

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF CIVIL PROCEDURE

CASE NO. SC10-

**PETITION OF THE COMMITTEE ON
ALTERNATIVE DISPUTE RESOLUTION RULES AND POLICY
TO AMEND THE FLORIDA RULES OF CIVIL PROCEDURE**

The Supreme Court Committee on Alternative Dispute Resolution Rules and Policy (ADR R&P Committee), by and through its undersigned Chair, the Honorable William D. Palmer, respectfully files this petition pursuant to Florida Supreme Court Administrative Order AOSC03-32. In Re: Committee on Alternative Dispute Resolution Rules and Policy (July 8, 2003). See Appendix C. Its effect preserved through successive reappointments and regular appointment of new members, the 2003 order directs the Committee to monitor court rules governing alternative dispute resolution procedures, and to make recommendations as necessary to improve the use of mediation to supplement the judicial process. The order further provides the ADR R&P Committee shall perform other assignments related to alternative dispute resolution as directed by the Chief Justice.

In this instance, the ADR R&P Committee petitions the court to revise the appearance provision under Florida Rule of Civil Procedure 1.720(b), not only

because of concerns surfacing in connection with routine review of the rule, as applied, but also acknowledging the implicit direction of the Chief Justice in Administrative Order AOSC09-54, In Re: Final Report and Recommendations on Residential Mortgage Foreclosure Cases (Dec. 28, 2009). See Appendix D at 8.

Background

On July 24, 2006, the Mediator Ethics Advisory Committee (MEAC) issued an opinion which states that statutory and rule provisions governing confidential mediation communications prohibit mediators from reporting to the courts a party representative's failure to appear with full authority to settle. See Mediator Ethics Advisory Committee Opinion 2006-003 (July 24, 2006) at Appendix E. The MEAC opinion points to the tension between confidentiality provisions under statute [sec. 44.401- 44.406 Fla. Stat. (2010)] and procedural rules authorizing sanctions for failure to appear without full authority to settle. [Fla. R. Civ. P. 1.720(b)].

The opinion was the subject of extended discussion at the Florida Dispute Resolution Center's Annual Conference in 2006. In November 2006, the ADR R&P Committee began to look for a means by which this tension might be addressed.

Working initially as a committee of the whole with Lawrence M. Watson informally overseeing development of a proposed response, members considered

the problem, including potential party abuse of the process, and discussed several alternatives. The first option was to amend the statute. While confidentiality provisions under the Mediation Confidentiality and Privilege Act (the Act), sections 44.401 – 44.406, Florida Statutes could be amended to extend the scope of existing exceptions, the ADR R&P Committee rejected this solution as it would have mediators assume responsibility for reporting noncompliance. The ADR R&P Committee reasoned that having mediators assume responsibility for reporting non-compliance would place mediators in a position that could compromise the mediator's impartiality, violate the Act, , and inhibit party communication during mediation.

A second option required the parties to file a pre-mediation notice with the court. The pre-mediation notice would identify the party representatives attending the mediation and confirm they would appear with the requisite settlement authority.

A third option would operate in the event of an impasse and require party representatives to file with the court a post-mediation notice confirming they had participated in the mediation with full settlement authority.

The ADR R&P Committee, after having discussed and omitted option one, sought public comment on options two and three, first publishing an online survey in September 2007, then publishing preliminary proposals with a link to the survey

in the November 2007 hard copy edition of *The Resolution Report*. The Dispute Resolution Center's hardcopy and online publications were directed at that time to approximately 5,500 certified mediators and more than 1,500 additional persons trained but not yet certified. *The Resolution Report* was also directed to numerous colleges, universities, professional associations, businesses, and governmental entities committed to the improvement of mediation and other alternative dispute resolution processes. A substantial majority of those either commenting on the preliminary drafts or responding to the survey indicated a preference for filing a confirmation of settlement authority with the court prior to mediation.

Prior to receiving comments and subsequently reinforced by the comments, the ADR R&P Committee favored filing prior to mediation for a number of reasons. First, filing in advance of mediation puts all involved on notice that one or more named individuals with the required authority to settle will be present at mediation. This requirement alone may effectively counter potential abuse. Second, filing a confirmation of settlement authority prior to mediation places in the court file a record document unrelated to confidential "mediation communications." Such filing, or failure to file, may later afford the court an opportunity to consider imposition of sanctions based on matters of record. Third, and hardly less important, filing the proposed confirmation in advance of the

mediation session encourages parties and lawyers to begin thinking seriously about settlement early in the process.

Representatives of the mediation community again discussed the matter at length at the Dispute Resolution Center's Annual Conference in 2008. The ADR R&P Committee approved revised text in November 2008, and published same with a request for further comment in the May 2009 online edition of *The Resolution Report*.

Even as the ADR R&P Committee was publishing draft proposed text, the court's Task Force on Residential Mortgage Foreclosure Cases (Task Force) was beginning to encounter some of the same concerns in relation to required appearance by party representatives in foreclosure mediations. Among its recommendations, the Task Force proposed that plaintiff's attorneys file, in advance of mediation, a certification of authority naming individuals having full authority to negotiate a settlement without further consultation. Prior to mediation, foreclosure mediation program managers would determine whether those named in the certification were present and have full authority to settle the case. On finding a plaintiff's representative did not have full authority to settle, program managers would be required to report this fact to the court.

The Task Force submitted its Final Report and Recommendations on August 17, 2009. The court issued Administrative order AOSC09-54 accepting the Task

Force's recommendations on December 28, 2009. See Appendix D. In its order, the court adopted the above-described process as an *interim* measure instead of an immediate rule change, noting the ADR R&P Committee "is examining the appearance issue in relation to all mediations as a potential change to Rule 1.720, Florida Rules of Civil Procedure." Id. at 8.

The court also approved, in its December 28, 2009 order, a second interim measure specifically in relation to telephonic or other electronic appearance at mediations of foreclosure actions. The court noted, "Electronic appearance is in compliance with existing mediation rules, including rule 1.720(b), Florida Rules of Civil Procedure, which permits a change in the appearance requirement by order of the court." Id.

At the ADR R&P Committee's January 29, 2010 meeting, the chair named a subcommittee to review the work undertaken to date in light of these interim measures, and to recommend final draft proposed language for submission to the court. Co-chaired by committee members the Honorable Burton C. Conner and Mike Bridenback, Trial Court Administrator for the Thirteenth Judicial Circuit, subcommittee membership included Thomas H. Bateman, III, Gregory Firestone, Perry S. Itkin, Melvin A. Rubin, Meah D. Tell, and Lawrence M. Watson. The subcommittee met by conference call no fewer than seven times beginning in March 2010 and, on June 8, 2010, voted without dissent to recommend to the full

ADR R&P Committee language substantially revising Florida Rule of Civil Procedure 1.720.

Meeting in person on June 16, 2010, the full ADR R&P Committee voted 14 - 0 to approve, with minor changes, the subcommittee's recommended revision of the appearance requirement in circuit civil mediations under rule 1.720(b).

On July 15, 2010, the ADR R&P Committee submitted the revised proposal to The Florida Bar Committee on Rules of Civil Procedure, through its chair, Donald E. Christopher, Esquire (absent subsequent addition of the word "and" after each sentence in section 1.720(b) and the words in the first sentence of the Committee Notes "without further consultation" which track the language of the rule). The ADR R&P Committee requested the Florida Bar committee review the proposed text and provide written comments and recommendations prior to the filing of this petition.

On September 22, 2010, the Civil Rules Committee, at its full committee meeting, voted 18 -13 in favor of the proposed revisions. The Civil Rules Committee's comments and recommendations are appended to this petition as Appendix F.

In addition to the favorable vote and input of the Bar's Civil Rules Committee, the proposed rule amendment was posted on the Florida Supreme

Court Dispute Resolution Center (DRC) website from August 19, 2010 until September 15, 2010. No comments were received as a result of this posting.

The ADR R& P Committee additionally solicited and received comments as a result of publishing notice of the proposed rule amendment in the Florida Bar News of August 15, 2010. Eight comments to the Florida Bar News publication were received from several firms and individuals (attached as Composite Appendix G).

ADR R&P Committee's Response to Comments

During the course of the ADR R&P Committee's "in person" meeting in Tampa, Florida on September 29, 2010, the members carefully considered all comments received by the ADR R&P Committee. While the ADR R&P Committee is appreciative of all comments, it was the consensus of the members that all issues raised by the comments have been fully considered by the ADR R&P Committee. The membership is of the opinion that the suggested revisions represent a good balance in strengthening the potential of resolution in circuit court civil mediations, without compromising confidentiality or self-determination.

Proposed Amendments to Florida Rule of Civil Procedure 1.720

The ADR R&P Committee, with thanks for the substantial work undertaken by its subcommittee and other members who worked on this matter prior to the subcommittee's inception, offers the following proposed amendments to Florida Rule of Civil Procedure 1.720(b). The proposed language is set forth in summary below and in full as appendices to this petition. The text appears first in full-page legislative format in Appendix A and in a two-column chart with explanations of new and changed text in Appendix B.

Proposed Rule 1.720(b) - Appearance at Mediation

Proposed revision of rule 1.720(b) substantially restructures the rule such that revised text would relate solely to appearance at mediation. A proposed new title better reflects content limited to appearance. Apart from relocation of existing language relating to appearance by public entities and sanctions for failure to appear, proposed changes in subdivision (b) are largely for purposes of clarifying existing language.

As before, parties are deemed to appear at mediation if : 1) the party or a party representative having full authority to settle without further consultation; and 2) the party's counsel of record, if any; and 3) a representative of the insurance carrier for any insured party are all physically present.

Although the party or party representative and the party's counsel are covered in two separate subdivisions of 1.720(b), and a designation of counsel as party representative is not common, committee members expressed concern that a party may attempt to designate its counsel as party representative. The proposed language is intended to eliminate this possibility. See Carbino v. Ward, 801 So. 2d 1028 (Fla 5thDCA 2001).

The ADR R&P Committee determined that the designation of the party's attorney as party representative would strike at the very heart of mediation as a process in which the parties exercise self-determination and are brought together informally to effectuate their own settlement. The designation of an attorney appearance in lieu of a party is a subversion of the process as it was meant to be practiced.

Further, the ADR R&P Committee stands firm in its position that parties should appear in person at mediation and proposes no rule change in relation to telephonic appearance.

The provision in AOSC09-54 which allows plaintiffs' representatives to attend by phone is in response to the extraordinary circumstances surrounding the current foreclosure crisis and only pertains to the residential mortgage foreclosure program.

Proposed Rule 1.720(c) – Party Representative Having Full Authority to Settle

Proposed new subdivision (c) further clarifies the appearance requirement by defining a “party representative having full authority to settle” as “the final decision maker with respect to all issues presented by the case who has the legal capacity to execute a binding settlement agreement on behalf of the party.”

The proposed Committee Note states the new language in subdivision (c) is based on objective standards thereby clarifying the interpretation of “full authority to settle”.

Proposed Rule 1.720(d) – Appearance by Public Entity

Proposed subdivision (d) is substantially the same as the existing provision under current subdivision (b) relating to appearances by public entities.

Proposed Rule 1.720(e) – Confirmation of Authority

Proposed revision of Florida Rule of Civil Procedure 1.720(b) addresses the previously described disconnect between the current rule’s appearance requirement and statutory provisions for confidentiality under the Act. The *rule* expressly provides for physical appearance with full authority to settle and further authorizes sanctions for noncompliance. The *statute* provides for confidentiality of all mediation communications, except those specifically exempted. See § 44.405(1), Fla. Stat. None of the statutory exceptions applies to a party’s failure to appear with full authority to settle. Id. § 44.405(4)(a). Consequently, even though a party fails to appear with settlement authority as required by the rule, the Act

prohibits both the mediator and other mediation participants from reporting noncompliance to the court.

The ADR R&P Committee would resolve the apparent conflict in relation to reporting non-appearance by providing that each party shall be required, in advance of mediation, to file with the court and serve opposing counsel a written notice. The pre-mediation notice would identify the person or persons who will be attending the mediation as a party representative or as an insurance carrier representative and would further confirm these persons are clothed with the requisite authority to settle. Filing the notice prior to mediation places in the court file a record document unrelated to confidential mediation communication, thereby later affording the court an opportunity, upon motion, to consider imposition of sanctions without imposing an obligation upon the mediator or anyone else to report matters subject to confidentiality provisions under the statute.

A proposed Committee Note emphasizes the process of identifying representatives and confirming such persons' authority to settle shall be by means of a direct representation to the court. The Note provides further assurance that any necessary verification of these matters follows from a party's motion or upon inquiry of the court without involvement of the mediator. Consistent with both statutory and rule requirements, the proposed certification of authority requires no disclosure of confidential mediation communications.

Proposed Rule 1.720(f) – Sanctions for Failure to Appear

Text under current subdivision (b) relating to sanctions would be relocated to proposed new subdivision (f). The relocated text remains substantially as it appears in the present rule. The existing language provides that the court, upon motion, shall impose sanctions, including an award of mediation fees, attorneys' fees, and costs against a party who, without good cause, fails to appear at a duly noticed mediation conference. The ADR R&P Committee proposes the addition of new language providing that the failure to file the confirmation of authority required under subdivision (e), or failure of persons identified in the confirmation to appear at mediation, will create a rebuttable presumption of a failure to appear. Parties failing to appear at mediation would be subject to sanctions.

Proposed Rule 1.720(i) – Communication with Parties or Counsel

With the exception of a new title indicating this provision relates to communication with counsel, as well as parties, new subdivision (i) consists entirely of text retained, without change, from the current rule.

Proposed Committee Notes

In addition to references in the proposed Committee Notes relating to proposed new rule language under subdivisions (c) and (e), the Notes underscore the critical premise underlying any viable mediation process: that participants engaged in these negotiations must have full authority to settle these cases.

Participation in mediation without full authority can only lead to claims for sanctions should the parties fail to settle due to a party's lack of authority.

The proposed Committee Note further points to party self-determination as another equally important concept underlying the viability of mediation as an alternative dispute resolution process. In this instance, self-determination is exercised if a party agrees in writing to a change in the requirements for appearance as set forth in this rule.

WHEREFORE, the Committee on Alternative Dispute Resolution Rules and Policy respectfully requests this court consider and adopt the proposed amendments to the Florida Rules of Civil Procedure, all relating to appearance at circuit court mediations by party representatives having full authority to settle.

Respectfully submitted this ____ day of December, 2010.

Judge William D. Palmer
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States mail this ____ day of December, 2010, to **Donald E. Christopher**, 300 North Orange Ave, Ste 1875, PO Box 1549, Orlando, Florida 32802-1549, Chair of The Florida Bar's Civil Procedure Rules Committee, **John F. Harkness, Jr.**, Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300 and to those submitting comments in response to the publication in the Florida Bar News as follows: Douglas M. Fraley, Molhem & Fraley, P.A., 320 W. Kennedy Blvd. Ste 330, Tampa, Florida 33606-1456, Larry T. Griggs, Esq., 1301 Plantation Island Dr. S. Ste 2028, St Augustine, Florida 32080-3112, Christopher M. Shulman, P.A., Alternative Dispute Resolution Services, 4023 Gunn Highway Ste 100, Tampa, Florida 33618-8796, Donna Evertz, Compliance Attorney, Law Offices of David J. Stern, P.A., 900 S. Pine Island Rd, Ste 400, Plantation, Florida 33324-3903, John A. Henneberger, Esq., 4 Carrick Rd, Palm Beach Gardens, Florida 22418, Karl E. Pearson, Powell & Pearson, 399 Carolina Ave. Ste 100, Winter Park, Florida 32789-3150, Jennifer Newton, Esq., Florida Legal Services, Inc., 2425 Torreya Dr., Tallahassee, Florida 32303, Cecil Pearce, Vice President, American Insurance Association, 5605 Glenridge Dr. Ste 845, Atlanta, Ga. 30342.

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