

O/a 2-5-90



SCOTT M. KENNEY
CIRCUIT JUDGE

State of Florida
Nineteenth Judicial Circuit

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January 17, 1990

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Honorable Raymond Erlich, Chief Justice
FLORIDA SUPREME COURT
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1925

CLERK, SUPREME COURT
By _____
Deputy Clerk

Re: Amendment to Florida Rules of Civil Procedure
1.700-1.780 (Mediation) Case No. 75,151

Dear Mr. Chief Justice:

I would like to comment upon certain of the proposed amendments to the mediation rules.

By way of personal background, part of my current judicial assignment includes domestic cases in St. Lucie County. Prior to that, my assignment included general civil cases. I have used mediation extensively in both areas, even before the enactment of the current statute.

Before commenting specifically, I believe the Supreme Court needs to be made aware of one very important development in the mediation field, which has arisen since the implementation of the mediation laws. There are several firms in Florida, whose main aim is to "corner" the private mediation market or at least obtain the vast "market-share". In addition, many private lawyers and non-lawyers have essentially abandoned their private practices, to become "full-time" mediators. They regularly solicit practicing attorneys and trial judges. However, many of them have absolutely no practical experience in the areas in which they are designated, other than taking the required mediation courses.

Obviously, the results can be devastating in marital cases

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and fruitless in other cases. Mediation is a great concept and tool for trial judges. Unfortunately, as happens with other good intentions, it is being abused by private marketers.

My first specific comment deals with proposed Rule 1.720(f)(2), which says there shall be a ~~rotation assignment~~ system, unless the chief judge enters an order to the contrary. This comment goes again to the proliferation of private mediators. ?

In this small Circuit alone, we have fifty certified general civil mediators. Our respective County Commissions have not deemed it necessary to fund a Court mediation office. Thus it is left to the individual assigned judges and their assistants to coordinate this process. We should not be obligated to use every certified mediator, especially where many get themselves certified in every single Circuit, even though they may live 500 miles away.

Nor should we be left to the whims of a Chief Judge in passing an Administrative Order. Rather, a trial judge should be allowed to choose and coordinate his or her own Mediators based upon experience and results. Of course, if the parties mutually choose another one, I have no problem and already allow it.

Essentially what I am asking, is that you give trial judges the discretion to control their own cases and dockets in this regard, unless the parties otherwise agree. If you do not, the private Mediators will do it. I do not believe that was the purpose of this entire concept. /

The ~~other specific comment~~ I want to make deals with proposed Rule 1.740(c) where I have to make an initial specific finding of ability to pay. In St. Lucie County we deal with many cases where there is not a lot of money, but they are fighting over custody and expected trial time is one-half day and more. I set those for mediation and 90% settle in 2-3 hours (many without lawyers, who are asked to leave after an initial presentation). Who would be able to pay lawyers' fees in those cases, if they went to trial for a day? Most likely, neither party can reasonably afford it.

I believe the better approach, is to give either side the chance to object based upon financial considerations. Some Circuits already have in-house mediators which allows the costs to be decreased. Again, the Commissioners in the Counties within my Circuit have not funded that yet, but, many of the private Mediators I have used do not dwell upon the parties' failure to

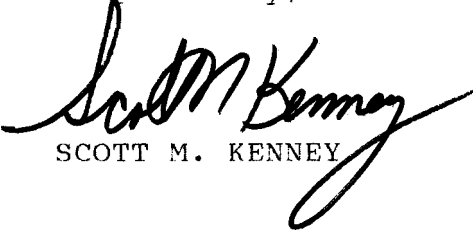
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pay. They will mediate the case. Once again, I believe you must give the assigned trial judge discretion in how to deal with these cases.

I realize one of the reasons behind the proposed rules is to put the parties in more control of the process. I respectively disagree, even though they should be allowed to chose their own qualified mediator. Mediators are, essentially, arms of a trial judge. Those judges should be able to control their own dockets. With the increase in supposed full-time mediators and the proliferation of firms who wish to control the market, these proposed rules would serve them, rather than the parties and trial judges.

Thank you for your attention to this matter.

Respectfully,



SCOTT M. KENNEY

SMK/mae

cc: Justice Parker Lee McDonald
Sid White, Clerk