

May 8, 2009

The Question:

Please be advised that at the end of October, 2008, I retired as Supervisor of the [county] County Child Legal Service Office for the Department of Children and Families / State of Florida. Pursuant to Administrative Order Number 08-34-S, Effective January 1, 2009, I am appointed as a General Magistrate in [name of county] Dependency Court. I will be serving on a voluntary basis during the current budgetary shortfall. Notwithstanding this, currently there is a need and desire to perform Dependency Mediation in [name of county] County. I am scheduled to take the Dependency Mediation Course with [name of training provider], and anticipate certification as such by May or June, 2009. Because of the current lack of funding support for the program in [name of county] County, it is my intention to also function as a Dependency Mediator in [name of county] County on a voluntary basis, should no funding subsequently be made available to assign and pay dependency mediators for these critical cases. I will also be working toward obtaining funding to resurrect the Dependency Mediation Program in [name of county] County.

A brief survey of the Mediation Ethics opinions, applicable Rules and Florida statutes does not reveal any opinion or guidance on point as to whether or not a General Magistrate can mediate a Dependency Case that comes before him or her as a result of an order issued at shelter, arraignment, subsequent motion or hearing, which require him or her to be a certified mediator, or by agreement of the parties, which does not require a certified mediator. Furthermore, there does not appear to be any opinion or direction in the rules governing Alternative Dispute Resolution in general or mediation in particular, the Florida statutes or rules governing the Duties and Responsibilities of General Magistrate F. R. Juv. P. 8.257, F. R. Civ. P. 1.490. F. R. for Certified and Court Appointed Mediators 10. 100 *et. seq.*, as to whether or not such cases may subsequently be mediated by a General Magistrate.

Although there does not appear to be an ethical opinion directly on point, Mediation Advisory opinion 96-002 as reaffirmed in 2006, wherein it was determined that a Mediator should decline serving as a General Master following mediating a case, gives some guidance. Rule 10.60, 10.360, 10.620, F.S. 44.405(2). However, since it has been thirteen years since it was promulgated, perhaps it should be revisited.

It is, therefore, requested that the issues raised above be reviewed and an opinion issued as to the following:

1. Would a person appointed as a General Magistrate subsequently be able to hear cases that had been under his cognizance as a Supervising or Trial attorney?
2. Is it permissible, by party agreement or court appointment, to serve as a mediator and general magistrate for the same case?
3. If so, should a General Magistrate subsequently hear the case by way of motions, to take consents or surrenders, Case Plan, Judicial and/or Status Reviews, etc. after mediation has been completed, either successfully by agreement or unsuccessfully by impasse?

Thank you for your anticipated courtesies and cooperation. I look forward to hearing from you in the near future.

Court-Appointed Dependency Mediator
Central Division

Authorities Referenced

Rules 10.310; 10.330; 10.340; 10.360; 10.900, Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinion 96-002

Summary

It is not permissible to serve as a general magistrate and mediator for the same case.

Opinion

1. The MEAC declines to answer this question because it is outside its jurisdiction. Specifically, the MEAC provides “advisory opinions to mediators subject to these rules in response to ethical questions arising from the Standards of Professional Conduct [for Mediators].” Rule 10.900.

2. It is not permissible to serve as a mediator and general magistrate for the same case. Doing so would create a clear nonwaivable conflict of interest. A mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator’s impartiality. Rule 10.340(a).

Additionally, mediation is based on the concepts of self determination of the parties (rule 10.310), impartiality and neutrality of the mediator (rule 10.330), and confidentiality of the process (rule 10.360). Serving in a dual capacity is problematic in all of these areas.

Because the question did not specify the order in which one might serve in these capacities, the Committee will discuss the situation both from the perspective of a general magistrate mediating a case that is before him/her and a mediator subsequently serving as a general magistrate for the case s/he previously mediated.

Serving first as a mediator and then as a general magistrate for the same case is nearly identical to the question raised in MEAC 96-002 in which the mediator inquired how to respond to a request by the trial court that he serve as special master in an estate proceeding after having served as the mediator for the case. The MEAC responded that the mediator should decline serving as a special master for a case he mediated based on the rules and statute governing confidentiality of mediation communications and a mediator's obligation to decline any act which would compromise the mediator's integrity. MEAC 96-002. The MEAC reaffirms this opinion.

Mediating a case in which you are serving as a general magistrate creates a clear, non-waivable conflict of interest. Rule 10.340. In addition, because there is no guarantee that the case will resolve in mediation, you could find yourself in the same position as discussed above, serving as an adjudicator for a case in which you mediated and learned confidential information. Rule 10.360(a). Finally, it is likely that serving in a dual role would have a chilling effect on the parties' self determination. Rule 10.310(b). Senior judges who also serve as mediators are in an analogous situation to the one posed. Thus, it is instructive to note that rule 10.340(e) states unequivocally, "[a] mediator shall not serve as a mediator in any case in which the mediator is currently presiding as a senior judge."

3. It is not permissible to serve as a general magistrate and mediator for the same case, regardless of the order of service, and even if the parties were to agree.

Date

Fran Tetunic, Committee Chair