

IN THE SUPREME COURT OF FLORIDA

15,151

FILED
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IN RE: PROPOSED AMENDMENTS
TO FLORIDA RULES OF
CIVIL PROCEDURE
(MEDIATION)

RECEIVED
JAN 29 1990

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C O M M E N T S

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COMMENT ONE

THE ATTORNEYS SHOULD HAVE THE UNRESTRICTED RIGHT TO STIPULATE TO ALL ELEMENTS OF THE AGREEMENT ESTABLISHING THE MEDIATION CONFERENCE SO LONG AS THE CONFERENCE IS COMPLETED BY A CERTIFIED MEDIATOR WITHIN THE TIME FRAME SET BY THE COURT.

The Rules should encourage to promote the voluntary use of mediation by counsel in the management of their case as it progresses through the court. The degree of confidence the parties place in the abilities and experience of the mediator and the timing of the conference are two of the most important elements in insuring the maximum effectiveness of the mediation process. This is certainly an area in which the court needs the enthusiastic cooperation of the attorneys. This can best be accomplished by having the attorneys control the mediation process until the Court sends the case to mediation after it is set for trial.

Generally the Bar has experience with mediation in most circuits and are in a better position to choose the mediator and match the mediator to the case. The attorneys are aware of the conflicts and past history and personal and business relationships with their fellow attorneys who are acting as mediators as well as their abilities and expertise.

The right of free choice and the right to freely stipulate is abridged by these suggested rules in the following particulars:

- 1) Rule 1.700(a) requires a stipulation to mediate to be incorporated into the order of referral;
- 2) Rule 1.720(g) says the court can review and control fees of the attorneys acting as mediators;
- 3) The rules are silent about other local circuit requirements for certification. A circuit could refuse to grant certification or revoke it because a mediator charges certain fees or allows a mediation conference to go longer than 4 hours or chooses to practice law as a mediator independent of a courthouse based mediation program.

The following changes need to be made in the proposed rules:

1) Rule 1.700(a) in the last sentence, delete "shall" and substitute "may" so the last sentence reads "SUCH STIPULATION MAY BE INCORPORATED INTO THE ORDER OF REFERRAL."

2) Rule 1.720(g) The second sentence needs to be extended to add "upon the objection of any party." Now the second sentence would read "WHEN THE MEDIATOR IS COMPENSATED IN WHOLE OR IN PART BY THE PARTIES, THE PRESIDING JUDGE MAY DETERMINE THE REASONABLENESS OF THE FEES CHARGED BY THE MEDIATOR, UPON THE OBJECTION OF ANY PARTY."

3) An affirmative statement needs to be articulated to stand for the principle that qualified attorneys can not be denied certification due to local rules or policies regarding fees or location or duration of conferences or any other local practice. The government programs are presumably only necessary if the free market does not provide an adequate supply of good quality lawyers practicing mediation. The court funded programs should not stifle the free growth of the private sector of mediation as a growing specialty of the Bar.

COMMENT TWO

THE TRIAL COURT SHOULD FOLLOW A UNIFORM PROCEDURE TO ORDER THE CASE TO BE MEDIATED BY A CERTAIN TIME. IF THE PARTIES CAN NOT AGREE ON THE CHOICE OF THE MEDIATOR OR OTHER DETAILS OF THE CONFERENCE, THE COURT WOULD INTERVENE AND DESIGNATE THE MEDIATOR OR OTHER DETAILS.

One of the main goals of these amendments is to allow the attorneys the option of choosing the mediator instead of the Court specifying the mediator or requiring the case to be mediated by court based mediation program. If the attorneys are to be allowed to agree on the details of the conference, it needs to be clearly set out in the rules. The Proposed Amendments need a slight clarification to affirmatively preserve the parties right to choose.

To complete the change from the present practice of the judge choosing the mediator, the model order needs to be adopted and a slight adjustment to the proposed amendments needs to be inserted.

I suggest Rule 1.720(f) be amended to read as follows:

(f) Appointment of the Mediator.

- (1) The court may order a case to be mediated and shall set the time within which the mediation conference shall take place and direct the parties to choose the mediator and arrange the other details of the mediation conference.
- (2) Within 15 days of the order of referral, the parties may agree upon a certified mediator and file a stipulation designating the mediator with the court.
- (3) If the parties cannot agree upon a mediator, the court shall be notified and appoint a certified mediator. (MATERIAL DELETED HERE)

The model order would greatly assist in the effort to standardize the application of mediation for maximum positive impact on the court system. It places a duty on one of their attorneys to either inform the court of the agreed details or submit an order with blanks for the disputed details. It is self executing as far as the judge is concerned so it will likely be utilized and will have less impact on the administrative load of the court and the judicial assistant.

COMMENT THREE


A CLARIFICATION IS NEEDED OF THE REQUIREMENT THAT THE INDIVIDUAL PARTY ATTEND THE MEDIATION CONFERENCE IN PERSON WHILE CORPORATIONS AND PARTNERSHIPS AND OTHER ENTITIES APPEAR BY A MANAGEMENT REPRESENTATIVE.

Rule 1.720(b)(1) allows "the party or its representative "to attend the conference. Under this language, an individual party could send his accountant or business manager or sister who has authority to settle. Clearly the language regarding a representative should only apply to a corporation or other entity. It should be stated as follows:

" ... if the following persons are physically present:

(1) the individual party. If the party is a corporation, partnership or other entity, then a fully authorized representative of management having full authority to settle without further consultation; and "...

January 25, 1990



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PROPOSED MODEL

ORDER OF REFERRAL

James B. Chaplin

IN THE CIRCUIT COURT OF
_____ JUDICIAL CIRCUIT
IN AND FOR _____
COUNTY, FLORIDA

CASE NO.

ORDER OF REFERRAL TO MEDIATION

Plaintiff,

Set for Trial Period
beginning: _____

vs.

Number of Trial days: _____

Defendant.
_____ /

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Court, having been apprised of the circumstances and finding such action appropriate under Chapter 44, Florida Statute and Florida Rules of Civil Procedure, 1.700 - 1.750 as applicable, hereby orders this case to mediation.

2. Within 15 days from date of this Order, counsel is directed to file (with an information copy to the undersigned judge):

A Stipulation executed by counsel for all parties, setting a mediation conference and stating the name and address of the Mediator, the location, date and time of the mediation conference and basis upon which the Mediator will be compensated: OR

If counsel for all parties cannot agree to the details set forth above, counsel for the Plaintiff shall submit to the Court an Order Appointing Mediator (with copies and postpaid envelopes addressed to counsel) with blanks for the unagreed details and the Court shall appoint a Mediator and set the mediation conference.

3. A list of all the Mediators certified for Circuit Civil Mediation in this Circuit is available from _____.

4. The mediation conference shall take place within 60 days from date of this Order or 10 days before the scheduled trial date, whichever is sooner.

5. If a party objects to this Order of Referral, they shall

file such objection no later than 15 days from date of this Order. The absence of a timely filed objection shall constitute consent to the mediation and any failure to comply with this Order shall be grounds for sanctions.

6. The parties shall present a brief written summary of the facts and issues to the Mediator then (10) days before the conference. Counsel for corporate parties will state the name and general job description of the employee or agent who will attend and represent the corporate party. The summaries need not be served on opposing counsel or filed in the Court file. The Mediator shall be served with copies of any pleadings regarding this Order.

7. The Plaintiff's attorney is hereby appointed as lead attorney to work with the Mediator and to coordinate the mediation conference. The lead attorney is responsible for immediately notifying the Mediator's office if the case settles prior to the conference.

8. Nothing contained herein shall delay or toll any time period, discovery, hearing, trial or other activity in this case.

DONE AND ORDERED at _____, _____
County, Florida, this _____ day of _____, 19____.

CIRCUIT COURT JUDGE

Copies Furnished:

Plaintiff: _____
(name, address & telephone number)

Defendant: _____
(name, address & telephone number)

Mediator: _____
(name, address & telephone number)