

GM Maria Hinds= notes on practicing before general magistrates. Prepared February 11, 2013.

## 1) Procedures

I require a pre-trial memorandum and send out a notice to produce at trial. I request the pre-trial be filed with copy to opposing party seven days before trial. If this is not done and there are potential witnesses, they will not be allowed to testify. This is to avoid Atrial by ambush.@ I am a bit more lenient when no witnesses other than the parties are to appear and can work with receiving the pre-trial a couple of days ahead. The production should be brought to trial with appropriate copies.

Motions to appear by phone, for continuances, etc., must be in writing, copied to other party, and must state whether or not the other party has been consulted and whether they agree or not.

Attorneys should be prepared, organized in their presentations, and not present me with the *pre-trial at trial*, when it is no help to me nor the opposing party. And, as noted, this will preclude their witnesses, if any, from appearing. Along these lines, I have had attorneys appear without the evidence needed to fashion an equitable distribution, which is very frustrating.

Late arrivals. Please tell clients that it may take them longer than they think to park, go through security, and get an elevator, so they should leave sufficient time.

NO CHILDREN. Clients sometimes appear with young children. They must make child care arrangements ahead of time. Deputies are not babysitters.

And PLEASE put the *division* number on your court filings.

## 2) Reasonable time for Report and Recommendation

In most cases, I do my own R & Rs. Early on, I really got behind with this, but have learned to balance my work load better and now it is rare for an R & R to go out more than a week to ten days after hearing, unless there is a specific reason it is being held.

If I ask an attorney to prepare the R & R, I will also ask that it be e-mailed to my secretary, so that I can review it and make changes, in which case I will tell the attorney when I expect it. I do often ask attorneys to prepare any additional documents, such as IWOs for child support and/or alimony. In that case, they should be submitted to my office at least three days prior to time for the order/final judgment to be signed by the referring judge.

Time for signing is the 16<sup>th</sup> day after the filing date for the R & R. Under rule 12.490, we must allow the 10 days for exceptions to be filed, plus five for mailing. If no exceptions are filed with the Clerk by the end of business on the fifteen day, the order/FJ goes to the referring judge for signature. Therefore, the IWO would be due in the Office of the General Magistrate no later than 12 days from the date the R & R is filed, so that it can be reviewed and sent to the judge at the time the order/FJ is sent.

### **3) Motions for rehearing/reconsideration**

GMs cannot hear motions for rehearing or reconsideration, which must be directed to a final order or final judgment within 10 days of entry. Our R & Rs are not final until adopted by the referring judge. This area can be a bit of a sticky wicket. I do hear motions for clarification, but only on very narrow grounds, such as when I have made a ruling on the record, but omit it from the written report or to correct a scrivener=s error or clarify some statement that is not as clear as it could be. In other words, this is simply to make clearer what has already been heard and decided, but not to change any substantive findings.

Thus, a party=s relief is by way of exceptions, which is where it becomes difficult if the party does not really take exception to the R & R, but wishes to ask for rehearing, for example, to admit newly discovered evidence. In that case, the party would move for rehearing within 10 days of entry of the final judgment. This is governed by rule 1.530. The eighth paragraph in the notes to the rule states that A[a] timely motion under this rule may be amended to state new grounds if allowed by the court prior to ruling on the motion.@

It seems me that if the judgment has been entered and the referring judge, based upon a motion for rehearing, then allows a statement of new grounds, the judge could issue a new referral allowing the GM to hear those new grounds and issue a new R & R. Timing is everything here and I would advise a close reading of rule 1.530 and all notes thereto, since a motion filed *after* notice of appeal destroys the effectiveness of the notice of appeal and filing notice of appeal *after* filing motion for rehearing would likely constitute abandonment of the motion. In other words, it appears that only one avenue of relief can be sought at a time; however, this does not preclude rehearing by the judge or if referred back by the GM and, finally, appeal could be taken to the ultimate final judgment, if the new evidence hearing, new R & R and final judgment did not solve the problem. Also, rule 1.530(e) allows for appeal of a non-jury action based upon sufficiency of the evidence to support the judgment whether or not the party has made any objection or motion for rehearing in the trial court.

**RULE 12.490. GENERAL MAGISTRATES**

(a) **General Magistrates.** Judges of the circuit court may appoint as many general magistrates from among the members of The Florida Bar in the circuit as the judges find necessary, and the general magistrates shall continue in office until removed by the court. The order making an appointment shall be recorded. Every person appointed as a general magistrate shall take the oath required of officers by the constitution and the oath shall be recorded before the magistrate discharges any duties of that office.

(b) **Reference.**

(1) No matter shall be heard by a general magistrate without an

appropriate order of reference and the consent to the referral of all parties. Consent, as defined in this rule, to a specific referral, once given, cannot be withdrawn without good cause shown before the hearing on the merits of the matter referred. Consent may be express or may be implied in accordance with the requirements of this rule.

(A) A written objection to the referral to a general magistrate must be filed within 10 days of the service of the order of referral.

(B) If the time set for the hearing is less than 10 days after service of the order of referral, the objection must be filed before commencement of the hearing.

(C) If the order of referral is served within the first 20 days after the service of the initial process, the time to file an objection is extended to the time within which to file a responsive pleading.

(D) Failure to file a written objection within the applicable time period is deemed to be consent to the order of referral.

(2) The order of referral shall be in substantial conformity with Florida Family Law Rules of Procedure Form 12.920(b), and shall contain the following language in bold type:

**A REFERRAL TO A GENERAL MAGISTRATE REQUIRES THE CONSENT OF ALL PARTIES. YOU ARE ENTITLED TO HAVE THIS MATTER HEARD BEFORE A JUDGE. IF YOU DO NOT WANT TO HAVE THIS MATTER HEARD BEFORE THE GENERAL MAGISTRATE, YOU MUST FILE A WRITTEN OBJECTION TO THE REFERRAL WITHIN 10 DAYS OF THE TIME OF SERVICE OF THIS ORDER. IF THE TIME SET FOR THE HEARING IS LESS THAN 10 DAYS AFTER THE SERVICE OF THIS ORDER, THE OBJECTION MUST BE MADE BEFORE THE HEARING. IF THIS ORDER IS SERVED WITHIN THE FIRST 20 DAYS AFTER SERVICE OF PROCESS, THE TIME TO FILE AN OBJECTION IS EXTENDED TO THE TIME WITHIN WHICH A RESPONSIVE PLEADING IS DUE. FAILURE TO FILE A WRITTEN OBJECTION WITHIN THE APPLICABLE TIME PERIOD IS DEEMED TO BE A CONSENT TO THE REFERRAL.**

**REVIEW OF THE REPORT AND RECOMMENDATIONS MADE BY THE GENERAL MAGISTRATE SHALL BE BY EXCEPTIONS AS PROVIDED IN RULE 12.490(f), FLA. FAM. L. R. P. A RECORD, WHICH INCLUDES A TRANSCRIPT OF PROCEEDINGS, MAY BE REQUIRED TO SUPPORT THE EXCEPTIONS.**

(3) The order of referral shall state with specificity the matter or matters being referred and the name of the general magistrate to whom the matter is referred. The order of referral shall also state whether electronic recording or a court reporter is provided by the court, or whether a court reporter, if desired, must be provided by the litigants.

(4) When a reference is made to a general magistrate, any party or the general magistrate may set the action for hearing.

(c) **General Powers and Duties.** Every general magistrate shall perform all of the duties that pertain to the office according to the practice in chancery and rules of court and under the direction of the court except those duties related to injunctions for protection against domestic, repeat, dating, and sexual violence, and stalking. A general magistrate shall be empowered to administer oaths and conduct hearings, which may include the taking of evidence. All grounds for disqualification of a judge shall apply to general magistrates.

(d) **Hearings.**

(1) The general magistrate shall assign a time and place for proceedings as soon as reasonably possible after the reference is made and give notice to each of the parties either directly or by directing counsel to file and serve a notice of hearing. If any party fails to appear, the general magistrate may proceed ex parte or may adjourn the proceeding to a future day, giving notice to the absent party of the adjournment. The general magistrate shall proceed with reasonable diligence in every reference and with the least delay practicable. Any party may apply to the court for an order to the general magistrate to speed the proceedings and to make the report and to certify to the court the reason for any delay.

(2) The general magistrate shall take testimony and establish a record which may be by electronic means as provided by Florida Rule of Judicial Administration 2.535(g)(3) or by a court reporter. The parties may not waive this requirement.

(3) The general magistrate shall have authority to examine under oath the parties and all witnesses upon all matters contained in the reference, to require production of all books, papers, writings, vouchers, and other documents applicable to it, and to examine on oath orally all witnesses produced by the parties. The general magistrate may take all actions concerning evidence that can be taken by the circuit court and in the same manner. The general magistrate shall have the same powers as a circuit judge to utilize communications equipment as defined and regulated by Florida Rule of Judicial Administration 2.530.

(4) The notice or order setting the cause for hearing shall be in substantial conformity with Florida Family Law Rules of Procedure Form 12.920(c) and shall contain the following language in bold type:

**SHOULD YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE GENERAL MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH RULE 12.490(f), FLA. FAM. L. R. P. YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS OR YOUR EXCEPTIONS WILL BE DENIED. A RECORD ORDINARILY INCLUDES A WRITTEN TRANSCRIPT OF ALL RELEVANT PROCEEDINGS. THE PERSON SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S**

## REVIEW.

(5) The notice or order setting a matter for hearing shall state whether electronic recording or a court reporter is provided by the court. If the court provides electronic recording, the notice shall also state that any party may provide a court reporter at that party's expense.

(e) **General Magistrate's Report.** The general magistrate shall file a report that includes findings of fact and conclusions of law, together with recommendations. If a court reporter was present, the report shall contain the name and address of the reporter.

(f) **Filing Report; Notice; Exceptions.** The general magistrate shall file the report and recommendations and serve copies on all parties. The parties may file exceptions to the report within 10 days from the time it is served on them. Any party may file cross-exceptions within 5 days from the service of the exceptions, provided, however, that the filing of cross-exceptions shall not delay the hearing on the exceptions unless good cause is shown. If no exceptions are filed within that period, the court shall take appropriate action on the report. If exceptions are filed, they shall be heard on reasonable notice by either party or the court.

(g) **Record.** For the purpose of the hearing on exceptions, a record, substantially in conformity with this rule, shall be provided to the court by the party seeking review if necessary for the court's review.

(1) The record shall consist of the court file, including the transcript of the relevant proceedings before the general magistrate and all depositions and evidence presented to the general magistrate.

(2) The transcript of all relevant proceedings, if any, shall be delivered to the judge and provided to all other parties not less than 48 hours before the hearing on exceptions. If less than a full transcript of the proceedings taken before the general magistrate is ordered prepared by the excepting party, that party shall promptly file a notice setting forth the portions of the transcript that have been ordered. The responding parties shall be permitted to designate any additional portions of the transcript necessary to the adjudication of the issues raised in the exceptions or cross-exceptions.

(3) The cost of the original and all copies of the transcript of the proceedings shall be borne initially by the party seeking review, subject to appropriate assessment of suit monies. Should any portion of the transcript be required as a result of a designation filed by the responding party, the party making the designation shall bear the initial cost of the additional transcript.

### Commentary

**1995 Adoption.** This rule is a modification of Florida Rule of Civil Procedure 1.490. That rule governed the appointment of both general and special masters. The appointment of special masters is now governed by Florida Family Law Rule of Procedure 12.492. This rule is intended to clarify procedures that were

required under rule 1.490, and it creates additional procedures. The use of general masters should be implemented only when such use will reduce costs and expedite cases in accordance with *Dralus v. Dralus*, 627 So.2d 505 (Fla. 2d DCA 1993), *Wrona v. Wrona*, 592 So.2d 694 (Fla. 2d DCA 1991), and *Katz v. Katz*, 505 So.2d 25 (Fla. 4th DCA 1987).

#### Committee Note

**2004 Amendment.** In accordance with Chapter 2004-11, Laws of Florida, all references to general master were changed to general magistrate.

## Summary Regarding the Use of General Magistrates

Referring motions and trials to the GM:	20%	never	28%	1-5 cases per month
Objecting to the GM:	11%	rarely	5%	occasionally
Willingness to refer to GM based on the identity of the GM:	37%	yes	20%	no
Willingness to refer to GM based on the client's preference or perception of GM:	27%	yes	29%	no
Willingness to refer to GM based on the opposing counsel:	24%	yes	31%	no
Prefer a system where GM is assigned to a specific judge:	44%	yes	11%	no
Prefer GM being randomly assigned when referral is made:	11%	yes	43%	no
Believe GM should be for pro se litigants and attorneys should practice before judges	38%	yes	11%	no

What would cause you to increase your use of the GM?

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| 1. All discovery motions referred to the GM              | 30% |
| 2. More consistent rulings between the GMs               | 25% |
| 3. More consistent adherence to rules of evidence        | 19% |
| 4. Specific types of motions heard by GM                 | 19% |
| 5. More consistent ruling with individual GMs            | 17% |
| 6. Entire case being referred instead of different parts | 16% |
| 7. More formal proceedings                               | 10% |



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February 11, 2013

**Standard of Review of Trial Court's decision to accept or reject general magistrate's findings of fact and conclusions of law.**

*Anderson v. Anderson*, 736 So. 2d 49 (Fla. 5th DCA 1999) (en banc) recognized that "the role of the trial court in reviewing the findings and determinations of the master are similar to those of the appellate court in reviewing a trial court's findings and determinations." *Id.* at 51. The reasons for restricted review are as follows:

- (1) a master is, or should be, experienced in determining the facts in family law cases;
- (2) duplication of a family law master's efforts by a circuit court would be costly and would contribute only negligibly to the accuracy of the determination of facts; and
- (3) the parties already have focused their energies and resources on the family law master's determination.

***Lambert v. Lambert*, 57 So. 3d 287 (Fla. 4th DCA 2011):**

It is clear that if one objects to a master's report, the trial court has an obligation not merely to consider the findings and recommendation of the master but also to review the entire file. But the review is not intended to permit the trial court to make its independent finding of facts or to reach its independent conclusion as to the legal effect of such facts. The review of the entire record is to ascertain whether the master's finding is supported by

competent evidence and to see if the master's conclusions pass the Canakaris test.

*Id.* at 289-90 (quoting *Anderson v. Anderson*, 736 So. 2d 49 (Fla. 5th DCA 1999) (footnote omitted)).

***In re: Drummond*, 69 So. 3d 1054 (Fla. 2d DCA 2011)** discussed the appellate court's role in reviewing the trial court's review of a general magistrates findings of fact and conclusions of law. The court stated:

The district court . . . reviews the trial court's decision to assure that it is applying the correct standard of review as a matter of law. The trial court's application of that standard is also entitled to a presumption of correctness, but the three-judge panel can equally perform the review that the trial court performed of the magistrate's record and findings. Thus, there is no need for a district court to defer to the trial court by using the abuse of discretion standard that we often apply when a trial court is applying law to its own factual determinations.

*Id.* at 1057.

***Perrone v. Frank*, 80 So. 3d 402 (Fla. 4th DCA 2012)** recognized that appellate court's utilize an abuse of discretion standard of review in examining a trial court's decision to accept or reject a general magistrates conclusions. However, it noted that the review is narrower than in other circumstances:

Because the trial court sits in its reviewing capacity when it makes such a decision and because in most instances the district court will be reviewing identical information on appeal, the discretion afforded the trial court to override the

magistrate is undoubtedly narrower than the discretion we provide to trial courts in a context where the trial court is making its own findings of fact.

*Id.* at 404 (citations omitted).

## CASE LAW RUNDOWN FOR RULE 12.490 AND GENERAL MASTERS

I.

Principle: 12.490 (f) exceptions must be filed within 10 days of date served on them.

**QUESTION FOR GROUP: Order dated November 1 and mailed. Exceptions sent certified on November 15. Timely? YES**

See Calderon v. Calderon 26 So. 3d 688 (Fla. 5<sup>th</sup> DCA 2010) : Rep and Rec dated Oct 2; exceptions dated Oct 16; received by clerk Oct 20. Timely since mailed to husband-date order signed not counted, so gave 15 days from Oct 3 as calculation.

BUT What if emailed?

II.

**QUESTION: Hearing on exceptions mandatory? YES**

See Simmons v. Simmons 16 So.3d 878 (Fla. 5<sup>th</sup> DCA 2009)

Rule states that if no exceptions filed in that time frame the Court will take "appropriate action" on report – does that automatically mean sign it?

If Rep and Rec goes beyond the issues referred, that portion of the report is a nullity. Waszkowski v. Waszkowski 367 So.2d 1113 (Fla. 3d DCA 1979)

III

**QUESTION: Can the trial judge upon exceptions being filed reweigh the evidence heard by the Magistrate? NO -Appellate like review**

Limits of trial court review of Report and Recommendation; ONLY looking to whether factual findings and conclusions are supported by competent substantial evidence, and whether the legal conclusions are clearly erroneous or whether the magistrate misconceived the legal effect of the evidence. Cerese v. Dewhurst 935 So.2d 575 (Fla. 3d DCA 2006) The trial Court may not substitute its opinion for the Magistrate's and is bound by the Magistrate's factual findings unless they are not supported by evidence. Ward v. Ward 90 So.3d 826 (Fla. 3d DCA 2012)

#### IV

**QUESTION: What if the Magistrate makes an erroneous mathematical calculation? What if that problem is not included in the exceptions filed? Can trial judge fix? YES**

Fixable, and Court should fix all obvious problems. See French v. French 12 So. 3d 278 (Fla. 5<sup>th</sup> DCA 2009), when miscalculation of Wife's expenses led to determination she had no need for alimony – Trial court should have looked at errors plain on the face of the Report and Recommendation EVEN THOUGH Wife had not included the miscalculation in her filed exceptions.

If no exceptions but report on its face does not support legal conclusions and ruling, what should trial court do? French says Court needs to do careful review of record and Order and catch mistakes clear on the face despite exceptions not including those mistakes. What if no exceptions filed timely, but mistakes on the face of Report and Recommendation? Still appealable even if no exceptions were filed?

See also Torres v. Torres 2011 Fla. App. LEXIS 15254 (Fla. 2d DCA 2011) : When error clear on face of Report, even when not raised in exceptions filed; should not be confirmed by trial court.

#### V

**QUESTION: Who has to provide transcript, if any? Always entire transcript? What else? Party claiming exception needs provide transcript timely with exceptions.**

Transcript and copies of all exhibits are required to be provided by Rule (g), by party claiming exception. ...can request permission to only order specific portions, with notice to other party and opportunity for them to request additional portions – not clear if trial court can apportion that cost to non-objecting party. Failure to provide transcript means Report is approved. Rodriguez v. Figueroa 958 So.2d 1041 (Fla. 3d DCA 2007) BUT: What if error clear on face of report??

FINALLY: Always keep in mind waiver of procedural rules: requiring strict compliance with pleading rule 12.110 for example may be waived if not brought up prior to litigation with Gen Master Cuartas v. Cuartas 951 So.2d 980 (Fla. 3d DCA 2007) ALSO, the requirement that the referral to the Gen Master be specific as to the matters to be heard may be waived.