

JAN 13 1997

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

IN RE: FLORTDA RULES OF JUVENILE PROCEDURE  
AND FLORTDA RULES FOR CERTIFIED  
AND COURT-APPOINTED MEDIATORS

CASE NO.  
89,681

PETITION FOR AMENDMENT TO THE FLORIDA RULES OF JUVENILE PROCEDURE  
AND FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS

The Mediation and Arbitration Rules Committee (Committee), respectfully shows unto the Court:

1. This is a matter within the exclusive jurisdiction of this Court pursuant to Article V, Section 2, Florida Constitution.

2. The Committee was established as a standing committee of the Supreme Court by the July 26, 1989 administrative order issued by the Chief Justice. The responsibilities of the Committee include researching, developing, and recommending to this Court appropriate amendments to the rules on court-ordered mediation and arbitration. \*

3. This petition is necessitated by the legislative enactment of section 39.4033, Florida Statutes (1995), which provides that dependency proceedings may be referred to mediation "in accordance with chapter 44 and rules and procedures developed by the Supreme Court," Presently, there are circuits in which dependency mediation is conducted, but they are operating without specific rule guidance in this area of mediation. The Committee believes that adoption of the proposed rules will bring a needed uniformity in and encourage the expansion of dependency mediation.

4. While the Committee concedes that its jurisdiction is generally limited to the mediation rules, it finds it necessary in this case to request the Court to amend the Florida Rules of Juvenile Procedure, since rules concerning dependency mediation would more appropriately be placed in those rules. While the Committee obviously would have no objection to the Court circulating this proposal to members of the Florida Bar Juvenile Rules Committee, it should be noted that extraordinary efforts were taken to gain input from persons working throughout the dependency area, including members of the Florida Bar Juvenile Rules Committee. For example, an ad hoc Dependency Mediation Subcommittee (subcommittee), chaired by Dee Anna Farnell, Circuit Judge, Sixth Judicial Circuit, was established with membership composed of representatives of the following: the Supreme Court Committee on Mediation and Arbitration Training, the then Department of Health and Rehabilitative Services (HRS), the Juvenile Section of the Conference of Circuit Court Judges, Guardian ad Litem (GAL) Program Directors, and dependency mediators from pilot programs. In addition to the input received from the ad hoc subcommittee, this Committee also directed the staff of the Dispute Resolution Center to circulate

copies of draft proposals, at various stages of development, to all the groups represented on the subcommittee including the entire membership of the Florida ~~Bar~~ Juvenile Rules Committee and state and regional representatives of HRS.

5. The Committee proposes that the rule on dependency mediation be numbered rule **8.290**, which is in part II of the Florida Rules of Juvenile Procedure, entitled "Dependency and Termination of Parental Rights Proceedings." This part deals with dependency proceedings, foster care, and termination of parental rights. Proposed rule 8.290 would be placed in the General Provisions section of part **11**, which deals with all three of the above proceedings.

6. Subdivision (a) of proposed rule **8.290** establishes the scope of the rules by defining dependency matters to include dependency cases, foster care, and termination of parental rights cases. This section also contains a generic definition of mediation. In order to avoid possible confusion in other rules, the definition of "dependency matters" is strictly limited to rule **8.290**.

7. Subdivision (c) provides that dependency mediation shall be conducted in compliance with statutory time requirements unless waived by all the parties and approved by the court. The Committee is aware of the fact that the superimposition of mediation upon a process which already contains rather stringent time limits may cause possible delays and confusion. However, the Committee believes that a general statement to the effect that this rule does not waive such statutory time limits is essential, since such time limits are necessary to ensure that these matters are taken care of in as expeditious a manner as possible, given that they deal with important issues for children.

8. Subdivision (d) requires that all referrals to mediation be in written form. Whereas this requirement is not present in relation to other mediation rules, the Committee believes that, in light of the complicated setting in which these mediations often occur, the additional requirement of a written order is appropriate. The Committee also believes that a provision requiring the mediation order to address any issues raised in the rule would be beneficial to avoid the waste of judicial time addressing these related issues in separate proceedings or orders.

9. The procedure for the appointment of a mediator contained in subdivision (e) is similar to that contained in other court rules dealing with mediation and outlines the alternative methods of selecting a mediator by court appointment or party stipulation.

10. Subdivision (f) provides that dependency mediation referrals may be made through a mediator or mediation program which charges a fee, but allows for the court to waive such fee upon the presentation of sufficient evidence that a particular party may not be able to pay the entire fee. The Committee would make this Court aware that, perhaps more than any area of mediation, including county, dependency mediation will involve many parties who are unable to pay the normal fees charged by a mediator. However, the Committee believes that the statement at the beginning of the section at least makes a philosophical statement that there is a general expectation that such fee should be paid in the same manner as any other mediation fee, when feasible. However, it should be noted that HRS and GAL representatives in particular believe that

in the majority of cases there will be no realistic expectation of payment,

11. The provision in subdivision (g) in relation to objection to mediation is similar to the motion to dispense with mediation contained in the civil rules. The Committee is inclined to replace the civil rules language with a more understandable term. Language, however, has been added to mandate that the mediation shall not be conducted until the court rules on any party's objections to the conducting of the mediation. The Committee believes that such procedure is in the interest of the efficient utilization of judicial resources and that it will not inordinately delay mediation.

12. Subdivision (h) authorizes the mediation conference to be held at any stage of the proceeding. The Committee believes that such flexibility is necessary to ensure appropriate referrals. This provision also authorizes the mediator to schedule the conference when not scheduled by the court, thus recognizing the diversity of practice in scheduling mediation in the state.

13. Subdivisions (i), (j), and (k), dealing with disqualification of a mediator, substitute mediators, and discovery, are lifted essentially intact from other mediation rules. The Committee does not believe that there are any inherent differences between dependency mediation and other mediation in relation to these matters sufficient to necessitate the development of different procedures.

14. Subdivision (l), which deals with appearances, was the subject of much consideration by the subcommittee, as well as this Committee. Matters that received special consideration were subdivisions (l)(2) concerning the physical presence of the adult parties and participants, specifically the provision that dependency mediation may proceed in the absence of any party or participant ordered to mediation. The Committee believes that this procedure is particularly important in relation to dependency mediation because such mediation very often will involve many parties (multiple fathers, relatives, extended family, guardians ad litem) and, therefore, a blanket rule prohibiting mediation from occurring if all parties are not present could greatly hamper the process. The proposed rule would leave it to the discretion of the mediator to determine whether the mediation can proceed in a meaningful manner with the parties that are present. It should be noted that this provision does not preclude an absent party, at the appropriate time and in the appropriate forum, from disputing any matters involving that party which may have otherwise been settled in a mediation agreement.

15. Subdivision (l)(4) would authorize the court to prevent the child from appearing at mediation upon determining that such appearance is not in the best interest of the child. The rule would also require the court to specify in the order of referral any special protection necessary for the child's appearance. There was extended discussion, particularly during meetings of the subcommittee, relating to the advisability of requiring the attendance of the child at the mediation. The compromise language contained in the proposal places the matter within the discretion of the court. Further clarification concerning the appearance of the child is found in the first paragraph of the appended committee note.

16. Other provisions in subdivision (1) dealing with the order naming or prohibiting the attendance of parties, the appearance of counsel, and sanctions for failure to appear are comparable to similar provisions in other mediation rules.

17. While subdivision (m) is consistent with other mediation rules concerning caucusing, subdivision (n), which deals with continuances, differs somewhat from other rules. Specifically, it does not require the mediator to provide further notification of a continuance to the parties present at the mediation session. Because of the number of parties and participants and the short time frame involved in dependency mediation, the Committee believes that the elimination of the requirement of further notification is justified.

18. Subdivision (o) establishes the procedures by which the mediator reports on mediation, in both the case when an agreement is reached and where an agreement is not reached. The proposal in relation to dependency mediation differs from other mediation rules mainly in relation to the fact that counsel would not have to sign any mediation agreements. There was much discussion among the members of the Committee on this issue, the determination being made that the signatures of the parties should be sufficient verification of the existence of the agreement. This provision, however, would not preclude the addition of signatures of counsel if the mediator obtains those signatures. The Committee also points out that counsel would be allowed to attend any hearing on the agreement and offer any objections at that time.

19. Subdivision (p) would extend a special protection to subjects of mediated agreements of dependency matters by requiring the court to hold a hearing prior to entering an order accepting or rejecting an agreement. The Committee believes that such a rule is consistent with the paramount duty of the court to protect the best interest of the child in these cases. In order to provide flexibility, this subdivision would also allow the court to modify the agreement with the consent of the parties. The Committee references this provision in its committee note where it states its view that statutory confidentiality provisions apply.

20. The final subdivision of proposed rule 8.290 would essentially carry over the existing provision from other mediation rules in relation to the imposition of sanctions when there is a breach of agreement. The Committee believes that such provision is appropriate in relation to dependency mediation.

21. The Committee also recommends that rule 10.010, Florida Rules for Certified and Court-Appointed Mediators, should be amended to include a fourth category of mediators subject to certification by the Supreme Court through the Dispute Resolution Center. The subjects that were of most concern to the subcommittee and this Committee related to the educational and experiential requirements for dependency mediation. The Committee believes that the requirements set forth in subdivisions (d)(2) and (3) represent an appropriate blending of the education and experience necessary for an individual to perform the function of a dependency mediator. Consistent with previous rules, the Committee also recommends adoption of the recommended provisions relating to temporary certification and a grandfather clause. If the Court adopts the rule as submitted, the Supreme Court Committee on Mediation and Arbitration Training will, pursuant to subdivision (d)(1), submit to this Court already-developed

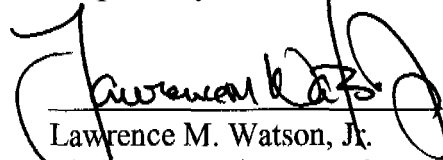
recommended revisions to the Mediation Training Program Standards and Procedures for dependency mediation training programs.

22. The Committee recommends what is essentially a technical amendment to 10.020(a) to include dependency mediators within the scope of the rules which apply to other certified and court-appointed mediators.

23. All additions are noted by underlining, deletions by strike throughs.

24. This petition is filed at the direction of the Mediation and Arbitration Rules Committee.

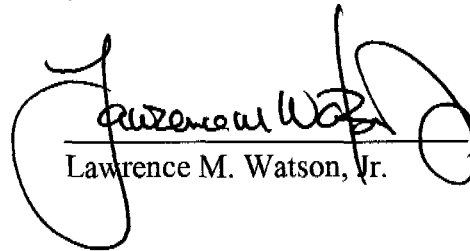
Respectfully submitted,



Lawrence M. Watson, Jr.  
Chairman, Mediation and  
Arbitration Rules Committee

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy has been furnished to John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachce Parkway, Tallahassee, Florida, 32399-2300 on this



Lawrence M. Watson, Jr.

## 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.

(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 any 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 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.

(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 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.



## Florida Rules for Certified and Court-Appointed Mediators

### Rule 10.010. GENERAL QUALIFICATIONS.

(a) County Court Mediators. For certification a mediator of county court matters must be certified as a circuit court or family mediator or:

(1) complete a minimum of 20 hours in a training program certified by the supreme court;

(2) observe a minimum of 4 county court mediation conferences conducted by a court-certified mediator and conduct 4 county court mediation conferences under the supervision and observation of a court-certified mediator; and

(3) be of good moral character.

(b) Family Mediators. For certification a mediator of family and dissolution of marriage issues must:

(1) complete a minimum of 40 hours in a family mediation training program certified by the supreme court:

(2) have a master's degree or doctorate in social work, mental health, or behavioral or social sciences; be a physician certified to practice adult or child psychiatry; or be an attorney or a certified public accountant licensed to practice in any United States jurisdiction; and have at least 4 years practical experience in one of the aforementioned fields or have 8 years family mediation experience with a minimum of 10 mediations per year:

(3) observe 2 family mediations conducted by a certified family mediator and conduct 2 family mediations under the supervision and observation of a certified family mediator; and

(4) be of good moral character.

(c) Circuit Court Mediators. For certification a mediator of circuit court matters, other than family matters, must:

(1) complete a minimum of 40 hours in a circuit court mediation training program certified by the supreme court:

(2) be a member in good standing of The Florida Bar with at least 5 years of Florida practice and be an active member of The Florida Bar within 1 year of application for certification; or be a retired trial judge from any United States jurisdiction who was a member in good standing of the bar in the state in which the judge presided for at least 5 years immediately preceding the year certification is sought;

(3) observe 2 circuit court mediations conducted by a certified circuit mediator and conduct 2 circuit mediations under the supervision and observation of a certified circuit court mediator; and

(4) be of good moral character.

(d) Dependency Mediators. For certification a mediator of dependency matters, as defined in 8.290(a), Florida Rules for Juvenile Procedure, must:

(1) complete a minimum of 40 hours in a dependency mediation training program certified by the supreme court; and

(2) have a master's degree or doctorate in social work, mental health, behavioral sciences or social sciences; or be a physician licensed to practice adult or child psychiatry or pediatrics; or be an attorney licensed to practice in any United States jurisdiction; and

(3) have 4 years experience in family and/or dependency issues or be a licensed mental health professional with at least 4 years practical experience or be a supreme court certified family or circuit mediator with a minimum of 20 mediations; and

(4) observe four dependency mediations conducted by a certified dependency mediator and conduct two dependency mediations under the supervision and observation of a certified dependency mediator; and

(5) be of good moral character.

(d)(e) Special Conditions. Mediators who have been duly certified as circuit court or family mediators before July 1, 1990, shall be deemed qualified as circuit court or family mediators pursuant to these rules. Mediators who have mediated a minimum of six dependency cases prior to July 1, 1997, shall be granted temporary certification and may continue to mediate dependency matters for no more than one year from the time that a training program pursuant to subsection (d)(1) is certified by the supreme court. Such mediators shall be deemed qualified to apply for certification as dependency mediators upon successful completion of the requirements of subsections (d)(1) and (d)(5) of this rule.

Rule 10.020. Preamble

(a) Scope; Purpose. These rules are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct. As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These rules apply to all mediators who are certified or ~~participate in court sponsored mediation~~ court-appointed. These rules are also intended to serve as and are a guide to mediator mediators' conduct in discharging their professional responsibilities ~~in the mediation of circuit civil and family and county court cases in the State of Florida as~~ mediators.

(b) Mediation Defined. Mediation is a process whereby a neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable agreement.

(c) Mediator's Role. 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, reducing obstacles to communication, maximizing the exploration of alternatives, and helping the parties reach voluntary agreements.

(d) General Principles. Mediation is based on principles of communication, negotiation, facilitation, and problem-solving that emphasize:

- (1) the needs and interests of the participants;
- (2) fairness;
- (3) procedural flexibility;
- (4) privacy and confidentiality;
- (5) full disclosure; and
- (6) self determination.