IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA
RULES OF APPELLATE PROCEDURE AND
THE FLORIDA RULES FOR CERTIFIED AND
COURT-APPOINTED MEDIATORS Case No. SC09-118
______________________________________/

APPELLATE COURT RULES COMMITTEE'S COMMENT

By Petition filed January 21, 2009, the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy submitted proposed appellate mediation rules to be added to the Florida Rules of Appellate Procedure, and proposed amendments to the Florida Rules for Certified and Court-Appointed Mediators.

By Notice issued March 30, 2009, the Court invited comments on the proposed Amendments. The Appellate Court Rules Committee (ACRC) respectfully offers the following comments, in three parts: Part I addresses the necessity for mediation rules, Part II addresses the functionality of this rule proposal, and Part III offers comments on particular rules in the proposal.

Part I
OVERALL RESPONSE OF APPELLATE COURT RULES COMMITTEE TO THE MEDIATION PROPOSAL

While the ACRC greatly values the labor of the Alternative Dispute Resolution Rules and Policy Committee in drafting and proposing a set of mediation rules for the appellate courts in Florida, this committee respectfully opposes the adoption of the rules as they are presently proposed to the Court. The ACRC is not opposed to appellate mediation; indeed, this committee supports appellate mediation. However, the proposed rule changes establish a uniform procedure which would be mandatory in all appellate courts, permitting no variations or waivers.

The reasons for this opposition are several:

A. First, the Fifth District Court of Appeal has implemented a mediation proposal similar, but not identical, to the proposal now pending before the supreme court. The judges of the district court and the lawyers who practice before them seem to be satisfied with that procedure. This committee has no interest in attempting to change that process.

B. Further, if the precept "First, do no harm" has application here, this committee would not tamper with the Fifth DCA's program which is working satisfactorily there. A table summarizing results of the program since 2001 is attached to these comments. (Appendix A.) If there is to be a uniform set of rules for appellate mediation, the proposed rules would be mandatory in all appellate courts in Florida. The Fifth District would be required to change its successful program, a result not desired by this committee.

C. The primary reason for this committee's opposition to a set of appellate mediation rules is that it requires this Court and the courts of appeal of every district, as well as the circuit courts in their appellate capacity, to utilize the same process for mediation. The Fifth District has demonstrated that a court can implement its own procedure, and can tailor it to the needs and practices of the judges, practitioners, and clients in that district. Such variations are commonplace among the circuit courts.

D. The ACRC strongly objects to the proposed requirement that mediation be undertaken at the outset of the appellate process and the proposed concomitant stay of the appellate proceeding for up to 75 days during mediation. While mediation at the beginning of an appeal maximizes the potential savings to clients in attorney's fees and costs, the pending proposal leaves no room for other considerations. At times, parties are not prepared to reconsider their positions until they have seen all of the briefs. As set forth more fully below, this committee believes that mediation may sometimes be appropriate early in the appellate process, but it may be deferred and more successful after the appellate issues have been fully examined by appellate counsel and most of the briefing is complete. At that later point, appellate counsel will have had the opportunity to be fully and ethically informed of the issues in the case and will be able to advise their clients meaningfully as to the risks of continuing the case to a

decision of the court. While such a deferral of mediation would increase the costs of the appeal proceeding in comparison to the uniform proposal pending before the court, such a decision is better framed in the context of a particular case, rather than having the decision made for all cases by the mandatory features in the pending proposal.

A secondary benefit of deferring mediation is that the need for a stay would be diminished. Trial court mediation is usually more successful after the case has proceeded, without abatement, to a point where most discovery is complete. Likewise, this committee believes appellate mediation will usually be more successful when the record has been studied by appellate counsel and the issues have been more fully researched. In such a case, there is little need for the appellate proceedings to be stayed.

There are natural gaps in the appellate calendar between the direction of the record and completion of the briefing, and between completion and oral argument or the rendering of a decision by the Court. In an appropriate case, the ACRC believes that mediation can be easily scheduled during one of those intervals without delaying the proceedings. Meanwhile, the mediator can be selected and the conference can be scheduled, without the need for a stay.

One of the purposes of mediation is to minimize the expenditure of the Court's time. Because the greater proportion of judicial labor at the appellate level is expended after the briefing is finished, savings to the court system can be preserved if the mediation is completed before significant judicial effort begins.

E. Although the Comment to the proposed rules suggests that the parties can agree to any lawyer as mediator, the rule itself contains a preemptive preference for a certified mediator. The point should be clarified. The comparable Fla.R.Civ.P. 1.720(f)(1)B expressly allows the parties to stipulate to their own choice of mediators. The ACRC believes that the parties in an appeal should likewise be given the express opportunity to select any individual of their choice who is otherwise deemed qualified by the court and who agrees to be bound by the essential principles of the Mediation Confidentiality and Privilege Act. Only if the parties fail to agree upon the initial

mediator (or any subsequent replacement) should the appellate court be required to select a certified appellate mediator.

F. Finally, the ACRC recognizes that a number of different types of proceedings are probably inappropriate for inclusion within a mediation program. The proposed rule is careful to acknowledge this as well. However, the list of inappropriate cases proffered in the proposed rule omits a significant number of types of cases that are inappropriate because of other rules, internal procedures, or subject matter. The listing of the particular types of cases eligible or ineligible for mediation would be best left to those rules and procedures.

While a uniform appellate mediation process would have the advantage of consistency, imposing such a process on an existing system that appears to be working to the satisfaction of judges and practitioners in the Fifth DCA seems counterproductive. If an appellate court wishes to select certain cases for mediation, or create its own mediation program different from that of the Fifth District, the ACRC believes that such efforts should be encouraged without hindrance.

Nothing in this comment should be construed as suggesting that the ACRC is opposed to appellate mediation. This committee simply believes that, from the standpoint of many appellate practitioners and their clients, the rules as proposed have sufficient weaknesses that they should not be imposed uniformly.

Part II
COMMENTS ON THE PROPOSED RULES STRUCTURE

A. Suitability of Mediation to Cases on Appeal

The ACRC supports the concept of mediation as a viable means of reducing costs and delay within our judicial system. Although some District Courts of Appeal have separately tested or implemented mediation programs, appellate mediation has not yet had a chance to prove its worth throughout the Florida appellate courts. The valuable work of the Alternative Dispute Resolution Rules and Policy Committee supports that opportunity, although the ACRC believes

that it should be undertaken without the constraints of the uniform structure proposed in this case.

B. Timing of Planned Appellate Mediations

As set forth in our introductory comments, the proposed structure is different from, and will therefore alter, a system which, at least for the judges and litigants in the Fifth District, seems to be working acceptably. The placement of mediation, by rule, at the very beginning of the appellate process is of concern to the Committee. A rules-based mediation structure should allow for the timing of mediation by agreement of the parties, by administrative order of the court or, when necessary, by order appropriate to the context of a particular case.

The ACRC's concern is that a significant proportion of appeals will not be ripe for successful mediation, with the issues carefully framed, until such time as the appellate litigators have an opportunity to develop their arguments and perhaps draft their briefs. In those cases, the Committee would prefer a system that allows flexibility in the timing of mediation. In some cases, early mediation would seem to favor appellees and to minimize the effect of a skilled appellate advocate for the appellant. Likewise, appellees fresh from a success in the lower tribunal may be reluctant to surrender too soon the benefits of that success. Certainly, economics favor mediation at the earliest practicable point, and if informed appellate counsel wish for their own reasons to mediate sooner rather than later, that is the best of all worlds.

C. Cost-Benefit Ratio

1. From the standpoint of fiscal constraints on the judiciary, any reduction of the caseload in any court is a positive. On the other hand, the probable success of appellate mediation will depend on whether the parties to the litigation will see a net reduction in litigation risks and expenses from the process, as has been the experience with mediation in the trial courts.

2. Most participants in trial court mediation agree that it works, in part for the following reasons:

a. The attorneys involved know the strengths and weaknesses of their case and, just as important, know their clients quite well.

b. The lead attorneys who participate in trial court mediation are usually the trial attorneys who should know the risks and expenses of trial.

c. Trial court mediations are routinely held near the end of the pretrial proceeding, at a point in time when a substantial portion of legal work is done, discovery is near completion, and the trial date is near.

d. The risk in proceeding to trial at that point is (roughly) equal on all parties since there has been no judicially declared winner or loser.

e. The range of possible outcomes of a trial is usually quite wide, ranging from a complete loss for the plaintiff, a partial loss, a moderate financial success, or a complete victory for the plaintiff.

f. The impending trial requires a major expenditure of time and expense. There is a very clear opportunity to choose between the commitment of energies to trial preparation in the near future, or the commitment to a financial solution at mediation.

3. Appellate mediation should not be structured in a way that gives undue advantage, or alters or dilutes the value of clients' investment in legal counsel. Clearly, the advantage of early mediation from a cost standpoint is that there is an opportunity for savings in appellate costs and attorney's fees for the client, as well as reduced costs for the court system. The major expense to the client with an appeal is the record review and legal research necessary to prepare the brief. While oral argument preparation is not insubstantial, it is almost always the smaller part of the appellate process. Consequently, if mediation is successful at the very beginning, <u>all</u> such costs and attorneys' fees are substantially reduced, which is the principal benefit of mediation at the proposed time.

However, the circumstances that have allowed trial mediation to succeed are not always present in appellate mediation, and the context in which appellate mediation would take place under the proposed rule provides significant differences for consideration, both positive and negative.

a. The potential change in attorneys handling the mediation:

i. In every case, timing of the appellate mediation should not offer an advantage to one side. Trial court mediation is usually handled by the lawyers who have substantially prepared a case for trial. Appellate mediation, particularly if conducted very shortly after the filing of the appeal, may not offer that advantage. If an appellate lawyer is newly retained, he or she is still learning the case, has almost certainly not reviewed the record, and probably has not yet fully analyzed the legal issues.

ii. If the trial attorney (especially the <u>prevailing</u> trial attorney) is handling the appeal, that trial attorney could have an early advantage over a new appellate lawyer on the other side.

iii. Conversely, in a mediation occurring soon after the filing of an appeal, a new appellate lawyer may bring a fresh mind and new objectivity in his or her relationship to the parties and the emotions of the trial.

iv. Where an appellate lawyer is newly hired, the client may not yet have had an opportunity to receive the full benefit of the lawyer's counsel and establish a strong relationship of confidence. A trial lawyer who also handles the appeal is more often the "regular" lawyer for the client, or at least a lawyer with whom the client has worked throughout the proceedings in the lower tribunal.

v. A newly hired appellate lawyer may be overly eager to inspire the confidence of the client and to keep the proceedings alive in early encounters, as opposed to trial counsel who may be more inclined to counsel the

practical and economic realities of the appellate process with the more established client.

vi. In the same vein, many trial lawyers may be more motivated to end the case after reaching a point when they fully understand the risks of not settling and are confident in their recommendation. However, under the proposed structure, appellate mediation substantially differs from trial court mediation on this point, making both sides less motivated to settle the case and less confident that their recommendations may be correct.

b. Other differences from trial court mediation:

i. The parties themselves may not yet have anticipated or incurred significant economic investment in the appeal, and all sides may be less motivated to resolve the dispute at the outset of an appeal.

ii. The probability of success in a trial is theoretically equal for each side at the time of trial mediation. It is not theoretically equal at the time of the appellate mediation. It will be influenced by presumptions of correctness and other standards of review on appeal. These factors are part of the appellate process every lawyer should communicate effectively to the client. Communication at an early stage in the appeal forces a meaningful discussion of the chances of success. This should drive settlements in many cases.

iii. The range of outcomes that faces appellant litigants is normally not as broad and varied as at the time of trial court mediation. With some obvious exceptions such as the ordering of a new trial, the appellate court outcome is usually win-lose.

iv. In appellate litigation, the progress of a case toward finality is inexorable in the absence of tolling. This is not necessarily true in trial court proceedings. Accordingly, some tolling may be necessary to accommodate appellate

mediation, particularly if mediation comes at the beginning of the appellate process, but tolling may be reduced or eliminated if the mediation is deferred.

Part III
COMMENTS SPECIFIC TO PROPOSED INDIVIDUAL RULES

A. Rule 9.700(a). Applicability.

There was some concern within the ACRC that the applicability of the mediation rules should not foreclose appellate mediation in cases involving review of administrative or quasi-judicial decisions in the circuit courts as well as the district courts. *See* § 70.001(8), Fla. Stat. (2008). The ACRC suggests amending the proposed rule as follows:

(a) Applicability. Rules 9.700-9.740 apply to all appellate courts, including circuit courts exercising jurisdiction under rule 9.030(c), ~~hearing appeals from county courts~~ district courts of appeal, and the Supreme Court of Florida.

This proposed change would also carry through what the ACRC believes to be the intent-- that is, to apply these rules to all courts hearing appeals from final orders.

B. Rule 9.700(b). Referral to Mediation.

Consistent with the petitioner's Comment recognizing the inherent right of the parties to select their own neutral, the ACRC believes that a motion for referral to mediation should inform the court if the parties have made or intend to make such a selection. The apparent obligation to report an opponent's reasons for objecting is new and unusual. The ACRC otherwise suggests that the time for response should be parallel to Rule 9.300(a). The suggested text is therefore:

(b) Referral. The court, upon its own motion or upon motion of a party, may refer a case to mediation at any time. Such motion from a party shall contain a certificate that the movant has consulted opposing counsel or unrepresented party and that the movant is authorized to represent that opposing counsel or unrepresented party:

(1) has no objection, in which case the motion shall also state whether the parties have agreed to select their own neutral;

(2) objects and cites the specific reasons for objection; or

(3) will promptly file an objection. An objecting party may serve 1 response to a motion for referral to mediation within 10 days of service of the motion.

C. Rule 9.700(c). Time Frames for Mediation.

1. The ACRC agrees that the time frames for mediation set forth in Rule 9.700(c) are appropriate if the mediation is going to proceed at the commencement of the case and not be delayed until the briefs are written.

2. If the parties are allowed an opportunity for later mediation, this subdivision could be modified to provide:

   (c) Time Frames for Mediation. The first mediation conference shall be commenced within 45 days of referral by the court, unless the parties agree and file notice with the court that the conference is deferred to a time not later than 20 days after the completion of briefing. ~~and t~~The mediation shall be completed within 30 days of the first mediation conference. These times may be modified by order of the court.

D. Rule 9.700(d). Tolling.

1. The proposed tolling system is in place in the Fifth District. Tolling is also provided under Rule 9.300(b), which does not exclude motions for referral. Multiple tolling rules may be misused by litigants using mediation principally as a further delaying tactic.

2. There is some concern as to whether all times under the rules should be tolled, or only the time limit for the preparation of the brief. There seems to be little reason why the filing of docket

statements and similar administrative matters need to be delayed. The preparation of the record may or may not fall under this category. Certainly, the preparation of the trial transcript is a tremendous expense which, if it could be avoided, would be a benefit. On the other hand, if every time limit called for in the appellate rules is extended, it would mean a delay of at least 75 days caused by the utilization of mediation.

3. One advantage of delaying mediation until after the completion of briefing is that the parties can take advantage of the time built into the appellate process to coordinate and schedule a mediation, which can take place without any tolling of the overall length of the appeal. Ordinarily, there is sufficient time for mediation after the last brief and before oral argument or final determination.

4. This Committee suggests the following rephrasing:

(d) Tolling of Times. <u>**A motion for mediation filed by a party within 30 days of the notice of appeal shall toll all deadlines under these rules until the motion is ruled upon by the court. Unless otherwise ordered, all times under these rules for the processing of cases shall be tolled for the period of time from the referral of a case to mediation until mediation ends. Upon the filing of notification that the parties have agreed to a deferral of the first mediation conference as permitted by this rule, tolling shall cease. The court, by administrative order, may provide for additional tolling of deadlines.**</u>

E. <u>Rule 9.700(e). Motion to Dispense with Mediation.</u>

The only issue in this subdivision is the proposed 15-day time limit for a motion to dispense with mediation. The party wishing to dispense with mediation because it is improper or for other reasons is motivated to move quickly, but the ACRC is concerned that an ineligibility or unsuitability for mediation, discovered <u>after</u> 15 days, might be the appropriate subject of a motion to dispense with mediation. Moreover, attorneys are given only 10 days to challenge a

selected mediator. For consistency, the ACRC recommends that subdivision (e) be amended to read as follows:

(e) Motion to Dispense with Mediation. <u>**A motion to dispense with mediation may be served not later than 10 days after the discovery of the facts which constitute the grounds for the motion, if:**</u>

> **(1) the order violates rule 9.710; or**
>
> **(2) other good cause is shown.**

F. <u>Rule 9.710. Eligibility for Mediation.</u>

1. The ACRC recognizes that many appeals are not appropriate for mediation and that those which are most appropriate would tend to be "classic" civil appeals for money judgments where the issues consist largely of the question of the defendant's responsibility to pay money and, if present, the amount of that financial responsibility. However, case selection need not foreclose other types of cases such as those seeking equitable relief or conditional permitting.

2. If a list of cases excluded from the proposed rules is necessary, the cases excluded by proposed Rule 9.710 are probably appropriate. However, there are a number of cases (particularly ones requiring expedited appellate attention such as termination of parental responsibility) that are not included in this list, but should be.

   If the intent of this subdivision is to provide an exhaustive list of cases that should <u>never</u> be mediated, the list now proposed appears inadequate. It may be preferable to leave the matter to an administrative order from each circuit or district court, or to leave it to the discretion of the screening process in each court. If necessary, a court or committee comment may offer nonbinding guidance.

3. The ACRC considered two specific questions. First, if there is to be a list of categories of cases ineligible for mediation, is

there really a need for both 9.710(b) and 9.710(e)? Second, should all extraordinary writ proceedings be automatically excluded? For example, some applications for common law certiorari are treated substantively as appeals of right.

4. On balance, it was the judgment of the committee that the selection of eligible categories of cases, like the screening of individual cases, should be left to the discretion of each court.

G. Rule 9.720(a). Appearance.

1. This subdivision also generated a great deal of concern among members of the ACRC. The rule appears to require the physical appearance of persons at mediation, but does not expressly so state. A clarification to that effect should be included in subdivision (a) of the rule. The Committee expresses its strong view that sanctions for failure to appear at mediation should not, of themselves, be allowed to determine the merits of an appeal.

2. With respect to subdivision (c) of Rule 9.720, there seems to be no reason why written notification should not be sent by the mediator to all parties when an adjourned mediation is to be recommenced. Exclusion of certain parties from the notice invites misunderstanding.

3. With respect to mandatory attendance at mediation conferences, it appears that the data from other jurisdictions' comparable mediation provisions do not show significant improvement in settlement rates when the parties are physically present. It should be noted that the mediation procedures of the Eleventh Circuit and Fifth District Court of Appeal provide for or permit telephonic attendance or conferences. The ACRC recommends that telephonic appearance should be allowed by agreement of the parties or order of the court. Proposed Rule 9.720(a) would accordingly be amended to read:

(a) Appearance. If a party to mediation is a public entity required to conduct its business pursuant to chapter 286, Florida Statutes, that party shall be deemed to appear at a

mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity. Otherwise, ~~unless changed by order of the court,~~ a party is deemed to appear at a mediation conference if the following persons are all physically present or, by agreement or as allowed by order of the court, participate in the mediation conference by telephone or other direct media.

4. With respect to subdivision (d) of Rule 9.720, the ACRC believes that although the mediator is in control of mediation sessions and their scheduling and adjourning, the court always retains ultimate control over its procedures. Accordingly, subdivision (d) is unnecessary.

5. Subdivision (e) is likewise unnecessary. The second sentence suggests that counsel need a rule for authority to consult privately. Counsel at all times are not only permitted but required to communicate privately with their clients and the presence of such a rule suggests that the absence of such a rule makes private communication impossible.

H. Rule 9.730. Appointment and Compensation of the Mediator.

1. Subdivision (a) of the proposed rule evokes the recurring discussion between litigators (and presumably appellate litigators) on the one hand, and certified mediators on the other. Certified mediators almost always assert that a certified mediator is a “better” mediator than an individual with particularized, specialized knowledge in the subject matter of the dispute. But the incorporation of that belief into the Rule-- that certified mediators are better-- seems to be contradicted by the assurances in the Committee Note, and so subdivision (a) needs to be clarified. The Committee Note does not suggest what constitutes an "otherwise qualified" non-certified appellate mediator, nor does it suggest why the parties should be barred from selecting their own neutral before or after an order of referral. Subdivision (a) seems to require a Florida mediator certified in some other specialty to be certified as an appellate

mediator, although the proposed Committee Note indicates that the parties can select an appellate specialist as opposed to a certified mediator. The ACRC believes that the right to select a non-certified mediator should be included in subdivision (a) with the addition of the phrase "or another mediator agreed to by all parties," and should not be relegated to a seemingly inconsistent comment.

2. In other words, the ACRC acknowledges that certified mediators bring something to the table and, in the absence of agreement of all parties, the mediator should be an approved, certified mediator. On the other hand, should the parties agree to utilize anyone at all, the parties should be allowed to select a mediator of their choice. Any person selected <u>by the parties</u> should be required to adhere to the general principles of mediation, such as confidentiality.

3. With respect to subdivision (b), the timing of the notification to the court of lack of agreement as "immediately" does have some definition in other rules of procedure, as opposed to "promptly," and is sufficient. If the court wishes to impose a specific time limit for that notification, the ACRC would have no objection.

4. If subdivision (a) is amended to allow the parties to agree to a non-certified mediator, the second sentence in subdivision (b) becomes unnecessary. Should the agreed-upon non-certified mediator be a lawyer from another jurisdiction, it should be sufficient. However, if the second sentence of subdivision (b) remains, it is unclear why the request of a single party (as opposed to all parties) should be sufficient to allow the appointment of an out-of-state mediator. The ACRC recommends elimination of the second sentence, along with the addition to subdivision (a) previously noted.

5. With respect to subdivision (c), the ACRC has no disagreement with the substance but it might more appropriately read:

   <u>Disqualification of Mediator. Any party may move to disqualify a mediator for good cause. Such a motion to</u>

disqualify shall be served not later than 10 days after the discovery of the facts which constitute the grounds for the motion. If the court disqualifies a mediator under this subdivision, an order shall be entered naming a qualified replacement. The time for mediation shall be tolled during the period in which a motion to disqualify is pending.

6. With respect to subdivision (d), no times are specified. Since the time for the designation of the original mediator is keyed to the order of referral, the ACRC suggests that subdivision (d) should be amended by adding, at the end of the proposed language, the following sentence:

   The time period for appointment of the substitute mediator shall commence upon the filing of a notice that the original mediator cannot serve.

7. With respect to subdivision (e), the proration of mediation fees among multiple parties is unclear. The ACRC suggests that half the fee should be divided equally among Appellant(s) and half equally among Appellee(s).

Again, the ACRC generally supports the concept of appellate mediation as a potentially effective means to reduce costs for the litigants and the court, and to expedite the appellate process. In so doing, however, the ACRC also notes that there are inherent costs in mediation as well. Those costs are substantial: the additional time spent by counsel, the travel expenses of the parties or financial representatives and the mediator's fees, as well as the financial and non-financial "costs" by virtue of the delay in the appellate process that occurs as a result of the mediation.

The attached report from the Fifth District shows that when referral to mediation is limited only to cases for which success is thought reasonably possible, still less than one-third of the cases are resolved and dismissed after mediation. When the data is expanded to include cases that are dismissed before mediation but after referral, the numbers climb above the one-third mark. (There is no data specifically indicating whether mediation was the cause for dismissals after referral or after mediation, but it is assumed that mediation had a significant role to play.)

Nevertheless, the ACRC has some concern as to whether, as structured by these rules, the attendant costs associated with any court's implementation of a mandatory mediation system will be seen by parties as justified by the proportion of cases that are resolved.

Respectfully submitted on July 7, 2009 by

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CERTIFICATE OF SERVICE

I certify that a copy of this Response was furnished on July 7, 2009 by United States Mail to Hon. Shawn L. Briese, Chair, Supreme Court Alternative Dispute Resolution Rules and Policy Committee, 125 East Orange Avenue, Room 106, Daytona Beach, Florida 32118 and Sharon Press, Committee Liaison, Dispute Resolution Center, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida 32399 .

CERTIFICATE OF FONT COMPLIANCE

I certify that this Response was prepared in compliance with the font requirements of *Fla. R. App. P.* 9.210(a)(2).

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