

October 12, 2010

The Question

- 1) Is it appropriate for a court-appointed mediator to act as plaintiff's representative during the pre-trial process? And,
- 2) If a court-appointed mediator is working one-on-one with a defendant to work out a payment plan during the pre-trial process, is this classified as mediation or is this outside the scope of the mediation process?

The Details are in the Background:

During small claims pre-trials, defendants are initially asked if they prefer to work out a payment plan with their plaintiff. Those saying yes are then sent with the plaintiff's attorney to negotiate and write up the stipulation. However, it is not unusual for a plaintiff's attorney to have a dozen or more cases on a docket, and when this is the case, mediators are handed the court file, given updated principle, interest, court costs, attorney fees and minimum acceptable payment amounts (provided by the plaintiff's attorney) and are sent with the defendant to write the stip.

If the defendant agrees to the amount, the mediator writes a stipulation, and takes it to the plaintiff's attorney for approval/signature. If there is no agreement, the parties are then sent to mediation with the same mediator.

This has driven considerable discussion around the appropriateness of a mediator stepping into the role of Plaintiff's representative, as well as whether these discussions should be considered mediations, thereby requiring the mediator to do an opening statement before attempting to work out a payment plan. And if the mediator does an opening statement with the defendant and is unable to work out a payment plan, must the mediator do a second opening statement if the parties are then sent to a full mediation.

Certified County and Circuit Mediator
Central Division

Authorities Referenced

Rules 10.330, 10.340(a), and 10.420(a), Florida Rules for Certified and Court-Appointed Mediators

Summary

Answer to Question One: No, it is not appropriate for a court-appointed mediator to act as plaintiff's representative during the pre-trial process.

Answer to Question Two: A court-ordered mediation begins when the court refers the case to mediation. In this scenario, actions undertaken prior to a court referral to mediation would be outside the mediation process.

Opinion

Answer to Question One: No, it is not appropriate for a court-appointed mediator to act as plaintiff's representative during the pre-trial process. In the facts presented, the mediator is being asked to provide the services and take over the responsibilities of the plaintiff's attorney who has obviously accepted more cases than s/he is able to properly handle. Acting as a representative for a party is the function of an advocate, not a mediator. The mediator is not present in the court to provide legal representation or services other than mediation. By negotiating a stipulation acting as the plaintiff's representative, the mediator has lost the reality and appearance of neutrality and impartiality and would be in violation of Rules 10.330 and 10.340(a).

Answer to Question Two: A court-ordered mediation begins when the court refers the case to mediation. If the mediator was "court-appointed" [the terminology used in your question] then the MEAC would presume that the parties were referred to mediation during the pre-trial process and the mediator should be acting in the capacity of a mediator. In so doing, the mediator should begin the session with an orientation pursuant to Rule 10.420(a) and follow with other commonly accepted mediation procedures (opening statements, offers, caucus if appropriate, etc.). While the Rules for Certified and Court-Appointed Mediators as well as the Rules of Civil Procedure permit a mediator to meet privately with one party outside the presence of the other party (commonly referred to as "caucus"), the act of a mediator meeting with one party does not in and of itself define whether mediation has taken or is taking place. It is possible that after an opening statement, acting under an order to mediate, a mediator could work in caucus with a defendant to go over a possible stipulation; however, unless the mediation was ordered by the court or agreed to by the parties, the mediation has not begun. See the answer to question one for why this action on the part of the mediator is inappropriate.

Date

Beth Greenfield-Mandler, Committee Chair