

May 22, 2003

THE QUESTION

Recently in discussions with other mediators, it has come to my attention, that a number of them are using the following method to generate business. An attorney's office will hire the mediator. The mediator will then send a letter to the unrepresented party stating that in by Administrative Order you are required to attend mediation. Your mediation is scheduled for "_____." Failure to participate in mediation prior to trial may result in sanctions (or some other such phrase). I believe the following:

- A. The mediator is not impartial. He/she is contracting with only one side, and inherently, it would be difficult to remain impartial.
- B. The letter or notice with the date and place of the mediation is very misleading. The mediator is making the party believe that they are ordered to attend this mediation, when in fact, they are ordered to attend a mediation.
- C. Any reference to sanctions is misleading. There would be no sanctions if the party did not attend their mediation. They are not required to do so.
- D. Often the mediator is charging much higher fees than would be available through the courts. The unrepresented party is unaware of the availability of less-expensive mediation sources, since the letter is so misleading and coercive.

I would appreciate an opinion on this growing trend.

Sincerely,

Certified County Mediator
Central Division

AUTHORITY REFERENCED

Rules 10.310(b), 10.330(a), 10.380, 10.520, 10.610 and 10.620, Florida Rules for Certified and Court-Appointed Mediators
Rules 12.740 and 12.741, Florida Family Law Rules of Procedure
MEAC Opinions 96-001 and 98-006

SUMMARY

- A. By contracting with only one party in a dispute, the mediator may have violated the general impartiality requirement contained in rule 10.330(a).
- B. Initiating the mediation process without the required judicial involvement is a violation of the ethical rules.
- C. Referencing sanctions for failure to participate in a mediation in a case which has not yet been court-ordered to mediation, is a violation of the ethical rules.
- D. A mediator must comply with ethical and procedural rules in relation to charging fees for mediation. Failure to do so would be an ethical violation.

OPINION

- A. The mediator may have violated the general impartiality requirement contained in rule 10.330(a), which requires a mediator to be free from favoritism or bias in word, action, or appearance. The Committee observes that the mediator in your scenario would have a continuing relationship with a particular law firm, and thus, would either have a bias (or appear to have a bias) in the firm's favor as opposed to the numerous unrepresented (or even represented) parties on the opposite side. See discussions in MEAC 96-001 and 98-006.
- B. The Committee is of the opinion that the action described would constitute a rule violation since the general administrative order, by definition, does not contain the specific information.

The Committee notes that the procedures for family mediation are contained in rules 12.740 and 12.741, Florida Family Law Rules of Procedure. Specifically, rule 12.740(a) provides that a family case may be sent to mediation "only after the court has determined that the parties have the financial ability to pay . . . a fee." After the court sets a fee, the parties may object to the fee. Rule 12.741(b)(6) describes the method of selecting a mediator, specifically providing that "[within] 10 days of the order of referral, the parties may agree upon a stipulation with the court designating" a mediator.

The scenario you describe seems to run roughshod over these rules of procedure, which a mediator is required to follow pursuant to rule 10.520, which provides that a mediator "shall comply with all statutes, court rules . . . relevant to the practice of mediation." Specifically, the mediator you describe seems to be initiating the process without the required judicial involvement.

C. While the reference to sanctions in your third comment may theoretically be accurate, it appears to be misleading. The crucial issue is whether the mediation has been ordered by the court in a manner consistent with rules 12.740 and 12.741. If the mediation has not been court-ordered, there can be no sanctions and any such reference could be coercive and demonstrate a lack of impartiality. See rules 10.310(b) and 10.330. The making of such a threat, if unsupported, may also violate rule 10.620, which prohibits a mediator from performing any act which would compromise the mediator's integrity or impartiality. In addition, if the mediator is viewed as engaging in marketing practices by sending out such notices, the use of any false or misleading information could constitute a violation of rule 10.610.

D. In relation to your fourth comment on the charging of high fees, the committee notes that any mediator must comply with rule 10.380, which deals with various aspects of mediation fees, including written notification thereof and reasonableness, as well as rules 12.740 and 12.741, Florida Family Law Rules of Procedure. As above, rule 12.740(c) requires judicial intervention in the setting of fees unless the parties otherwise agree and even contains a procedure by which a party may object to the court on the issue of fees. Failure to comply with these procedures would be a violation of rule 10.520.

Date

Fran Tetunic, Committee Chair