

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC21-990

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF CIVIL
PROCEDURE, FLORIDA RULES
OF GENERAL PRACTICE AND
JUDICIAL ADMINISTRATION,
FLORIDA RULES OF CRIMINAL
PROCEDURE, FLORIDA
PROBATE RULES, FLORIDA
TRAFFIC COURT, FLORIDA
SMALL CLAIMS RULES,
FLORIDA RULES OF APPELLATE
PROCEDURE

**COMMENTS OF THE EXECUTIVE COUNCIL OF THE
ALTERNATIVE DISPUTE RESOLUTION SECTION
OF THE FLORIDA BAR**

Patrick Russell, Chair of the Alternative Dispute Resolution Section of The Florida Bar (“ADR Section”), submits these comments on behalf of the Executive Council of the ADR Section¹, as follows.

I. PROPOSED RULES

The ADR Section submits these comments only as to those Rules (1.700, 1.720, 1.730, 1.750, 9.700, 9.720, and 9.740) that address dispute resolution, namely mediation and arbitration.

¹ These comments are submitted on behalf of the Section only, and do not express the position of The Florida Bar.

II. THE GOAL OF THE PROPOSED RULES

The proposed rule changes (the “Proposed Rules”), have at their heart the goal to permit the use of communication technology and to expressly authorize remote participation in the context of mediation and arbitration proceedings. The Proposed Rules extend what was a necessary change to meet the challenges of the pandemic where physical appearance was not possible or safe. The Workgroup petition references anecdotal reports that remote dispute resolution proceedings have been effective and popular during the pandemic. The ADR Section would concur with the Workgroup that remote dispute resolution proceedings have been effective, efficient, and widely requested.

Mediators and Arbitrators conducted mediations and arbitrations (in whole or in part) through telephone, videoconferencing, Zoom, Face Time, Skype, and other electronic means, at the request of parties and their counsel, prior to the Covid-19 crisis. We are in favor of continuing the use of remote participation when agreed to by the parties or when ordered by the Court in the absence of an agreement by the parties.

A recently conducted survey² of ADR Section members in which 240 responses were received revealed the following:

- 79% believed that the virtual mediations they participated in were very effective.
- 66% believed that the virtual settlement rate was higher than a live mediation.
- 63% did not believe that settlement rates would have been different if the mediation was live versus being remote.
- 70% received positive feedback from lawyers and pro-se clients about virtual mediation.
- 85% were in favor of the Court continuing/ordering virtual mediations in the future.

The goals of providing fair and equal access to the dispute resolution process and allowing the parties to craft how they mutually agree to engage in the process should be paramount considerations. We believe that proposed changes should provide a more flexible approach for the use of remote communication --which

² The full results of the 2021 Alternative Dispute Resolution Section Member Survey from September 2021 are attached.

we have sometimes found has to change at the last minute due to technological or other issues.

III. BENEFITS

The use of communication technology and remote participation at mediation and arbitration provides ready access to these proceedings by adding an additional means to attend and often lowers barriers to participation. Scheduling is easier when travel time is eliminated. The cost of attending is less when travel and lodging and parking costs are eliminated. Any early concerns as to communication technology and security have been addressed to the satisfaction of most practitioners and participants; it is anticipated that these systems will continue to evolve and improve over time.

IV. CONCERNS

Traditionally, physical presence of the parties at mediation and arbitration was considered important because it allowed parties and their counsel the opportunity to focus on the disputes at hand, without distraction, and to be fully engaged in the process. The ADR Section suggests that any rule changes be studied further to

determine process issues, such as whether (1) attendance can be by telephone only; (2) attendance by video can be had if the person turns their camera off or they cannot connect via video but can connect via audio or through telephone; (3) whether all parties should be using the same communication technology to attend and not some by telephone, some by video, and some with their cameras off, (4) whether remote participation requires certain additional safeguards, such as eliminating third party interference by coaching, making hand signals, prompting answers, and other ethical considerations that should be considered when engaging in remote participation, and (5) better defining the role of the neutral in ensuring equal and fair access to the process given the ethical standards that govern neutrals in court-connected mediation and arbitration processes.

V. RECOMMENDATIONS

The recommendations set forth below use the terminology contained in proposed Rule 2.530 of the Florida Rules of General Practice and Judicial Administration.

A. Rule 1.700 (a): We agree that the parties should be able to stipulate in writing how the mediation or non-binding arbitration

should be conducted, in person, remotely via audio or audio-video communications technology, or a combination thereof, and that the stipulation need not be included in the order of referral to mediation or non-binding arbitration. However, an additional sentence should be added to state that “Notwithstanding, subject to agreement of the parties during the process, the parties and the neutral may agree to a change in communication technology, as the need may arise, to assure equal access to the process. For example, although everyone may agree on audio-video communications, if a party is unable to connect via video, and everyone agrees that they can just participate using audio, then this flexibility should be accommodated without having to file a new written stipulation, or get a new court order, which will delay and interrupt the process.

B. Rule 1.720: We agree with the Proposed Rule Change, except that (d) should define “participate through the use of communication technology as defined in Rule 2.530 of the Florida Rules of General Practice and Court Administration.”

C. Rule 1.730(b): We agree with the Proposed Rule Change. However, we note that the Electronic Signature Act and Uniform

Electronic Transaction Act may make this change unnecessary, and that ordinarily an agreement that is executed in counterparts would state that it is executed in counterparts.

D. Rule 1.730 (c): We do not agree with this language which is overbroad, and which seems to state that if the procedural aspects of mediation set forth in Rules 1.700, 1.710 and 1.720 are complied with no party can object to the enforcement of a mediation agreement. There may be grounds to object to the enforceability of a mediation agreement, such as coercion or duress, even when the procedural rules are complied with.

Established case law recognizes parties right to go to court to overturn or reform their mediated agreements for matters such as fraud, coercion, mutual mistake, mediator misconduct and extortion. The Mediation Confidentiality and Privilege Act specifically delineates an exception to confidentiality and privilege for mediation communications offered to establish or refute legally recognized grounds for voiding or reforming a mediated agreement. Fla. Stat. 405(4)(a)5.

We believe the intent of the rule change was to prevent parties from objecting to the enforceability of their mediated agreement based on the use of communication technology when Rules 1.700, 1.710, 1.720 and 1.730 have been followed. Therefore, we recommend that Rule 1.730(c) clearly state this limited prohibition:

“The parties may not object to the enforceability of a mediated agreement based on the use of communication technology if the requirements for mediation in rules 1.700, 1.710, 1.720 and this rule have been satisfied.”

E. Rule 1.750: We agree with the Proposed Rule Change except that (e) should conclude with “participate through the use of communication technology as defined in Rule 2.530 of the Florida Rules of General Practice and Court Administration.” See Comment to Rule 1.730 (b).

F. Rule 9.700 (b): We believe that the following language should be added after (3):

“Notwithstanding, subject to agreement of the parties during the mediation, the parties and the mediator may agree to a

change in communication technology, as the need may arise, to assure equal access to the process. The use of communications pursuant to this rule may not be a basis for any motion seeking to invalidate or not to enforce an agreement entered into as a result of a court-ordered mediation.”

G. Rule 9.720 (a): We believe the Rule should be amended to state:

“As used in this subdivision, the term ‘presence’ means physical presence at the mediation conference, or participation using communication technology as set forth in rule 9.700 (b).”

H. Rule 9.740: Please see the previous comment to Rule 1.730 (b).

VI. CONCLUSION

The ADR Section is well-acquainted with the issues raised by the Petition and has filed substantive comments to prior proposed rule changes that impact dispute resolution policies, procedures, and proceedings. The ADR Section favors enhancing the dispute resolution process through modernization while also increasing

efficiency and lowering costs for the participants. It appears the Proposed Rules will assist to meet that goal, and as such the ADR Section supports the Workgroup proposed changes to Rules 1.700, 1.720, 1.730, 1.750, 9.700, 9.720, and 9.740 with the changes suggested in this Comment.

WHEREFORE, the ADR Section of The Florida Bar respectfully submits these comments for the Court's consideration.

Respectfully submitted,

/s/ Patrick Russell

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Certificate of Service

I certify that the forgoing Comments of The Alternative Dispute Resolution Section of The Florida Bar was served by mail on the Workgroup Chair, Judge Lisa T. Munyon, Ninth Judicial Circuit, Orange County Courthouse, 425 N. Orange Avenue, Orlando, Florida 32801, and on the OSCA Staff Liaison to the Workgroup, Tina White, 500 S. Duval Street, Tallahassee, Florida 32399.

Certificate of Font Compliance

I certify that this comment was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045(b).

/s/ Patrick Russell
Patrick Russell