

047

IN THE SUPREME COURT OF
FLORIDA

SUPREME COURT NO: 89,681

IN RE: FLORIDA RULES OF
JWENILE PROCEDURE AND
FLORIDA **RULES** FOR CERTIFIED
AND COURT-APPOINTED MEDIATORS

FILED

SID J. WHITE

MAR 14 1997

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

*W/attand
& present o.a.*

COMMENTS AND RECOMMENDATIONS **OF** THE JWENILE COURT
COURT RULES COMMITTEE REGARDING THE PETITION OF
THE MEDIATION AND ARBITRATION RULES COMMITTEE
TO AMEND THE FLORIDA RULES OF JUVENILE PROCEDURE

Comes Now, the Juvenile Court Rules Committee of the Florida Bar, by and through its undersigned chair and the executive director of the Florida Bar, pursuant to the previous request of this Honorable Court, and files these comments and recommendations regarding the proposed changes to the Florida Rules of Juvenile Procedure. The committee says:

During the process of review leading to the proposed changes to the Juvenile Court Rules, a presentation to this committee was made and our input sought. As a result, some changes were incorporated into the proposed rules as a result of concerns raised by this committee. This committee mainly supports the proposed changes. However, we have identified three areas of disagreement that we

believe warrant comment at this time. Attached to this pleading and incorporated by reference herein are our suggested changes to the proposed rules. Strike-throughs refer to deletions and underscoring refers to additions. Our explanation for the suggested changes is as set forth below.

1. Rule 8.290(d), Referral. In this section we are suggesting the addition of the underscored language in order to ensure that the order referring the case to mediation is served upon all parties and counsel of record. Because the proposed rules appear to provide that any and all dependency matters may be referred to mediation and that such mediation is treated as mandatory, (absent a valid objection), we believe that it is important to ensure that all parties and counsel are served with a copy of the order of mediation referral. Ensuring service will protect a party's ability to object, Rule 8.290(g), and is crucial given the ability of mediators and attending parties to agree to mediation in the absence of other parties or counsel. Rule 8.290(1) 1,2. One of **our** concerns is that should mediation occur by agreement when someone is missing, then it is only fair to ensure that the missing party or participant had been notified of the mediation so as to have had an opportunity to participate. Additionally, we would hope that by ensuring service on all parties and counsel, the resolution of the dependency case

through mediation would be facilitated by complete participation.

Committee vote: 14-0-0

2. ~~Rule 8.290(1)(4), Appearance of child.~~ We suggest the deletion of the proposed language and the substitution of the underscored language. We believe that it is of utmost importance that a presumption attach to the appearance of the child at a mediation. Because it is the child's life that is being directly affected, the child should have the right to appear and discuss any relevant issues with the mediator. The language of the proposed rule presumes the opposite; it presumes that the child will not be present unless the court has previously determined by written order that such an appearance is necessary and in the child's best interest. While we agree that the court should make the appearance determination, we believe the better practice to be to presume appearance and forbid it under appropriate circumstances. As written, the burden is on the child or the child's representative to obtain an order permitting the child's appearance. We believe that the burden should attach to the party or representative seeking exclusion to convince the court that a child should not appear.

Although these concerns were specifically raised by this committee and revealed to the Mediation and Arbitration Rules Committee, that committee did not accept our suggestions. In turn,

in a conference call held on March 4, 1997, and our committee reaffirmed its commitment to this position.


Committee vote: 9-5-2

3. Rule 8.290(o) Report on Mediation. Our suggestion as to this proposed rule is to amend subsection (o)(1) to simply provide that a copy of the mediator's report also be submitted to counsel for the parties. The reasons are rather self-evident as counsel should have the opportunity to timely review the report in order to take any action called for and to prepare for the hearing at which time the court will enter an order relating to the mediation agreement.

Committee vote: 13-0-0

Wherefore, having had the opportunity to review and discuss the proposals submitted to this Court, this Committee recommends that these rules be adopted with the amendments identified herein.

Respectfully submitted,



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FLORIDA BAR NO. 123390

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to John W. Frost, 11, President, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, and Lawrence M. Watson, Jr., Chair, Mediation and Arbitration Rules Committee this 13th day of March, 1997.



Florida Rules of Juvenile Procedure

Rule 8.290. DEPENDENCY MEDIATION

(a) Definitions. The following definitions apply to this rule:

(1) "Dependency matters" means proceedings arising under Part III (Dependency Cases), Part V (Children in Foster Care), and Part VI (Termination of Parental Rights), of Chapter 39, Florida Statutes.

(2) "Dependency mediation" means mediation of dependency matters.

(3) "Mediation" means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving and exploring settlement alternatives.

(b) Applicability. This rule applies only to mediation of dependency matters.

(c) Compliance with Statutory Time Requirements. Dependency mediation shall be conducted in compliance with the statutory time requirements for dependency matters unless waived by all parties and approved by the court.

(d) Referral. Except as provided by this rule, all matters and issues described in subsection (a)1 may be referred to mediation. All referrals to mediation shall be in written form, shall advise the parties of their right to counsel, and shall set a date for hearing before the court to review the progress of the mediation. The mediator or mediation program shall be appointed by the court or stipulated to by the parties. In the event the court refers the matter to mediation, the mediation order shall address all applicable provisions of this rule. The mediation order shall be served on all

parties and on counsel pursuant to the provisions of the Florida Rules of Juvenile Procedure.

(e) Appointment of the Mediator.

(1) Court Appointment. The court, in the order of referral to mediation, shall appoint a certified mediator selected by rotation or by such other procedures as may be adopted by administrative order of the chief judge in the circuit in which the action is pending.

(2) Party Stipulation. Within ten days of the filing of the order of referral to mediation, the parties may agree upon a stipulation with the court designating:

(A) another certified mediator of dependency matters to replace the one selected by the judge; or

(B) a mediator who does not meet the certification requirements of these rules but who, in the opinion of the parties and upon review by the presiding judge, is otherwise qualified by training or experience to mediate all or some of the issues in the particular case.

(f) Fees. Dependency mediation referrals may be made to a mediator or mediation program which charges a fee. Any order of referral to a mediator or mediation program charging a fee shall advise the parties that they may timely object to mediation on grounds of financial hardship. Upon the objection of a party or the court's own motion, the court may, after considering the objecting party's ability to pay and other pertinent information, reduce or eliminate the fee.

(g) Objection to Mediation. Within ten days of the filing of the order of referral to mediation, any party or participant ordered to mediation may make a written objection to the court about the order of referral, if good cause for such objection exists. If a party objects, mediation shall not be conducted until the court rules on the objection.

(h) Scheduling. The mediation conference may be held at any stage of the proceedings. Unless otherwise scheduled by the court, the mediator or the mediation program shall schedule the mediation conference.

(i) Disqualification of the Mediator. Any party may move to enter an order disqualifying a mediator for good cause. If the court rules that a mediator is disqualified from mediating a case, an order shall be entered setting forth the name of a qualified replacement. Nothing in this provision shall preclude mediators from disqualifying themselves or refusing any assignment.

(j) Substitute Mediator. If a mediator agreed upon by the parties or appointed by a court cannot serve, a substitute mediator can be agreed upon or appointed in the same manner as the original mediator, A mediator shall not mediate a case assigned to another mediator without the agreement of the parties or approval of the court. A substitute mediator shall have the same qualifications as the original mediator.

(k) Discovery. Unless stipulated by the parties or ordered by the court, the mediation process shall not suspend discovery.

(l) Appearances.

(1) Order naming or prohibiting attendance of parties. The court shall enter an order naming the parties and the participants who must appear at the mediation and any parties or participants who are prohibited from attending the mediation. Additional participants may be included by court order or by mutual agreement of all parties.

(2) Physical presence of adult parties and participants. Unless otherwise agreed to by the parties or ordered by the court, any party or participant ordered to mediation shall be physically present at the mediation conference. Persons representing an agency, department, or program must have full authority to enter into an agreement which shall be binding on that agency, department, or program. In the discretion of the mediator, and with the agreement of the attending parties, dependency mediation may proceed in the absence of any party or participant ordered to mediation.

(3) Appearance of counsel. In the discretion of the mediator, and with the agreement of the attending parties, dependency mediation may proceed in the absence of counsel, unless otherwise ordered by the court.

~~(4) Appearance of child. The court may prohibit the child from appearing at mediation upon determining that such appearance is not~~

~~in the best interest of the child. No minor child shall be required to appear at mediation unless the court has previously determined by written order that it is in the child's best interest to be physically present. The minor child may appear at mediation unless the court previously has determined by written order that it is not in the child's best interest to be physically present.~~ The court shall specify in the written order of referral to mediation any special protections necessary for the child's appearance.

(5) Sanctions for failure to appear. If a party or participant ordered to mediation fails to appear at a duly-noticed mediation conference without good cause, the court, upon motion of any party or on its own motion, may impose sanctions. Sanctions against the party or participant failing to appear may include one or more of the following: contempt of court, an award of mediator fees, an award of attorney's fees, award of costs, or other remedies as deemed appropriate by the court.

(m) Caucus with Parties and Participants. During the mediation session, the mediator may meet and consult privately with any party, participant or counsel.

(n) Continuances. The mediator may end the mediation session at any time and may set new times for reconvening the mediation. No further notification shall be required for parties or participants present at the mediation session.

(o) Report on Mediation.

(1) If agreement is reached as to all or part of any matter or issue, including legal or factual issues to be determined by the court, such agreement shall be immediately reduced to writing, signed by the attending parties and promptly submitted to the court by the mediator with copies to all parties and counsel.

(2) If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court without comment or recommendation.

(p) Court Hearing and Order Upon Mediated Agreement. Upon receipt of a full or partial mediation agreement, the court shall hold a hearing and enter an order accepting or rejecting the agreement consistent with the best interest of the child. The court may modify

the terms of the agreement with the consent of all parties to the agreement.

(q) Imposition of Sanctions Upon Breach of Agreement. In the event of any breach or failure to perform under the court-approved agreement, the court, upon a motion of any party or upon its own motion, may impose sanctions. The sanctions may include contempt of court, vacating the agreement, imposition of costs and attorney's fees, or any other remedy as deemed appropriate by the court.

Committee Notes

1997 Adoption. In considering the provision regarding the appearance of the child found in subsection (1)(4), the Committee considered issues concerning the child (sic) right to participate and be heard in mediation and the need to protect the child from participating in proceedings when such participation would not be in the best interest of the child. The Committee has addressed only the issue of mandating participation of the child in mediation. In circumstances where the court has not mandated that the child appear in mediation, the Committee believes that, in the absence of an order prohibiting the child from mediation, the participation of the child in mediation will be determined by the parties.

Whenever the court, pursuant to subsection (p) determines whether to accept, reject, or modify the mediation agreement, the Committee believes that the court shall act in accordance with the confidentiality requirements of Chapter 44, Florida Statutes.