

Proposed Amendments to the Florida Probate Rules – Mediation and Arbitration

The Committee on Alternative Dispute Resolution Rules and Policy (Committee) invites all interested persons to comment on proposed amendments to the Florida Probate Rules. The Florida Probate Rules currently do not include mediation and arbitration rules; these amendments would establish them. The amendments provide that the court may refer all or any part of a contested probate or guardianship matter to mediation or arbitration, thereby empowering courts and parties with the option of using non-adversarial dispute resolution processes to resolve these disputes.

Proposed rule 5.183(b)(2)(B) provides that when the parties cannot agree upon a mediator, they may request, or the court on its own motion may appoint a Florida Supreme Court certified circuit or family mediator who has completed a Florida Supreme Court certified elder mediation training program. The amendments promote opportunities for Florida's elderly citizens and their families to request and the court to appoint Florida Supreme Court certified mediators with specific training in elder issues and shared decision-making. The amendments support three specific goals of the Long-Range Strategic Plan for the Florida Judicial Branch 2016-2021: increasing the use of constructive and non-adversarial resolutions in family cases; promoting the use of innovative and effective problem-solving courts and alternative dispute resolution processes; and expanding the education of judges and court employees to recognize and understand various perspectives of court users on relevant and emerging topics.

Please send comments for the Committee to the Florida Dispute Resolution Center (DRC) by October 3, 2019, to: DRCmail@flcourts.org; Florida Dispute Resolution Center, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida 32399; or fax (850) 922-9290.

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Rule 5.181 Rules Common to Mediation and Arbitration

(a) Referral by Presiding Judge or by Stipulation. Except as hereinafter provided or as otherwise prohibited by law, the presiding judge may enter an order referring all or any part of a contested probate or guardianship matter to mediation or arbitration. The parties to any contested probate or guardianship matter may file a written stipulation to mediate or arbitrate any issue between them at any time. Such stipulation shall be incorporated into the order of referral.

(1) Conference or Hearing Date. Unless otherwise ordered by the court, the first mediation conference or arbitration hearing shall be held within 60 days of the order of referral.

(2) Notice. Within 15 days after the designation of the mediator or arbitrator, the court or its designee, who may be the mediator or the arbitrator, shall notify the parties in writing of the date, time, and place of the conference or hearing, unless the order of referral specifies the date, time, and place.

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

(1) the issue to be considered has been previously mediated or arbitrated between the same parties pursuant to Florida law;

(2) the issue presents a question of law only;

(3) the order violates rule 1.710(b) or rule 1.800; or

(4) other good cause is shown.

(c) Motion to Defer Mediation or Arbitration. Within 15 days of the order of referral, any party may file a motion with the court to defer the proceeding. The movant shall set the motion to defer for hearing prior to the scheduled date for mediation or arbitration. Notice of the hearing shall be provided to all interested parties, including any mediator or arbitrator who has been appointed. The motion

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shall set forth, in detail, the facts and circumstances supporting the motion. Mediation or arbitration shall be tolled until disposition of the motion.

(d) Disqualification of a Mediator or Arbitrator. Any party may move to enter an order disqualifying a mediator or arbitrator for good cause. If the court rules that a mediator or arbitrator is disqualified from hearing a case, an order shall be entered setting forth the name of a qualified replacement. Nothing in this provision shall preclude mediators or arbitrators from disqualifying themselves or refusing any assignment. The time for mediation or arbitration shall be tolled during any periods in which a motion to disqualify is pending.

Rule 5.182 Mediation Rules

(a) Completion of Mediation. Mediation shall be completed within 45 days of the first mediation conference unless extended by order of the court or by stipulation of the parties.

(b) Exclusions from Mediation. A probate/guardianship action shall be ordered to mediation upon stipulation of the parties. A probate/guardianship action may be ordered to mediation upon motion of any party or by the court, if the judge determines the action to be of such a nature that mediation could be of benefit to the litigants or the court. Under no circumstances may the following categories of actions be referred to mediation:

(1) Bond matters.

(2) Civil or criminal contempt.

(3) Other matters as may be specified by administrative order of the chief judge in the circuit.

(c) Discovery. Unless stipulated by the parties or ordered by the court, the mediation process shall not suspend discovery.

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Rule 5.183 Mediation Procedures

(a) Interim or Emergency Relief. A party may apply to the court for interim or emergency relief at any time. Mediation shall continue while such a motion is pending absent a contrary order of the court or a decision of the mediator to adjourn pending disposition of the motion. Time for completing mediation shall be tolled during any periods where mediation is interrupted pending resolution of such a motion.

(b) Appointment of the Mediator.

(1) Within 10 days of the order of referral, the parties may agree upon a stipulation with the court designating:

(A) a certified mediator, other than a senior judge presiding as a judge in that circuit; or

(B) a mediator, other than a senior judge, who is not certified as a mediator 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.

(2) If the parties cannot agree upon a mediator within 10 days of the order of referral, the plaintiff or petitioner shall so notify the court within 10 days of the expiration of the period to agree on a mediator, and the court 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.

(A) At the request of either party, the court shall appoint a certified circuit court mediator who is a member of The Florida Bar.

(B) When elder law issues are involved in the dispute or upon the request of all parties, the court may select a certified family or circuit mediator

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who has completed a Supreme Court of Florida certified elder mediation training.

(3) 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.

(c) **Compensation of the Mediator.** The mediator may be compensated or uncompensated. When the mediator is compensated in whole or part by the parties, the presiding judge may determine the reasonableness of the fees charged by the mediator. In the absence of a written agreement providing for the mediator's compensation, the mediator shall be compensated at the hourly rate set by the presiding judge in the referral order. Where appropriate, each party shall pay a proportionate share of the total charges of the mediator. Parties may object to the rate of the mediator's compensation within 15 days of the order of referral by serving an objection on all other parties and the mediator.

Rule 5.184 Completion of Mediation

- (a) **No Agreement.** 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. With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

- (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. The agreement shall be filed when required by law or with the parties' consent. A report of the agreement shall be submitted to the court or a stipulation of dismissal shall be filed. By stipulation of the parties, the agreement may be electronically or stenographically recorded. In such event, the transcript

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may be filed with the court. The mediator shall report the existence of the signed or transcribed agreement to the court without comment within 10 days thereof. No agreement under this rule shall be reported to the court except as provided herein.

- (c) **Imposition of Sanctions.** In the event of any breach or failure to perform under the agreement, the court upon motion may impose sanctions, including costs, attorney fees, or other appropriate remedies including entry of judgment on the agreement.

Rule 5.185 Exclusions from Arbitration

A civil action shall be ordered to arbitration or arbitration in conjunction with mediation upon stipulation of the parties. A civil action may be ordered to arbitration or arbitration in conjunction with mediation upon motion of any party or by the court, if the judge determines the action to be of such a nature that arbitration could be of benefit to the litigants or the court. Under no circumstances may the following categories of actions be referred to arbitration:

- (1) Bond matters.
- (2) Civil or criminal contempt.
- (3) Such other matters as may be specified by order of the chief judge in the circuit.