms of their own orders in this regard.

More important that liability and enforceability is the rationale behind cancellation fees. Far too often, litigants and their counsel use the scheduling of a mediation as a "settlement deadline tickler" system and routinely strive to settle before mediation. While I encourage settlement, I do not encourage my colleagues to settle on the eve of a mediation, tell me "thanks anyway", and leave me with a half day that I can no longer use for mediation or other billable work.

Most cancellation fee provisions that I have seen are quite reasonable, imposing zero fees if the cancellation occurs at least 10 days before the scheduled Mediation, and incremental fee increases the closer the cancellation is to the mediation conference. There is nothing to stop the parties from settling prior to the mediation. There may be excellent reasons for doing so - to avoid travel expenses, billings to the client, scheduling inconvenience, client discomfort in confronting the opposition, etc.

Likewise, there is nothing to stop the parties from setting the settlement deadline tickler system at 10 days prior the mediation, or otherwise factoring in the cancellation fees into the negotiation. One thing you cannot and should not do is claim surprise or offense.

To put it differently, is it fair for you and your client to reap a cost savings at the mediator’s expense.

Yes, we realize that sending cancellation fee invoices may burn bridges (just as I realize that writing this article may do likewise). For this reason, many mediators refrain. However, as the current debate regarding the force of UN resolutions demonstrates, refusal to enforce terms breeds contempt for those terms.

Thankfully, I have not received any such letters from any of you, even though you may have similar feelings. Hopefully you can better understand the basis and propriety of mediation cancellation fees, and perhaps implement ways to avoid them. This local bar is reputed to be professional, collegial and respectful to and of one another. Those same qualities should carry over to the Mediators you use. Their time is no less valuable than yours, and it deserves no less respect than does yours.

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