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

RESPONSE OF THE COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION RULES AND POLICY TO COMMENTS OF THE APPELLATE COURT RULES COMMITTEE

The Committee on Alternative Dispute Resolution Rules and Policy (the Committee), by and through its undersigned Chair, the Honorable William D. Palmer, respectfully submits this response to comments filed in this matter by the Appellate Court Rules Committee (the ACRC) on July 7, 2009.

The ACRC has divided its comments into three parts, Part I addressing the necessity for appellate mediation rules, Part II addressing the functionality of the rule proposal, and Part III offering comments on particular proposed rules. The response of the Committee is similarly organized.

PART I

The ACRC generally opposes the establishment of uniform procedures which would be mandatory in all appellate courts. Initially, it should be pointed out that the proposed rules do not require any appellate court to implement a mediation program. Rather, they provide procedures to be utilized in the event an appellate court chooses

to adopt an appellate mediation program. In addition, the proposed rules provide, where appropriate, wide discretion to the courts. For example, Rule 9.700(c) allows the court to modify the time frame for mediation and Rule 9.700(d) gives the court authority to alter the rules regarding the tolling of time. Similarly, Rule 9.710, which defines cases which are ineligible for mediation, allows any court to add additional categories of ineligible cases by administrative order.

The ACRC expresses its concern as to the effect these proposed rules will have on the one currently existing appellate mediation program in the state, that utilized in the Fifth District Court of Appeal. However, the undersigned, who was Chief Judge of the Fifth District Court of Appeal at the time this committee's petition was filed, and the Committee as a whole focused on ways to protect and improve the existing program, not to harm it, when drafting the proposed rules.

The ACRC "strongly objects" to the concept that mediation routinely be undertaken at the outset of the appellate process arguing that, at times, parties are not prepared to reconsider their positions until they have seen all of the briefs. In response, the Committee would note that nothing in the proposed rules would prevent parties from seeking permission from the court to delay mediation in a particular case or from mediating a second time at a later stage in the proceedings, if they thought it would be productive.

Although the ACRC asserts that "this committee believes that appellate mediation will usually be more successful when the record has been studied by appellate counsel and the issues have been more fully researched," it provides no data or details in support of that belief.

In fact, the overwhelming majority of state courts in the country that have appellate mediation programs require mediation prior to briefing. Appellate mediation programs in Alabama, Arizona, Rhode Island, Utah, and the First Appellate District of the Court of Appeal of the State of California all schedule mediation prior to briefing. In fact, in adopting its appellate mediation rules, the First Appellate District of the Court of Appeal of the State of California prepared a study that found that of the cases that settled before or during briefing 90% were settled prior to the briefing. See excerpt of report attached hereto as Exhibit 1.

The ACRC proposes that mediation should be scheduled during some "natural gaps" in the appellate calendar, such as between the completion of the briefing and oral arguments, or between oral arguments and the rendering of a decision by the court. However, as the ACRC notes, one of the purposes of mediation is to minimize the expenditure of the court's time, which purpose would be thwarted by routinely holding mediation at these later times in the appellate process. Time spent by judges and court attorneys analyzing cases begins soon after the briefs are completed and the

judges often expend time on cases even prior to the completion of the briefing as a result of motions being filed. Another purpose of mediation is cost savings for the parties, which can best be achieved by early mediation.

Accordingly, the Committee believes that the early scheduling of appellate mediation, best serves the needs of both the parties and the court.

The ACRC also argues that the party should be able to stipulate to anyone serving as a mediator, not being limited to using a certified mediator. Rule 9.730, as referenced in the committee notes, does not prohibit parties from selecting an otherwise qualified non-certified appellate mediator prior to the court's order of referral to mediate the case, but simply provides that the parties can only satisfy the court's order of referral to mediation by use of a certified appellate mediator. The Committee believes that the proposed rules provide an appropriate balance between parties' exercising self-determination in selection of a mediator and maximizing the chances of success in mediation.

Finally, in Part I, the ACRC contends that the list in the proposed rules of cases which are inappropriate for mediation omits various categories of cases that are inappropriate because of other rules, internal procedures, or subject matter. However, as noted above, any court can add additional categories to the list of cases ineligible for mediation by administrative order. The ACRC's position on this issue appears to be

inconsistent with its general objection to requiring uniformity in all appellate mediation programs. The proposed rules give each court the discretion to include whatever additional categories on its ineligible list that it chooses, but the ACRC finds that flexibility inappropriate.

ACRC's arguments against the implementation of uniform rules of procedure for appellate mediation could have similarly been made at the time mediation was introduced in the trial courts, simply allowing each circuit to determine the structure and applicable rules for their own mediation program, if any. However, this Court chose to adopt uniform rules at the trial court level, and the success of mediation at the trial court level cannot be disputed. Adoption of uniform rules for appellate mediation is both logical and consistent with this Court's precedent at the trial court level.

PART II

The entire thrust of Part II of the ACRC's comments focus on the timing of appellate mediation, once again objecting to early mediation as the norm. However, as noted above, early mediation scheduling is the norm for most appellate mediation programs in the country. In addition, the proposed rules provide for flexibility with regard to timing. Rule 9.700(c) specifically provides that the timeframe for the mediation may be modified by order of the court. Accordingly, in any given case, if the parties believe that a later mediation has a better chance of success, the courts have

the flexibility to allow a change in the timing.

A large portion of Part II focuses on the potential disadvantage of early mediation in those cases where new appellate counsel takes over from trial counsel. However, nothing in the proposed rules prevents trial counsel from participating in the appellate mediation process, even if new appellate counsel has come into the case. In any given case, if new appellate counsel believes that they are at a disadvantage in an early mediation, they are free to involve trial counsel to whatever extent they deem appropriate.

The ACRC's comments focus on perceived differences between appellate mediation and trial mediation. The Committee would submit that a number of the arguments made with regard to those purported differences are inaccurate. For example, the ACRC alleges that "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." The Committee could not disagree more. Based upon the pertinent facts and the controlling law, an evaluation is routinely made as to the chances of success at trial. It is the exception, rather than the rule, when that chance of success is equal to 50%. Some cases are inherently stronger than others, both factually and legally, and, accordingly, the chances of success can vary greatly from case to case.

Similarly, the ACRC asserts that "the range of outcome that faces appellate 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 outcome is usually win-lose." Once again, the Committee disagrees. The potential outcome of a trial can be anything from a total loss to a total win, with a large variety of intermediate possibilities. Similarly, appeals can result in anything from an outright reversal to an outright affirmance, with a large varieties of intermediate possibilities such as partial affirmances, partial reversals, reduction or elimination of certain damage claims, or ordering of a new trials (in which case the entire range of possible outcomes once again comes into play).

Appellate mediation is not so different from trial court mediation as to support the argument that no rules of procedure should be adopted for appellate mediation.

PART III

Part III of the ACRC's comments specifically address individual proposed rules. The Committee welcomes these specific comments and, in certain instances, would agree that the proposed changes would be an improvement over the proposed rules submitted.

A. Rule 9.700(a). Applicability.

The ACRC suggests amending the proposed rule to more fully encompass all

appellate proceedings, including appellate proceedings in circuit courts on administrative or quasi-judicial decisions, rather than simply appeals from county court. The Committee finds the proposed amendment to be an improvement over our proposed rule and would recommend its adoption.

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

The ACRC proposes to add two provisions to this rule, one requiring a motion for mediation to state whether the parties have agreed to select their own mediator and another one providing that a party objecting to mediation may serve a response to a motion for mediation within ten days of service of the motion.

Requiring a motion for mediation to state whether the parties have agreed to select their own mediator would not add much to the rule, since that information would be ascertained shortly thereafter anyway, when the parties are ordered to attempt to agree on a mediator. However, the Committee has no strong position on the issue and if the Court feels that the addition of that language would be helpful, the Committee would not object.

The second proposed change is unnecessary since Florida Rule of Appellate Procedure 9.300 already provides that a party may serve one response to a motion within ten days of service of the motion and that rule would be applicable to a motion for mediation, just as it would be to any other motion.

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

The ACRC proposes that this rule be changed to allow the parties to agree, by filing a notice with the court, to defer the mediation conference until after the completion of briefing.

This proposed change is unnecessary. The rule already provides that the time frames for mediation may be modified by order of the court. Most joint motions from the parties seeking a deferral of mediation would likely be granted. However, since the court has an inherent interest in the mediation process going forward, including the potential saving of court time that might otherwise be expended as a result of a later mediation, the Committee believes that it is preferable to leave some discretion with the court with regard to delaying the mediation.

D. Rule 9.700(d). Tolling.

The main change contained in the ACRC's proposed rule simply moves the final sentence of the rule to the beginning. The only substantive change is the addition of a sentence indicating that if the parties file a notification that they have agreed to defer the mediation, tolling shall cease. This proposed change would only be relevant if the Court adopted the ACRC's proposed change to rule 9.700(b) to allow the parties to postpone the mediation without court approval. If no such automatic extension is allowed under (b), this proposed change to subsection (d)

would not be needed.

E. Rule 9.700(e). Motion to Dispense with Mediation.

The only proposed change in this subsection is to specifically authorize a motion to dispense with mediation to be served later in the proceeding upon discovery of facts which would constitute the grounds for the motion. Nothing in the rule as currently proposed would prevent the filing of such a motion directed to the court's inherent authority. However, explicitly recognizing that right in the rule is not objectionable.

F. Rule 9.710. Eligibility for Mediation.

The ACRC raises concerns about whether the list of cases not appropriate for mediation is broad enough and their concluding position is that "selection of eligible categories of cases, like the screening of individual cases, should be left to the discretion of each court." However, that discretion is already incorporated in the proposed rule since subsection (f) of the rule specifically provides that a court can specify by administrative order other matters ineligible for mediation.

G. Rule 9.720(a). Appearance.

The ACRC suggest that parties should, by stipulation of the parties, be allowed to appear at mediation by telephone without court order. The rule, as proposed by the Committee, requires a court order to appear by telephone rather

than a stipulation of the parties. The Committee believes that courts should retain the discretion to determine whether allowing telephone attendance in any particular case would be helpful or harmful to the mediation process. The Committee would note that Rule of Civil Procedure 1.720 does provide that the determination of the parties' appearance can be changed by order of the court or stipulation by the parties. Accordingly, if the Court wishes to have the language of Rule 9.720 track the language of Rule 1.720, a change to the proposed rule would be required.

The ACRC expresses its strong view that sanctions for failure to appear at mediation should not be allowed to determine the merits of an appeal and, accordingly, apparently oppose the sanctions portion of the rule which would allow dismissal or summary affirmance. By comparison, the sanctions provision of Rule 1.720 directs that the court shall impose sanctions for failure to appear, including an award of mediator or attorney's fees. Under that rule, the trial court would appear to have the authority to impose any number of possible sanctions, including the striking of pleadings or other sanctions that might determine the merits of the case although specific sanctions are not listed. The proposed rule does nothing more than provides specific examples of sanctions which are within the authority of the court.

Proposed Rule 9.720 actually contains a weaker sanctions provision, since it

provides that the court "may impose sanctions", while Rule 1.720 provide that the court "shall impose sanctions."

The ACRC also contends that the rule should include a requirement that written notification be sent to all parties when an adjourned mediation is to be recommended. The propose rule provides that written notice is not required to be given to parties present at an adjourned mediation conference. This instance appears to be one where the ACRC, while generally arguing for maximum flexibility and discretion in the rules, now seeks to impose less flexibility by requiring written notification, even to those parties who were present and received oral notification of an adjournment.

The ACRC find subdivisions (d) and (e) to be unnecessary, although they do not otherwise find them objectionable. The Committee notes that Rule 1.720 contains language similar to the language in the proposed rule.

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

The ACRC once again make the argument regarding to the use of certified or non-certified mediators, which has already been addressed above.

With respect to subdivision (c), the ACRC indicates it has no disagreement with the substance of the rule, but merely seeks to modify the wording somewhat. The proposed wording changes do not seem to improve or significantly change the

rule as proposed.

With respect to subdivision (d), the ACRC suggest that a sentence be added addressing the time period for appointment of a substitute mediator. The Committee sees no need for such an addition, since the time frames set forth in subdivision (a) of the rule would then apply, but has no objection if the Court believes the rule requires clarification.

With respect to subdivision (e), the ACRC suggest that the language regarding the proration of fees is unclear and should be changed to state that half of the fees be divided among the appellants and half among the appellees. Rule 1.720(g), which provides for compensation of trial court mediators, states "where appropriate, each party shall pay a proportionate share of the total charges of the mediator." That language would appear to be more consistent with the Committee's proposed language than the ACRC's alternative language.

Respectfully submitted this ____ day of August 2009.

_____
Judge William D. Palmer
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Chair of the Committee on
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished United States mail this ____ day of August 2009, to John G. Crabtree, Chair of the Appellate Court Rules Committee, 328 Crandon Blvd, Suite 225, Key Biscayne, FL 33149 and to John F. Harkness, Jr. Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300.

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify this petition has been prepared in MS Word using Times New Roman 14-point font, which complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

_____
Judge William D. Palmer
Florida Bar No. 220361