The Question

The following questions address Rule 10.340, Conflicts of Interest and Rule 10.360, Confidentiality.

Question 1: A circuit’s ADR Unit is organizationally placed under the administrative magistrate. This unit is comprised of full-time state employees who are certified mediators and independent contract mediators. The magistrate has direct supervisory control over the ADR Director (one of the full-time state employees), approving the director’s time and leave, providing performance evaluations, and other administrative matters. Moreover, the magistrate gives substantive directives to the ADR Director about the unit’s performance, including the performance of the independent contract mediators, which includes but is not limited to specific issues with signed agreements, directives related to the wording of mediator’s reports, and recommendations on “template” language to use in mediated agreements. The administrative magistrate also has supervisory control and executive oversight over the circuit court’s case managers assigned to assist pro se parties in family matters and other magistrates and hearing officers. The magistrate, as part of the supervisory and executive oversight responsibilities, holds periodic meetings with the employees who are mediators, case managers, hearing officers, and other magistrates to ensure that all units are performing appropriately and focusing on the mission of the circuit. Is there any conflict of interest which may apply in this situation such as the following?

1. Is it a clear conflict of interest for a mediation unit, which is supervised by the magistrate, to mediate cases which are assigned to that member of the judiciary? If there is a clear conflict of interest, does it only apply to the Director of the Unit?

2. Is there a clear conflict of interest for the unit to mediate a case when the administrative magistrate’s spouse or family members are involved in the case, either as a party or counsel? If there is a clear conflict of interest, does it only apply to the Director of the Unit?

Question 2: This same administrative magistrate as described in Question 1 has a pro se family law caseload and orders all such family law cases to mediation, per administrative order. From time-to-time, the administrative magistrate discusses cases (or more specifically, mediated agreements) with the ADR Director in an effort to improve the products produced by employees and independent contract mediators. The magistrate may receive verbal complaints from parties...
during final hearings regarding the service provided by the mediators or the products (e.g., agreements) produced. If this magistrate acts as the supervisor investigating a complaint or if the magistrate has a personal concern about a mediator’s product, can the mediator in question do the following?

1. Provide details about the mediation to this magistrate, understanding that the magistrate makes decisions about the case?
2. Disclose confidential mediation communication to the magistrate under the “umbrella of confidentiality” which could apply to the unit per MEAC 2005-005?
3. Disclose confidential mediation communication to the magistrate as per MEAC 2005-005 if the magistrate was not assigned to the same case for which the magistrate is investigating a complaint?

Question 3: Assume a certified mediator is an independent contract mediator with a court-annexed ADR Unit and is also an attorney who practices family law within the same circuit. Is it a conflict of interest for the court-annexed ADR Unit to mediate a case in which this certified mediator is acting as counsel for a client in a family law case ordered to mediation? In other words, does the ADR Unit become a defacto “mediation firm” and, therefore, cannot provide such mediation services to this attorney because of the working relationship between the attorney who is also an independent contract mediator and the Unit? Is it a clear conflict of interest for the entire ADR Unit or only for the Director who approves monthly invoices of the attorney who is also an independent contract mediator with the ADR Unit? Can any of the other full-time state employed mediators or independent contract mediators mediate such cases?

Florida Supreme Court Certified County, Dependency, and Appellate Mediator
Northern Division

Authorities Referenced

Section 44.405, Florida Statutes
Rules 10.330(a), 10.340(a) – (c), and 10.910(a), Florida Rules for Certified and Court-Appointed Mediators
MEAC Opinion 2005-005

Summary

The MEAC answers several questions about conflicts of interest involving a circuit court ADR unit and also regarding the unit’s mediators maintaining mediation confidentiality when the unit is supervised by an administrative magistrate.
Opinion

Answers to Question One:

According to rule 10.340(a), Florida Rules for Certified and Court-Appointed Mediators, “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.” Based on the general information presented in the paragraph labeled Question 1, it is not a clear conflict of interest for a mediation unit which is supervised by an administrative magistrate to mediate cases assigned to the magistrate. As the magistrate does not represent either party and is an impartial adjudicator, there is no appearance of partiality or partiality by the unit mediator toward one party or the other, or the magistrate if the unit mediator conducts a mediation in a case assigned to the magistrate. However, it is a clear conflict of interest for the mediators of the unit and the director to mediate a case in which the magistrate’s spouse or family members are involved, either as a party or counsel. The relationship between the mediator and the magistrate’s spouse or family members “compromises or appears to compromise the mediator’s impartiality” in that the magistrate has supervisory authority over the mediators and the director which could appear to influence the mediators and director to treat the magistrate’s spouse or family members with “favoritism or bias in word, action, or appearance” in violation of rule 10.330(a), Florida Rules for Certified and Court-Appointed Mediators.

Answers to Question Two:

According to the Mediation Confidentiality and Privilege Act, section 44.405, Florida Statutes, “Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant’s counsel.” Applying this statutory provision, the MEAC believes it would be a violation of mediation confidentiality for the mediator in the instant scenario to provide details about the mediation to the magistrate who is the judicial officer charged with making decisions about the case, even if the magistrate is acting as the ADR unit’s supervisor investigating a complaint against the mediator or the magistrate has a personal concern about the mediator’s product. Nor does the “umbrella of confidentiality” between an ADR unit mediator, the other members of the unit, and mediation participants which is mentioned in MEAC 2005-005 apply to the circumstances described in these questions as the magistrate who supervises the unit is not in any of those roles.

Section 44.405(4)(a)(6), provides an exception to mediation confidentiality for any mediation communication “offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the

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investigation of the conduct.” Whether the magistrate qualifies for the exception to confidentiality as “the body conducting the investigation of the conduct” when investigating the conduct of a mediator on a case to which the magistrate is assigned or a case to which the magistrate is not assigned, is a legal question which is a matter outside of the Committee’s jurisdiction under rule 10.910(a), Florida Rules for Certified and Court-Appointed Mediators. Thus, the MEAC declines to answer whether the exception applies to Questions 2, 1. and 3.

Answer to Question Three:

While a circuit ADR unit may be compared to a mediation firm, there are significant differences between the two. Unlike a private mediation business whose mediators may have a financial interest in the business such as profit sharing, promotions, or partnership, the staff and independent contractor mediators of a circuit ADR unit have no such financial interests in the unit or with each other as members of the unit. Applying rule 10.340(a) – (c), if a unit mediator believes they are able to be impartial when mediating a case in which an independent contract mediator of the unit is acting as the attorney for one of the parties, the unit mediator is obligated to disclose the fact that the attorney works as a contract mediator within the ADR unit and the substance of the relationship between the unit mediator and the contract mediator/attorney. As the MEAC believes the relationship creates a waivable conflict of interest, upon receiving the mediator’s disclosure, the parties must determine whether they want to use the unit mediator.

As the person with managerial responsibility over the contract mediator, which includes a financial relationship with the mediator, the director of the unit would have a clear conflict of interest in conducting a mediation in which the contract mediator/attorney represents a party. The professional relationship between the director and the contract mediator/attorney could affect the mediator’s ability to be free “from favoritism or bias in word, action, or appearance” in violation of rule 10.330(a), Florida Rules for Certified and Court-Appointed Mediators, and could particularly create the appearance of impropriety.

Signed and Dated by Charles Castagna, MEAC Committee Chair

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