

January 12, 2001

THE QUESTION

We are in need of an ethical standards and/or rules opinion in the following case dealing with Dependency Mediation:

- Fact pattern P The Division received an order for co-mediation with a court ordered psychologist (not a certified mediator).
- P This psychologist has also been court ordered to evaluate the parent and the child's custodian. These evaluations have already been conducted.
- P The parent's attorney is willing to waive confidentiality, the Department of Children and Families is not.

Please refer this to the appropriate committee.

Thank You,

Certified County, Family, Circuit and Dependency Mediator
Southern Division

and

Certified County, Family, Circuit and Dependency Mediator
Southern Division

AUTHORITY REFERENCED

- Rule 1.720(f)(1)(B), Florida Rules of Civil Procedure
- Rule 8.290(e)(2)(B), Florida Rules of Juvenile Procedure
- Rule 12.741(b)(6)(A)(ii), Florida Family Law Rules
- Rules 10.200, 10.330(a), 10.340(a) and (c), 10.620, Florida Rules
for Certified and Court-Appointed Mediators

SUMMARY

It is inappropriate and violates the Standards of Conduct for Mediators for a certified mediator to participate in this mediation.

OPINION

The Committee opines that it is inappropriate and violates the Standards of Conduct for

Mediators for a certified mediator to participate in this mediation under both procedural rules and ethical standards.¹

First, the appointment of a non-certified mediator absent the agreement and request of the parties violates procedural rules. A non-certified mediator may only be appointed under the following circumstances: 1) upon agreement of the parties pursuant to rule 8.290(e)(2)(B), Florida Rules of Juvenile Procedure for dependency cases [rule 1.720(f)(1)(B), Florida Rules of Civil Procedure, for circuit civil cases and rule 12.741(b)(6)(A)(ii), Florida Family Law Rules for family cases], or 2) the court may appoint a trainee and a certified mediator as co-mediators, pursuant to Florida Supreme Court Administrative Order AOSC00-8. Based on the facts provided above, the uncertified mediator does not appear to fall into either of these categories.

Second, the Committee is concerned that impartiality and conflict of interest violations will occur if the non-certified mediator were to participate in a mediation after completing psychological evaluations of the parent and the child's custodian. Specifically, under rule 10.330(a), a mediator is required to "maintain impartiality throughout the mediation process." Impartiality is defined as "a freedom from favoritism or bias in ... appearance." The Committee Notes to this rule state that "[i]n the event circumstances arise ... that would reasonably be construed to impair or compromise a mediator's impartiality, the mediator is obligated to withdraw." The companion "conflicts of interest" provision is found in rule 10.340. In subdivision (a), it states that a "mediator shall not mediate a matter that presents a clear... 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." Under subdivision (c), the rules continue that "if a conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the parties."

Under these rules, this mediation is inappropriate with a non-certified mediator who previously completed psychological evaluations of the parent and the child's custodian. The Committee opines that service as an evaluator creates a clear conflict of interest which, at a minimum, raises the appearance of compromising the mediator's impartiality. As a result, the non-certified mediator, who is subject to the rules

referenced above as a court-appointed mediator pursuant to rule 10.200, should not mediate this case. Additionally, the certified mediator should refuse to mediate this case since such participation would be an ethical violation of rule 10.620, which states that a mediator "shall not ... provide any service... that would compromise the mediator's integrity or impartiality."

¹ The Committee notes that this opinion should not be viewed as a general disapproval of innovative alternative dispute resolution techniques, which by definition would not be subject to the mediation rules.

January 12, 2001

Date

Charles M. Rieders, Chair