

**IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC24-0774**

**IN RE:
AMENDMENTS TO FLORIDA RULES
OF CIVIL PROCEDURE 1.070,
1.410, 1.550, AND 1.730**

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

Ana Cristina Maldonado, Chair of the Alternative Dispute Resolution Section of The Florida Bar (“ADR Section”), on behalf of the Executive Council of the ADR Section,¹ submits these comments to the Amendments proposed by the Civil Procedure Rules Committee (“Rules Committee”) to Fla. R. Civ. P. 1.730. COMPLETION OF MEDIATION (“Rule 1.730 Proposed Amendment”).

SUMMARY

The ADR Section requests that the Rule 1.730 Proposed Amendment make it clear that if a party representative is identified by a party as having full authority to settle and sign a mediated settlement agreement that this **identification be in writing**, and that it conform to Rule 1.720 (b) (1) which requires that the party

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

representative have full authority to settle to be “**without further consultation**” with the party. The reason for asking for the identification to be in writing is to relieve the mediator of any responsibility to determine the issue of authority, and for the court and the parties to be able to provide such written authorization in the event of any disputes regarding authority to sign the mediated settlement agreement. This is particularly important as there are severe sanctions which can be imposed in the event of any breach or failure to perform under the mediation agreement under Fla. R. Civ. P. 1.730 (d). Additionally, although party self-determination includes a party delegating their authority to settle and sign a mediated settlement agreement to a party representative, case law and statutory law make it clear that such authority cannot be delegated to the party’s counsel, and that if counsel signs in lieu of his client, the mediated settlement agreement will not be enforceable. ²

The ADR Section proposes the following language:

² The only exception is in small claims court where parties are not required to attend but can be represented by their counsel. See. Fla. R. Civ. P. 1.750 (e).

“If a partial or final agreement is reached it must be reduced to writing and signed by each party or the party’s representative having full authority to settle without further consultation under rule 1.720 (c), and identified in compliance with rule 1.720 (e) or as otherwise set forth in writing by the party and delivered by the party to all other parties prior to the commencement of or during the mediation. Counsel for the party, if any, may not serve as a party’s representative for the purpose of this rule or rule 1.720 (c), except in small claims mediations. [Counsel for all parties must sign the mediation settlement agreement in their capacity as counsel and not as a party].”

We have put in the language in the last sentence regarding the signature of counsel, if any, in brackets as the ADR Section takes no position as to the proposed deletion of the requirement for counsel’s signature in Fla. R. Civ. P. 1.730 (b). We note that the signature of the attorney does not bind a client to a mediated settlement agreement in the absence of signature by the party under well-established case law, except in small claims mediations. In that regard, mediated settlement agreements differ

from other negotiated settlement agreements outside of the mediation process.

DISCUSSION

Background

A. Relevant Statutes and Mediation Rules:

(1) Other than in small claims court-ordered mediations, the parties or their party representative must sign a written mediation agreement. In Appendix A we have compiled the relevant statutory provisions and the Rules of Procedure for Court-Ordered Mediation promulgated by the Florida Supreme Court in appellate court mediation, circuit court mediation, county court mediation including small claims, dependency or in need of services mediation, and family mediation. It should be noted that some of these rules of procedure have been amended as to appearance and completion of the mediation, and there is currently a petition pending to remove the requirement for counsel to sign the agreement and to eliminate signature by facsimile in appellate mediations. *In re: Amendments to Florida Rules of Appellate Procedure*, SC2024-0215.

(2) Small Claims mediations: The Civil Procedure Rules Committee correctly notes that there is no statutory requirement for

an attorney to sign a Mediated Settlement Agreement. However, in small claims mediations where counsel can attend on behalf of a party and the party does not appear, the attorneys sign the mediated settlement stipulation. See Fla. R. Civ. P. 1.750 (e) County Actions. We note that whenever an attorney signs a mediated stipulation or agreement it should be made clear in the signature line that they are signing as counsel for the party, and that they are not a party to the agreement. This should alleviate to some degree the ethical concerns raised by the Civil Procedure Rules Committee as to attorneys signing off on unethical mediation agreements.

B. Relevant Case Law:

The case law in Florida is well settled. In circuit civil cases (not including small claims cases) all parties must sign the mediation settlement agreement. Signature by counsel, even if in the presence of the party cannot substitute for signature of the party.

See *Parkland Condominium Association, Inc. v. Henderson*, 350 So.3d 484 (Fla. 2d DCA 2022)(the Court did not enforce a settlement agreement prepared by counsel for a party and accepted by email from counsel for the opposing party indicating that his client agreed to the documents as drafted; neither party signed the

settlement agreement). Accord, *Kozminski v. Koeppen, et al.*, 380 So.3d 1291, 1291 (the Appellants did not sign the mediation agreement so it was not enforceable). See also *Gordon v. Royal Caribbean Cruises Ltd.*, 641 So. 2d 515, 517 (Fla. 3d DCA 1994) (attorney's signature alone in presence of client who did not sign the settlement agreement reached during mediation is insufficient; *City of Delray Beach v. Keiser*, 699 So. 2d 855, 856 (Fla. 4th DCA 1997) (no binding agreement where neither party signed memo handwritten by one attorney)(citing *Gordon*); *Scott v. Tischler*, 882 So. 2d 461, 462 (Fla. 4th DCA 2004) (mediated agreement unenforceable where two parties refused to sign mediated settlement agreement) (citing *Gordon* and *Keiser*); *Mastec, Inc. v. Cue*, 994 So. 2d 494, 495 (Fla. 3d DCA 2008) (no binding agreement where mediated settlement agreement was not reduced to writing and the parties did not sign); *Dean v. Rutherford Mulhall, P.A.*, 16 So. 3d 284, 286 (Fla. 4th DCA 2009)(mediated settlement agreement unenforceable where signed by attorney but not his client).

This differs from non-court ordered mediation settlement agreements where the signature or agreement of counsel may bind

clients to the agreement. However, this sometimes raises issues as to whether the agreement was actually agreed to by the party and should be enforceable.

C. Fla. R. Civ. P. 1.730 (d):

Fla. R. Civ. P. 1.730 (d), provides for sanctions, including attorney's fees and costs, if there is a breach or failure to perform under a mediated settlement agreement. This Rule emphasizes the importance of understanding the parties' obligations under a mediated settlement agreement, and what may occur in the event of a breach or failure to perform, even when such sanctions are not specifically set forth in the mediation agreement.

“(d) 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, attorneys' fees, or other appropriate remedies including entry of judgment on the agreement.”

The scope of the Florida Rules of Civil Procedure extends to all circuit and county court cases (except those to which the Florida Probate Rules, the Florida Family Law Rules of Procedure, or the Small Claims Rules apply.) See Fla. R. Civ. P. 1.010. SCOPE AND

TITLE OF RULES.

COMMENT

The case law, statutory provisions, and mediation rules are clear. Settlement agreements reached at mediation must be signed by the parties. That is as it should be, since the hallmark of mediation is the self-determination of the parties. (“Decisions made during a mediation are to be made by the parties.” Rule 10.310, Florida Rules for Certified and Court Appointed Mediators).

Party self-determination also encompasses the right of a party to designate a party representative at mediation, with full authority without further consultation to negotiate and execute a mediated settlement agreement, subject to statutory and case law constraints, which require signatures by parties and not their counsel for a mediation agreement to be enforceable (except for small claims mediations). The Rules Committee has suggested amending the rules to permit a representative of an insurance carrier with full authority to settle a claim to sign a mediated settlement agreement when the insurance carrier representative appears at mediation but the defendant does not appear.

We believe that in order to protect the mediation process, to

assist the court and the parties, any designation of a party representative who can sign a mediated settlement agreement on behalf of a party without further consultation, pursuant to Fla. R. Civ. P. 1.720 (c) should be identified in writing.

The words “without further consultation” are important because deleting this language, which appears in Fla. R. Civ. P. 1.720 (b) regarding appearance by a “party representative having full authority to settle without further consultation” creates an ambiguity between proposed Fla. R. Civ. P. 1.730 (b) and Fla. R. Civ. P. 1.720. These rules should be read in tandem, and any ambiguity should be avoided.

The identification of a party representative **in writing** by the party will avoid disputes as to whether the party representative had the actual authority to negotiate and settle on behalf of a party without further consultation. This written identification can be satisfied by identifying the party representative in a Certification of Authority filed 10 days before the mediation, or as otherwise stipulated by the parties, as provided in Fla. R. Civ. P. 1.720 (e), or by any other writing, or stipulation signed by a party which is sent to the other parties prior to or during the mediation conference,

which makes it clear to the other part[ies] to the dispute that the party has designated a party representative with full authority and without further consultation to negotiate and settle at mediation, and sign the written mediation agreement or stipulation. This can include designations by the party in written contracts, powers of attorney, or in any other written form. The designation by a party of a party representative should be in **writing** and provided to the other party **prior to commencement of or at the mediation conference** so that the parties, counsel and the court know who represented the party at mediation in the event of any disputes. Mediators do not want to be called upon to disclose any mediation communications or communications in furtherance of mediation which are confidential and privileged, and the requirement of written disclosure by a party to all other parties should relieve the mediator from having to review such written disclosures, or determine their adequacy, or otherwise have to testify when issues of authority or appearance may arise. (“Except where disclosure is required or permitted by law or is agreed to by all parties and counsel, a mediator must maintain confidentiality of all information revealed during mediation. Rule 10.360, Florida Rules for Certified

and Court Appointed Mediators).

A party contesting the adequacy of a designation or authority of the party representative can bring such issue to the court without involving the mediator.

The ADR Section makes no comment as to whether the signature of counsel to a mediation settlement agreement should be required, other than in small claims mediations where only the attorney appears. We note however, that an agreement will not be enforceable if signed by counsel absent signature of the parties, and counsel should not be designated as a party representative. If counsel is required to sign, they should sign as counsel and not sign as a party, and indicate that they are not signing as a party, to avoid the ethical concerns raised by the Civil Rules Committee.

CONCLUSION

The ADR Section of The Florida Bar believes that Rule 1.730 (b), if amended, should state as follows:

“If a partial or final agreement is reached it must be reduced to writing and signed by each party or the party’s representative having full authority to settle without further consultation under rule 1.720 (c), and identified in compliance

with rule 1.720 (e) or as otherwise set forth in writing by the party and delivered by the party to all other parties prior to the commencement of or during the mediation. Counsel for the party, if any, may not serve as a party’s representative for the purpose of this rule or rule 1.720 (c), except in small claims mediations. [Counsel for all parties must sign the mediation settlement agreement in their capacity as counsel and not as a party].”

We take no position with regard to the Proposed Amendment deleting the requirement of the signature of counsel, if any, to the mediated settlement agreement, and note that the signature of counsel absent signature by the party or party representative makes the agreement unenforceable, whether counsel signs the agreement or not.

In light of the sanctions that can be imposed if a party designates someone as their party representative and fails to perform under the mediated settlement agreement or breaches the mediated settlement agreement, and questions which can arise as to the identity and authority to act as the party representative, we urge that this identification be in writing. This will also assist the

mediator and counsel in having the proper signatories to the mediated settlement agreement.

WHEREFORE, the ADR Section of The Florida Bar respectfully submits these comments for the Court's consideration in order to assist the court, the parties, and their counsel.

Certificate of Service

I certify that the foregoing Comments of The Alternative Dispute Resolution Section of The Florida Bar was served upon the individuals set forth in the Service List on October 1, 2024.

Certificate of Compliance

I certify that these rules were read against Thomson Reuters' Florida Rules of Court—State (2024 Edition). I certify that this report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045 and the requirements within In re: Guidelines for Rules Submissions, Fla. Admin. Order No. AOSC22-78 (Fla. Oct. 23, 2022).

Respectfully submitted,

/s/ Ana Cristina Maldonado
Ana Cristina Maldonado
Chair, Alternative Dispute
Resolution Section of
The Florida Bar

3070 Shepard Broad Way
Davie, FL 33314
Florida Bar No.: 89562
Telephone: 561-301-5174
Email:
maldonadomediation@gmail.com

SERVICE LIST:

Heather Savage Telfer
The Florida Bar Staff Liaison
651 East Jefferson Street
Tallahassee, FL 32399-2300
850/561-5833
htelfer@floridabar.org
rules@floridabar.org

Murray Bruce Silverstein
STINSON LLP 100 S Ashley Dr
Ste 500 Tampa, FL 33602-5301
813-534-7558
murray.silverstein@stinson.com

Joshua E. Doyle
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
850/561-5600
jdoyle@floridabar.org

APPENDIX A: STATUTES AND PROCEDURAL RULES
REGARDING VARIOUS TYPES OF MEDIATION:

STATUTORY PROVISIONS

(1) Enabling Statute:

Pursuant to §44.102 (1), Fla. Stat. (2024), the enabling statute for court-ordered mediation, court-ordered mediation shall be conducted according to the rules of practice and procedure adopted by the Supreme Court.

(2) Circuit court mediations:

§44.1011 (2) (b), Fla. Stat. (2024) states that in circuit court mediations “If a party is represented by counsel, the counsel of record must appear unless stipulated to by the parties or otherwise ordered by the court.”

(3) County court mediations, which include small claims disputes:

§44.1011 (2) (c), Fla. Stat. (2024) provides “negotiations in county court mediation are primarily conducted by the parties. Counsel for each party may participate. However, presence of counsel is not required.”

(4) **Dependency or in need of services mediation:**

These are referred often referred to as “juvenile” or “dependency mediations.” They are governed by the Fla. R. Juv. P.

Pursuant to §44.1011 (2) (d), Fla. Stat. (2024), “negotiations in dependency or in need of services mediation are primarily conducted by the parties. Counsel for each party may attend the mediation conference and privately communicate with their clients. However, presence of counsel is not required and, in the discretion of the mediator and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court.”

(4) **Family Mediations:**

Pursuant o §44.1011 (2) (e), Fla. Stat. (2024), “Negotiations in family mediation are primarily conducted by the parties. Counsel for each party may attend the mediation conference and privately communicate with their clients. However, presence of counsel is not required, and, in the discretion of the mediator and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court.”

(5) **Florida Mediation Confidentiality and Privilege Act**

§44.401-44.406 Fla. Stat. (2024):

For purposes of defining the beginning and end of court-ordered and all other mediations (duration), all mediations end when “A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court.” See 44.404 (1)(a) and (2)(a), Fla. Stat. (2024).

B. RULES OF PROCEDURE FOR MEDIATION.

(1) Fla. R. Civ. P. 1.720 (b) Appearance at Mediation:

This Rule provides:

“(b) Appearance at Mediation. A party is deemed to appear at a mediation conference if the following persons are physically present, or if authorized under rule 1.700(a), participating through the use of communication technology:

- (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 who is not such carrier’s outside counsel

and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

(c) Party Representative Having Full Authority to Settle. A "party representative having full authority to settle" shall mean 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. Nothing herein shall be deemed to require any party or party representative who appears at a mediation conference in compliance with this rule to enter into a settlement agreement.

(d) Appearance by Public Entity. If a party to mediation is a public entity required to operate in compliance with chapter 286, Florida Statutes, that party is deemed to appear at a mediation conference by the 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. Such representative may be physically present or, if authorized

under rule 1.700 (a), may participate through the use of communication technology.

(e) Certification of Authority. Unless otherwise stipulated by the parties, each party, 10 days prior to appearing at a mediation conference, must file with the court and serve all parties a written notice identifying the person or persons who will appear at the mediation conference as a party representative or as an insurance carrier representative, and confirming that those persons have the authority required by subdivision (b).”

(2) Fla. R. Civ. P. 1.730 Agreement:

Fla. R. Civ. P. 1.730 (b) requires both parties and counsel to sign a mediated settlement agreement [except as provided in Fla. R. Civ. P. 1.750, County Court Actions, see below].

Fla. R. Civ. P. 1.730(b) currently provides that:

“If a partial or final agreement is reached, **it must be reduced to writing and signed by the parties and their counsel**, if any.” (emphasis added)

The Proposed Amendment to this rule seeks to delete the requirement for counsel to sign, based upon concerns about

attorneys being asked to sign unethical provisions in the mediated settlement agreement. The Proposed Amendment references the Florida Bar Rule Regulating the Florida Bar, Rule 4-5.6 (b) and Florida Ethics Opinion 04-02. As a practical matter based upon mediator experience, many counsel sign mediation settlement agreements as “counsel for the parties” and do not agree to be bound by the agreement, or sign solely for the purposes of Rule 1.730 (b), or will not sign at all.

(3) Fla. R. Civ. P. 1.750 (e) County Actions: Appearance and Agreement:

Fla. R. Civ. P. 1.750 has two different rules for appearance and signature depending upon whether or not the matter is a small claims mediation.

“(e) Appearance at Mediation. In small claims actions, an attorney may appear on behalf of a party at mediation provided that the attorney has full authority to settle without further consultation. Unless otherwise ordered by the court, a nonlawyer representative may appear on behalf of a party to a small claims mediation if the representative has the party’s

signed written authority to appear and has full authority to settle without further consultation. In either event, the party need not appear in person. In any other county court action, a party will be deemed to appear if the persons set forth in rule 1.720(b) are physically present or, if authorized under rule 1.700(a), participating through the use of communication technology.”

(f) Agreement. Any agreements reached as a result of small claims mediation must be written in the form of a stipulation. The stipulation may be entered as an order of the court. Signatures for the stipulation may be original, electronic, or facsimile and may be in counterparts.”

(4) Fla. R. App. P. 9.720 (a): Appearance at Mediation:

Like the Circuit Court rule, the Appellate mediation rules require there must be the party or party representative, counsel, and a representative of the insurer present at mediation. The Rule states:

“(a) Appearance. If a party to mediation is a public entity required to conduct its business pursuant to chapter 286, Florida Statutes, that party is deemed to appear at a

mediation conference by the 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, a party is deemed to appear at a mediation conference by the presence of the following persons: (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 1 counsel, the appearance of only 1 counsel is required; and (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. As used in this subdivision, the term "presence" means physical presence at the mediation conference or participation using communication technology if authorized under rule 9.700(b).

....

(f) Party Representative Having Full Authority to Settle. Except as provided in subdivision (a) as to public entities, a "party or its representative having full authority to settle" shall mean 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. Nothing herein shall be deemed to require any party or party representative who appears at a mediation conference in compliance with this rule to enter into a settlement agreement.

(g) Certificate of Authority. Unless otherwise stipulated by the parties, each party, 10 days prior to appearing at a mediation conference, must file with the court and serve upon all parties a written notice identifying the person or persons who will appear at the mediation conference as a party representative or as an insurance carrier representative, and confirming that those persons have the authority required by this rule.”

(5) Fla. R. App. P. 9.740 (b): Agreement.

Currently the Appellate Rule requires signature of parties and their counsel.

“(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. Signatures may be original, electronic, or facsimile and may be in counterparts. Within 10 days thereafter, the mediator shall file a report with the court on a

form approved by the court.”³

(6) Fla. Fam. L. R. P. 12.740 (d): Appearance:

In family mediations, a party is required to appear at mediation, as is their counsel. However, in the discretion of the mediator, and with the agreement of the parties, mediation may proceed in the absence of counsel, unless otherwise ordered by the Court. This Rule reads:

“(d) Appearances. A party is deemed to appear if the named party is physically present at the mediation conference or, if permitted by court order or written stipulation of the parties, present via communication technology. In the discretion of the mediator and with the agreement of the parties, family mediation may proceed in the absence of counsel unless otherwise ordered by the court.”

(7) Fla. Fam. L. R. P. 12.740 (f) (1): Agreement:

In family mediations, only the parties are required to sign the mediated agreement. Fla. Fam. L. R. P. 12.740(f)(1) states:

³ There is a pending petition to remove the requirement for counsel to sign the agreement and to eliminate signature by facsimile. *In re: Amendments to Florida Rules of Appellate Procedure*, SC2024-0215.

“(1) If agreement is reached as to any matter or issue, including legal or factual issues to be determined by the court, the agreement must be reduced to writing, signed by the parties, and submitted to the court unless the parties agree otherwise. By stipulation of the parties, the agreement may be electronically or stenographically recorded and made under oath or affirmed. In that event, an appropriately signed transcript may be filed with the court. Signatures may be original, electronic, or facsimile, and may be in counterparts.”

(8) **Fla. R. Juv. P. 8.290 (1): Appearance:**

The Juvenile Rule is a multi-faceted rule because there are often many individuals required to attend or prohibited from attending mediation pursuant to court order. The Rule provides that mediation can proceed in the discretion of the mediator and with agreement of the attending parties, without counsel, unless the court otherwise orders. The Rule is set forth below:

“(1) Appearances.

(1) Order Naming or Prohibiting Attendance of Parties. The court must enter an order naming the parties and the

participants who must appear at the mediation and any parties or participants who are prohibited from appearing at the mediation. Additional participants may be included by court order or by mutual agreement of all parties. The order may provide for mediation to be conducted in person, by communication technology, or a combination thereof.

(2) Presence of Adult Parties and Participants. Unless otherwise agreed to by the parties or ordered by the court, any party or participant ordered to mediation must be present at the mediation conference either in person or, if permitted by court order or written stipulation of the parties, via communication technology. Persons representing an agency, department, or program must have full authority to enter into an agreement that is binding on that agency, department, or program. In the discretion of the mediator, and with the agreement of the attending parties, dependency mediation may proceed in the absence of any party or participant ordered to mediation.

(3) Appearance of Counsel. In the discretion of the mediator, and with the agreement of the attending parties, dependency

mediation may proceed in the absence of counsel unless otherwise ordered by the court.

(4) Appearance of Child. The court may prohibit the child from appearing at mediation upon determining that such appearance is not in the best interest of the child. No minor child is required to appear at mediation unless the court has previously determined by written order that it is in the child's best interest to be physically present. The court must specify in the written order of referral to mediation any special protections necessary for the child's appearance."

(9) **Fla. R. Juv. P. 8.290 (o) (1): Agreement:**

This Juvenile Rule only requires the parties attending the mediation to sign the Mediation Agreement. The Rule states:

"(o) Report on Mediation.

(1) If agreement is reached on all or part of any matter or issue, including legal or factual issues to be determined by the court, the agreement must be immediately reduced to writing, signed by the attending parties, and promptly submitted to the court by the mediator with copies to all parties and counsel. Signatures may be original, electronic,

or facsimile, and may be in counterparts.”