

APPENDIX B

Proposed Appellate Mediation Rule
in Two-Column Format

Florida Rules of Appellate Procedure

Rule 9.700. Mediation Rules

(a) Applicability. Rules 9.700 – 9.740, apply to all appellate courts, including circuit courts when hearing appeals from county courts, district courts of appeal, and the Supreme Court of Florida.

(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 has:

- (1) no objection;
- (2) objects and cites the specific reasons for objection; or
- (3) will promptly file an objection.

(c) Time Frames for Mediation. The first mediation conference shall be commenced within 45 days of referral by the court, and the mediation shall be completed within 30 days of the first mediation conference. These times may be modified by order of the court.

(d) Tolling of Times. 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

Reasons for Change

New rules implement statewide appellate mediation program based on comparable provisions governing mediation in the trial courts and insight gained from pilot program in the Fifth District Court of Appeal. Proposed rule codifies much of what has been an ad hoc process authorized by administrative order.

Rather than require a joint stipulation of the parties as in the civil rules, the proposed appellate rule permits referral to mediation upon a request of one of the parties with a certificate of consultation.

Shortens by 15 days the time frames for commencement and completion of appellate mediations as compared with the civil rules, given the strict time frames for appeals.

Tolling for mediation is necessary given the strict time frames for appeals.

mediation ends pursuant to section 44.404, Florida Statutes. The court, by administrative order, may provide for additional tolling of deadlines. 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.

(e) Motion to Dispense with Mediation. A party may move, within 15 days after the order of referral, to dispense with mediation if:

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

Eliminates provisions in comparable civil rule deemed inapplicable in appellate context. Cf. Fla. R. Civ. P. 1.700(b).

Rule 9.710. Eligibility for Mediation

Any case filed may be referred to mediation at the discretion of the court, but under no circumstances may the following categories of actions be referred:

- (a) Criminal and post-conviction cases.
- (b) Habeas corpus and extraordinary writs;.
- (c) Civil or criminal contempt.
- (d) Involuntary civil commitments of sexually violent predators.
- (e) Collateral criminal cases.
- (f) Other matters as may be specified by administrative order.

The proposed rule would effectively limit appellate mediations to civil cases with specific matters excluded based on the experience in the Fifth District's program.

Rule 9.720. Mediation Procedures

(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 physically present:

- (1) The party or its representative having full authority to settle without further consultation.
- (2) The party’s trial or appellate counsel of record, if any. If a party has more than one counsel, the appearance of only one counsel is required.
- (3) A representative of the insurance carrier for any insured party who is not such carrier’s outside counsel and who has full authority to settle without further consultation.

(b) Sanctions. If a party fails to appear at a duly noticed mediation conference without good cause, the court, upon motion of a party or upon its own motion, may impose sanctions, including, but not limited to, any or all of the following, against the party failing to appear:

- (1) An award of mediator and attorney fees and other costs or monetary sanctions.

Closely tracking the civil rules, the proposed appellate rule broadens the appearance requirement to include both trial and appellate counsel depending on what point in the process the referral to mediation is made. If the parties have multiple appellate counsel, the appearance rule requires only one appear.

Consistent with rule provisions governing the trial court mediation program, specific sanctions are tailored to the appellate context.

(2) The striking of briefs.

(3) Elimination of oral argument.

(4) Dismissal or summary affirmance.

(c) Scheduling and Adjournments. Consistent with the time frames established in rule 9.700(c) and after consulting with the parties, the mediator shall set the initial conference date. The mediator may adjourn the mediation conference at any time and may set times for reconvening the adjourned conference. The mediator shall notify the parties in writing of the date, time, and place of any mediation conference, except no further notification is required for parties present at an adjourned mediation conference.

(d) Control of Procedures. The mediator shall at all times be in control of the procedures to be followed in the mediation.

(e) Communication with Parties. The mediator may meet and consult privately with any party or parties or their counsel. Counsel shall be permitted to communicate privately with their clients.

The scheduling and adjournment provisions in the proposed appellate rule are consistent with actual practice in both the trial courts and the Fifth DCA's mediation program.

Consistent with rule 1.720(d), Florida Rules of Civil Procedure.

Combines a portion of civil rule 1.720(d) with existing rule 1.720(e), both provisions proven effective in trial court mediations.

Rule 9.730. Appointment and Compensation of the Mediator.

(a) Appointment by Agreement. Within 10 days of the court order of referral, the parties may file a stipulation with the court designating a mediator certified as an appellate mediator pursuant to rule 10.100(f), Florida Rules for Certified and Court-Appointed Mediators.

(b) Appointment by Court. If the parties cannot agree upon a mediator within 10 days of the order of referral, the appellant shall notify the court immediately and the court shall appoint a certified appellate mediator selected by such procedure as is designated by administrative order. At the request of either party, the court shall appoint a certified appellate mediator who is licensed to practice law in any United States jurisdiction.

(c) Disqualification of Mediator. Any party may move to enter an order disqualifying a mediator for good cause. Such a motion to disqualify shall be filed within a reasonable time, not to exceed 10 days after discovery of the facts constituting the grounds for the motion, and shall be promptly presented to the court for an immediate ruling. If the court rules that a mediator is disqualified from a case, an order shall be entered setting forth the name of a qualified replacement. The time for mediation shall be tolled during any periods in which a motion to disqualify is pending.

The rules having been amended in 2007 to encourage a more varied background among supreme court certified mediators, the proposed appellate rules would require selection of a certified mediator in order to satisfy the referral by the court. Cf. Fla. R. Civ. P. 1.720(f)(1) (selection of non-certified mediators “otherwise qualified by training or experience”).

Failing selection by the parties, the proposed rule provides for court appointment in accordance with a procedure to be established by administrative order. As the proposal does not require all certified appellate mediators to be attorneys, either party would be permitted to request an attorney mediator even absent agreement on a specific individual.

The proposed appellate rule improves on the current civil rule by providing a time frame for filing the motion to disqualify.

(d) Substitute Mediator. If a mediator agreed upon by the parties or appointed by the court cannot serve, a substitute mediator may be agreed upon or appointed in the same manner as the original mediator.

(e) Compensation of a Court-Selected Mediator. If the court selects the mediator pursuant to subdivision (b), the mediator shall be compensated at the hourly rate set by the court in the referral order or applicable administrative order. Unless otherwise agreed, the compensation of the mediator should be prorated among the named parties.

Committee Notes

This rule is not intended to limit the parties from exercising self-determination in the selection of any appropriate form of alternative dispute resolution or to deny the right of the parties to select a neutral. The rule does not prohibit parties from selecting an otherwise qualified non-certified appellate mediator prior to the court's order of referral. Parties may pursue settlement with a non-certified appellate mediator even within the ten-day period following the referral. However, once parties agree on a certified appellate mediator, or notify the court of their inability to do so, the parties can satisfy the court's referral to mediation pursuant to these rules only by appearing at a mediation conducted by a supreme court certified appellate mediator.

The proposed appellate rule eliminates ambiguous and repetitive text in the comparable civil rule. Cf. Fla. R. Civ. P. 1.720(f)(3),

The proposed rule addresses only compensation of court-appointed mediators, leaving to the parties fee arrangements for mediators selected by agreement.

Though the proposed rule discloses a preference for use of certified mediators in appellate mediations, the committee notes point to time frames within which one may continue to exercise—and the court may affirmatively protect-- party self-determination in the selection of non-certified mediators.

Rule 9.740. Completion of Mediation

(a) No Agreement. If the parties do not reach an agreement as a result of mediation, the mediator shall report, within 10 days, the lack of an agreement to the court without comment or recommendation.

(b) Agreement. If a partial or final agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any. Within 10 days thereafter, the mediator shall file a report with the court on a form approved by the court.

Similar to the comparable civil rule, the proposed rule adds a ten-day time requirement and otherwise leaves out text unnecessary in an appellate context. Cf. Fla. R. Civ. P. 1.730(a).

The proposed appellate rule is a simpler version of the counterpart rule 1.730(b), Florida Rules of Civil Procedure, and is consistent with procedures used in the Fifth District's mediation program.

