



Ohio Board of Professional Conduct

OPINION 2019-12

Issued October 4, 2019

Appointment of a Magistrate as an Eldercare Coordinator

SYLLABUS: A probate court magistrate may not be appointed as an eldercare coordinator in addition to his or her duties as a judicial officer. The dual appointment of a probate court magistrate as an eldercare coordinator interferes with the official duties of the position of magistrate and leads to frequent disqualification. The dual appointment of a probate court magistrate as an eldercare coordinator raises questions as to the magistrate's impartiality.

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QUESTION PRESENTED: Whether a probate magistrate may serve in a dual role as an eldercare coordinator.

APPLICABLE RULES: Jud.Cond.R. 1.2, 2.6, 3.1, 3.9

OPINION: A probate court judge proposes that two magistrates be appointed on a case-by-case basis to serve as eldercare coordinators for the court. Each magistrate would be appointed only in cases not previously referred to them by the judge and would not participate as an eldercare coordinator in any matter in which they presided as magistrate. If a magistrate is appointed as an eldercare coordinator before a guardianship proceeding is filed, that magistrate will not participate in any subsequent guardianship proceedings involving the same ward.

Eldercare coordination is a form of dispute resolution offered by some probate courts in pending and impending guardianships when traditional mediation is not

appropriate or has failed. *See* Sup. R. 79(B). The goal of eldercare coordination is to complement other services, such as legal representation and mediation, and to “help manage high-conflict family dynamics so that the elder, family and stakeholders can address their non-legal issues independently from the court.”¹ To this end, an eldercare coordinator may help make decisions within the scope of a court order or with prior approval of the parties. In most jurisdictions the eldercare coordinator is paid directly by the parties for his or her services.² An eldercare coordinator appointed by the court is required to complete specialized training and must have adequate knowledge and experience to assist the parties.

Judicial functions of a magistrate

Magistrates perform judicial functions and therefore are subject to the Code of Judicial Conduct, Jud.Cond.R., *Application*, I(B). Magistrates may not act as arbitrators or mediators or perform other judicial functions apart from their official duties unless expressly authorized by law. Jud.Cond.R. 3.9. “Law” is a defined term that includes court rules, the Code of Judicial Conduct, the Rules of Professional Conduct, statutes, constitutional provisions, and decisional law. Jud.Cond.R. 1.0. In some jurisdictions, mediation by a judicial officer of cases before another judge is permitted under the Code of Judicial Conduct because the activity is expressly authorized by other law. For example, pursuant to a Nevada Supreme Court rule, parties and their attorneys may meet in person “with a judge other than the judge assigned to preside over the trial” for purposes of attempting to settle the case. Nev. Sup. Ct. Rule 252; Nev. Std. Comm. Jud. Eth. Op. JE10-006. In Ohio there is no comparable law expressly permitting the mediation by one judicial officer of another judicial officer’s cases that would qualify as an exception to the prohibition in Jud.Cond.R. 3.9.

In addition, a magistrate “appointed under Civil Rule 53 can be appointed only to function in the manner authorized by Civil Rule 53.” *Cuyahoga County Bd. of Mental Retardation v. Assn. Cuyahoga County Teachers of Trainable Retarded*, 47 Ohio App. 2d 28, 39, 351 N.E.2d 777 (8th Dist.1975). Upon referral from a judge, a magistrate is permitted under Civ.R. 53(C) to determine any motion in any case; conduct the trial of any case that

¹ Fieldstone & Bronson, *From Friction to Fireworks to Focus: Eldercaring Coordination Sheds Light in High-Conflict Cases* 24 *Experience* (2015).

² Supplemental compensation of magistrates by third parties is prohibited by R.C. 2921.43 and Jud.Cond.R. 3.11.

will not be tried to a jury; preside over the trial of any case that will be tried to a jury; conduct proceedings upon application for the issuance of a temporary protection order as authorized by law; exercise any other authority specifically vested in magistrates by statute and consistent with this rule. The enumerated list of permissible functions in Civ. R. 53 does not include the referral of a matter to a magistrate for the purposes of dispute resolution or eldercare coordination.

In contrast, a magistrate is permitted to participate in a mediation or settlement conference as a part of his or her assigned judicial duties in cases over which he or she is presiding. Jud.Cond.R. 3.9, cmt. [1]. While eldercaring coordination is not considered a formal mediation process, it is a form of dispute resolution involving parties in matters pending or impending before the probate court. The functions of an eldercare coordinator are far different from that of managing a settlement conference or mediating a case over which the judicial officer presides. A magistrate's appointment as an eldercare coordinator, in addition to his or her official judicial duties, exceeds those activities deemed permissible under Jud.Cond.R. 3.9 and Civ.R. 53.

Eldercaring coordination as an extrajudicial activity

A magistrate's service as an eldercare coordinator for a court is considered an extrajudicial activity because the coordinator seeks to resolve pending or impending issues of parties independently from the court. While judicial officers may permissibly participate in certain permissible extrajudicial activities, they may not engage in extrajudicial activities that will lead to frequent disqualification or interfere with their judicial duties. Jud.Cond.R. 3.1. For example, the proposed appointment of each magistrate as an eldercare coordinator contemplates that the magistrate will not hear any matter stemming from his or her participation as a coordinator. This arrangement constitutes a blanket disqualification in all matters the magistrate serves as an eldercare coordinator, interferes with the official duties of the position of magistrate, and constitutes the type of frequent disqualification that the rule seeks to prevent. *See e.g.* NY Jud. Adv. Op. 06-64 (should a judge's service as a mediator result in frequent recusal, the judge cannot continue to serve in that capacity.) In addition, time spent serving as an eldercare coordinator will interfere with the magistrate's ability to properly perform his or her official duties. Jud.Cond.R. 3.1(A).

Impartiality of the Magistrate

A judicial officer may not participate in extrajudicial activities when it would appear to a reasonable person to undermine the judicial officer's independence, integrity, or impartiality. Jud.Cond.R. 3.1(C), 1.2. Service in a dual role as both a judicial officer and a coordinator in a dispute resolution process may raise questions from court participants about the impartiality of the magistrate. For example, the parties may question whether the magistrate will rule on matters in an impartial manner when serving in both roles and when the overall objectives of the eldercare coordination process may vary considerably from those present in litigation. Reasonable questions may also be raised by parties about a magistrate's ability to hear a matter on the merits, especially if in the role of eldercare coordinator, the magistrate promotes the use of the coordination program as a preferred alternative to further litigation. *See also* Jud.Cond.R. 2.6, cmt. [3] (a judge must be mindful of the effect settlement discussions can have * * * on the appearance of their objectivity and impartiality.)

Neither a parttime magistrate nor a parttime judge is subject to the prohibition against participation as an arbitrator or mediator in Jud.Cond.R. 3.9. However, a part-time magistrate position does not obviate all the issues stated above when the eldercare coordinator position is performed in the same court or division where he or she presides. For these reasons, the Board advises that a full or parttime magistrate not serve in a capacity as an eldercare coordinator in the same probate court in which the magistrate presides.

CONCLUSION: A magistrate is a judicial officer subject to the Code of Judicial Conduct. Like a judge, a magistrate's extrajudicial duties are subject to the restrictions set forth in the Code. A judicial officer is not permitted to engage in mediation or arbitration in cases in which he or she does not preside unless expressly authorized by law. There is no law in Ohio that permits a judicial officer to participate in mediation apart from those cases over which he or she presides. A magistrate's appointment as an eldercare coordinator is an extrajudicial activity and not a judicial function. Under the Code, extrajudicial activities cannot interfere with the judicial officer's principal duties nor raise questions about his or her impartiality. The dual appointment of a magistrate as an eldercare coordinator may also interfere with the magistrate's duties and likely raise reasonable questions about the magistrate's impartiality in guardianship cases. Regardless of whether the magistrate serves in a full or part-time capacity, the Board

advises that he or she not serve as an eldercare coordinator in the same court in which they are appointed as magistrate.