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ADR Newsflash

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Big Changes in Mediation Appearance

Fla. R. Civ. P. 1.720 substantially rewritten

As a member of the National Academy of Distinguished Neutrals, the Florida Circuit Civil Mediator Society, and the Florida Academy of Professional Mediators, and as your professional colleague, I wanted to alert you to a significant revision to the mediation appearance rule, Fla. R. Civ. P. 1.720, which takes effect January 1, 2012.

In its November 3, 2011 opinion, SC10-2329, the Supreme Court of Florida adopted revisions to Rule 1.720 that mirror much of what the Court required in the Residential Mortgage Foreclosure Mediation Process, but with some clarifications. Other than a few reorganizations of prior rule content (such as moving the discussion of appearance by Ch. 286 government entities at mediation from subdivision (b) to renumbered subdivision(d)), the principal changes are three-fold:

1. While parties are still not required to settle, they must have present at mediation "the final decisionmaker 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." (new Fla. R. Civ. P. 1.720(c))
2. At least 10 days prior to the mediation conference, each party must "file with the court and serve all parties a written notice identifying the person or persons who will be attending the mediation conference as a party representative or as an insurance carrier representative, and confirming that those persons have the [required] authority. . ." (new Fla. R. Civ. P. 1.720(e))
3. Parties may be sanctioned for failing to appear (which, per the balance of the Rule, means failing to appear with the requisite settlement authority). The failure to file the certification of authority or the failure of persons named therein to appear constitute "a rebuttable presumption of a failure to appear." (new Fla. R. Civ. P. 1.720(f))

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Note: The Rule has always required having someone present who could make the final decision, so the new version of the Rule does not significantly alter that requirement. The new Rule does seem intended to go after the not infrequent practice of having an adjuster or representative attend who has only limited authority but who can reach someone else with such final authority by phone. The New Rule is also clearly intended to remind us that a mediation is MUCH likelier to yield a settlement if everyone participating has the ability to make any deal they wish. That flexibility and commitment to the process are what enable deals that might otherwise not occur.

Practice Tips for Lawyers mediating under the new Rule

- File the Certificate early, with several names of people who could be there, making it clear in your Certificate that you only expect one of them to attend mediation.
- Make sure at least one person listed on the Certificate is present.
- Obtain a stipulation with opposing counsel that no certifications need be filed. (See intro to Fla. R. Civ. P. 1.720(e))
- Obtain a stipulation (or, if they won't agree, a court order) allowing the person with authority to appear by phone. (See intro to revised Fla. R. Civ. P. 1.720(b)) Note: it will probably increase your chances of getting a stipulation or an order if you also have a live body present who has some authority.

Why ADR Newsflash?

When we attorneys attend continuing education to keep us up-to-date, we attend classes given by colleagues who are familiar with the latest trends and changes in the relevant law. As many of you know, I am something of an ADR – especially an ADR ethics – geek. I think the Rules, both the Ethics Rules and the Rules of Procedure, provide us the framework within which we must and should operate. Consequently, I spend an inordinate amount of time thinking about and discussing, in a variety of contexts, the Rules and Practice of Alternative Dispute Resolution.

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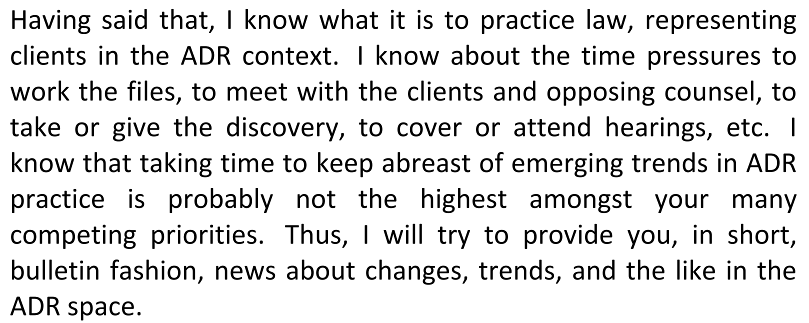

Having said that, I know what it is to practice law, representing clients in the ADR context. I know about the time pressures to work the files, to meet with the clients and opposing counsel, to take or give the discovery, to cover or attend hearings, etc. I know that taking time to keep abreast of emerging trends in ADR practice is probably not the highest amongst your many competing priorities. Thus, I will try to provide you, in short, bulletin fashion, news about changes, trends, and the like in the ADR space.

I hope you find this helpful. If you don't, please not only delete this email but also tell me you would like to be removed from my distribution list. Conversely, if you know of someone else you believe would be interested in receiving this occasional newsletter, please forward it to him/her and cc: me – I will add him/her to the database.

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