OA 2-5-90 75,15
Michael J. Samuels
presented O.A.


**ELEVENTH JUDICIAL CIRCUIT OF FLORIDA**

ADMINISTRATIVE OFFICE OF THE COURTS
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GERALD T. WETHERINGTON
CHIEF JUDGE
FRANCIS J. CHRISTIE
SENIOR JUDGE

ELLIS D. PETTIGREW
COURT ADMINISTRATOR


January 25, 1990



Honorable Justice Parker Lee McDonald
The Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32399

Re: Suggested Proposed Mediation Rule Changes

Dear Mr. Justice:

We have taken the liberty of attaching hereto the suggested changes and comments which we wish to input for your consideration.

The comments represent an aggregate of the thoughts of the members of the Mediation/Arbitration Division of the Eleventh Judicial Circuit.

We further request that time be allotted on February 5, 1990, for the appearance at the scheduled hearing for Mr. Michael J. Samuels of this Division, for the purpose of presenting oral argument.

Very truly yours,

NORMAN K. SCHWARZ, J.D., Director
Mediation & Arbitration Division
(Signed in his absence to avoid delay)
NKS:dy
Attachment

PROPOSED RESPONSES TO SUGGESTED CHANGES TO MEDIATION RULES

Rule 1.700(a) suggests the striking of the words "civil" on line 3 and line 5, and the inclusion after the word referral, "subject to Rule 1.710(b)".

Comment: The exclusion of the words "civil" broadens the scope of referral by the presiding Judge. The addition of the words "subject to Rule 1.710(b), appears to be consistent with the intent set forth in that Rule.

Rule 1.700(a)(2) NOTICE. We suggest the inclusion of a period after the word hearing in the next to the last line and the striking of the words, unless, etc.

Comment: A Referral Order of a Judge setting a specific time, date and place would cause a great deal of calendar problems for Mediators who set their own time frames for conferences.

(b)(1). We would strike the words "or arbitrated".

Comment: We construe mediated and arbitrated to be two (2) separate forums which should be kept viable to the disputants and recommend that if a Mediation is impassed it can be referred to Arbitration upon stipulation of the parties, provided that the Arbitrator is not the Mediator previously involved.

Rule 1.710 (a). We would substitute the word "or" on the third line with a comma, and further add, after the word, "parties", "or by mediator".

Comment: Although the parties may not feel that further Mediation will be fruitful, under many circumstances, the continuation of the matter by the Mediator may stimulate additional thought process toward resolution.

(c). We would suggest the substitution of the word "shall" rather than "may" on the second line, and the inclusion after the word Mediation, "unless the parties stipulate otherwise".

Rule 1.720(b). We suggest that in the revised portion, line 3, after the word "motion", the words "of Mediator", be inserted.

Comment: If an impasse is entered, each of the parties may start bickering as to whether or not the failure to appear was, in fact, without good cause. This should be a decision prompted by the Mediator's motion to the Court accordingly. The problem of failure to appear and/or continuances are presently the most pressing problem in the Eleventh Judicial Circuit and we are attempting alternative methods.

(b)(1). We suggest the substitution of the words "a corporate" for "its".

Comment: Attendance by the parties has proved to be a very essential ingredient for successful Mediation and if the party is an individual, that person should appear.

(b)(3). We suggest that this paragraph be re-written as follows: "A representative of the insurance carrier for any insured party who has full authority to settle without further consultation, by pledging the full benefits of the policy involved".

The inclusion of the words "not such carrier's outside counsel" opens the doors to various interpretations.

(c). We suggest the inclusion of the following words on line 4 after the word "conference", "notwithstanding Rule 1.710(a)".

Comment: The inclusion appears to clarify the previous Rule.

Rule 1.720(f). Before discussing this Rule, it is necessary to call the Court's attention to the fact that various Mediation formats are offered, including Court In-House Mediation, Private Mediation, Voluntary Mediation, and other formats which have a diversity of views and goals which effect the consideration of appointments of Mediators. In reviewing the "reason for change" comments, we do not necessarily agree that the "strong consensus developed amongst members favoring a notion that the parties to a Mediation should have a greater degree of freedom in choosing the Mediators" is in the best interests of the public. The right of choice of Mediator may be fraught with problems which will develop when the individual counsel become selective in the choice of Mediators based upon a relationship which is foreseeable in light of the financial consequences offered through Mediation.

We assume that a Judge, even restricting the choice of Mediators to a limited group, will create a diversification which will subsequently prove to be in the best interests of the public in general, therefore, we suggest that you consider same.

(f)(1). We would substitute, on the second line, the word "object" to the word "agree" upon a certified Mediator. This seems to indicate that the Order of Referral will contain no Mediator's name. However, if a Mediator's name is included, it means that the Mediator must wait 10 days before setting a hearing because said Mediator may be removed by stipulation. While we do not believe that the parties should not have a right to remove a Mediator, for cause, it would be just as easy if the Order of Referral indicated who the Mediator was and if one of the parties objected to the Mediator, that party could motion the Court for the appointment of another Mediator, or at that point, the parties could stipulate to another Mediator.

(f)(2). We would substitutethe words "If such objection is filed" for "if the parties cannot agree upon a Mediator", etc.

Comment: If the Rule is changed so that attorneys pick their own Mediator, it will lead to lobbying of law firms by Mediators for use of a particular Mediator. This will not only reduce the process of appointment of Mediators by the Court, it will create, for all practical purposes, a questionable association between the Mediator and a lawyer or law firms which may have a look of *inpropriety*.

(NOTE): We further believe that free market and expertise are words that are inconsistent with our present judicial system which affords a blind filing system in each of our Circuits rather than a choice of a particular Judge, General Master, or Mediator.

In a response to the minority comment of the Committee, we do not believe that a Mediator needs to be an expert in the field that he is mediating. It is necessary that the Mediator knows the process. The parties themselves and/or the lawyers need to be experts.

Rule 1.720(g).

Comment: This Rule contemplates that the Mediator may have a written agreement providing for compensation in some instances. The Referring Judge would not normally know what the hourly rate was without contacting the Mediator first.

However, presuming that the Order of Referral says "at a rate of $_____ or such other compensation as agreed to in writing by the parties", this would take care of that problem. This still leaves the viable problem of a Mediator lobbying a law firm for a contract to do all their Mediations at a particular price and then, when one of the firm's cases is referred to Mediation, said Mediator running to opposing counsel to have them agree on the compensation. This would seem very unprofessional and it is our suggestion that fees be set by the Chief Judge in the Circuit. This would keep overall costs down for the litigants and be a reliable criteria for all Mediations. This procedure would also reduce objections that a Judge may have to hear regarding excessive Mediator fees.

Rule 1.730(a). Omit second sentence.

Comment: Leaves the process open to abuse of confidentiality and does not define the suggested manner for continuing to an end result.

Rule 1.730(b).

Comment: This seems to take out the ability of the Mediator to reach a partial agreement.

We further believe that the 10-day Rule should remain.

NOTE: In response to the note regarding clarity, it would seem that this amendment does not eliminate the lack of finality, but, rather perpetuates it so that partial agreements cannot be reached. In addition, it would seem that waiting 10 days in order to see if counsel objects to the agreement would be a better procedure than impassing a case.

Rule 1.740(e). A comma should be put on the third line after the word "Court" and add, "by agreement of the parties or by the Mediator".

Comment: This allows for a mutually acceptable conclusion of a viable Mediation.

Rule 1.760(b)(2).

Comment: Attorneys should be licensed to practice law in Florida.