

Knobel Mediation Services

112 Sharpe Street
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SAVING YOUR CLIENTS AND YOU MONEY THROUGH MEDIATION AND ARBITRATION

Let me make two assumptions: first, let me assume that you have an active family law practice where (1) all of your many clients have been fully and completely satisfied with your professional services, (2) they have paid you, to date, every single dollar of the fees and costs you've charged them, without questions or concerns, and (3) you have absolutely no doubt that as your case ultimately goes to trial, and is possibly appealed, your clients will continue to be pleased with you and will pay your fees and costs in full, no matter the amount.

If this assumption is correct, don't waste your time reading any further. Have a nice day.

For the second assumption, let me assume that everything stated above is the complete opposite.

Before I go any further, and to avoid any claim of absolute plagiarism, I want to give attribution to Jim McLaren, Esq., of Columbia, for making an excellent presentation on this very subject at the December, 2008 Family Law Bench/Bar CLE.

I recently sent out an e-mail wondering why there is apparent resistance among South Carolina family law attorneys to engage in some form of arbitration (and, arguably, mediation). Some responses were cordial, some were pretty blunt, but they all came to the same conclusion: "MONEY". They said mediation and arbitration are too expensive and clients cannot afford it...or, the "amount of money involved in the case" doesn't warrant mediation or arbitration. They related miserable experiences they had encountered with the appointed mediator.

Let's look at what you perceive to be the "problem", and let me just encourage that you try to see the potential of mediation and arbitration as offering your clients and YOU an opportunity, not an obstacle.

First of all, always remember that inside a family courtroom you always should at least have a 50/50 chance of being successful for your clients.

And compare those odds with you always having a 100% chance of having a successful outcome for your client in a carefully planned and well-conducted mediation (I realize I'm discussing with you "mediation" and not "arbitration"...the arbitration discussion will come later).

With that said, all family law attorneys in this State have *requirements, options, and considerations* which are in play in dealing with the issue of mediation/arbitration costs. If you already know what they are, then quit reading, and have a nice day.

Requirements:

(1) In the court-annexed ADR Rules affecting those counties who are under mandatory family court ADR, Rule 4(d)(1) requires that “if there are unresolved issues of custody or visitation...the court shall appoint a mediator at a temporary hearing. If there is no temporary hearing, then the parties shall agree upon a mediator or notify the court for the appointment of a mediator within fifteen (15) days of the joinder of the issues of custody or visitation...”. If those issues (custody or visitation) are in play, you have no choice but to mediate those issues. Now, how could you get around it? One way is to hope the family court judge conducting your temporary hearing doesn’t know that Rule, and you choose not to bring it to his or her attention. Another way is that neither the attorneys nor the judge involved in your temporary hearing are aware of this Rule, or, if they are aware of it, they all choose to ignore it or, at least, not be bound by it. There are several other, more preferred, alternatives which I’ve listed under “*Options*”, below.

(2) Under ADR Rule 4(d)(2), if there are issues other than custody or visitation, you are required to mediate those issues prior to scheduling your “hearing on the merits” (“...The court shall not schedule a hearing on the merits until a Proof of ADR has been filed.”)

(3) Under ADR Rule 4(d)(4), the initial mediation conference must occur within 30 days of the mediator’s appointment or selection.

(4) Pursuant to *South Carolina Code Ann. §63-3-530(39)*, any family court judge in any county, not just the ADR-mandated counties, has the jurisdiction to order that parties engage in mediation.

Options:

(1) Under ADR Rule 5(e), you can always file a motion (or include such a motion along with your motion for temporary relief), requesting that your chief administrative judge exempt your case from any mediation requirements. The Rule lists, as case-specific reasons for exemption, “incarceration or mental or physical condition”, but you can list whatever you believe might work (e.g., your client has moved to another state, you have raised issues of domestic violence making it dangerous for your client to be in the same room or vicinity of the spouse, etc.).

(2) Under ADR Rule 9(b), if the judge orders mediation (as opposed to the attorneys consenting to it), the court order can set the mediation fees at \$175 per hour (in fact, the order can include the specific language from this Rule). (Note: the ADR Rules anticipate that the mediation fees will be split equally between or among the parties.)

(3) If your client believes he or she qualifies for “indigency status”, then under ADR Rule 9(d), he or she (through you) may make a motion before your chief administrative judge to be exempted from the payment of any mediation fees. However, there is only a 10-day window “after the ADR conference has been concluded” within which your client must file an

indigency request. Arguably, you should at least make that request before or at the time your case is sent by the judge to mediation.

(4) If your case is mediated, without success, and you believe the other party violated “any provision of the ADR Rules without good cause”, then pursuant to ADR Rule 10(b), you can request that the court award your client his/her mediation fees.

Considerations:

With all due respect, if at any time you make the statement – or take a broad position – that “my client cannot afford the mediation fees”, then you have put all of the following very quickly into motion:

- Short of fully settling your case, you have eliminated and closed the door, outright, of giving your client even the opportunity of getting an early resolution of his or her case. To protect yourself, it might be a good idea to have your clients sign some brief acknowledgement that you have fully explained the “mediation requirements” to them, and that they have knowingly elected to forego any efforts to mediate their case.
- You have most probably extended the time when your client’s case will get into court for trial by 9 – 18 months, depending upon the county in which the case is filed. This may not matter to a patient client involved in a divorce or custody dispute.
- As Jim McLaren so clearly and cogently stated, the time you invest in preparing your client’s case for trial and trying the case, at your hourly rate, will most probably be substantially more than the total of all the mediation fees which may have been incurred in your case (remember: unless otherwise agreed by the parties, under the ADR Rules your client is responsible for only one-half of the mediation fees...conversely, your client is responsible for 100% of your fees...think about that for a moment). Also, consider the additional time you will spend in meeting with witnesses, engaging in discovery, taking depositions, issuing any subpoena...and on and on. If you have a client who can easily pay you for all of your time, your paralegal’s time, your advanced litigation costs, etc., then terrific...good luck at trial. I hope your trial judge awards you substantial attorney’s fees and all of your litigation costs...and, also, good luck with any appeal.

As you of course know, all of this is just food for thought...nothing more, nothing less.

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