

SAVING YOUR CLIENTS AND YOU MONEY THROUGH MEDIATION AND ARBITRATION

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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.

As I have continued to travel the State with my ADR practice, I often ask family law attorneys why there has been an apparent resistance (or stated otherwise, a lack of general acceptance) among South Carolina family law attorneys to embrace, and 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 often disappointing, even miserable, experiences they had encountered with the appointed mediator or arbitrator.

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 should at least have a 50/50 chance of being successful for your clients; and if you have a client with a "gambler's mentality", then those odds of success may be appealing (no play on words intended).

And compare those odds with ***your 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 now. However, for the rest of us, we are finding

that due in large part to the stark reality of “docket delay” (that ever-expanding period of time been the commencement date of your case and the actual trial of the merits), the family law bars of more and more counties are opting to be included as a “mandatory mediation” county (the number now stands at 19, and counting).

Requirements:

(1) In the court-annexed ADR Rules affecting those counties who are under mandatory family court alternative dispute resolution, **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, and especially in a mandatory mediation county, 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, and perhaps longer, depending upon the county in which the case is filed. This may or may not matter to a “patient” client involved in a divorce or custody dispute.
- As Jim McLaren so clearly and cogently stated in a prior CLE, 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 or ordered by the court, 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.

YOU DECIDE – THE CASE FOR ARBITRATION IN THE FAMILY COURT

Take it from someone who never was one - but who has observed many over the past 37+ years - family court trial lawyers in South Carolina comprise the very best trial lawyers in any court, at any level, in this State...period.

Think about it for a few minutes. No, seriously, think about it.

On a level of importance, is it more important to be able to successfully seek (and recover) insurance proceeds for someone injured in a car wreck...or to be able to win for a parent the custody (lives, souls, hearts) of their children? How important is it for a family court trial lawyer to anticipate the future financial needs of your client and then successfully provide for those needs? Can you compare trying a “road-closing” or condemnation case with defending a case where one side is attempting to forever terminate a parent’s right to be with his or her children? How does a family court trial lawyer artfully remove (and then later skillfully use) the emotions (anger, bitterness and hurt) in a case where a client’s spouse has committed adultery (for many, the ultimate marital sin)?

A family court trial lawyer is both required and compelled to be, concurrently:

- Brilliant and mentally agile
- Eloquent
- A skilled therapist and counselor
- Prescient (a great word)
- Empathetic
- Cool under pressure
- An exceptionally hard worker (always fully capable of outworking the opposition)
- Able to focus, laser-like, on the task at hand
- Personable (both inside and outside the family courtroom)
- An amazing, skilled negotiator
- Always overly-prepared and trial-ready
- Able to fully control, and remain in control of, the court process
- Able to win every appeal, whether representing the respondent or appellant

And with all these diverse skills, a family court trial lawyer has to impress only one person in the courtroom. Not 12, not 6...just one, just a jury of one.

Hmmmm...let me think about this for just a moment. Give me a second. OK, a family court trial lawyer has the talent and the abilities to control every aspect of his or her case (client and witness preparation, evidence preparation, preparation for cross-examination). What’s left to control? Oh, yes...you can’t pick your decider. Pure luck of the draw there, man.

You have a great case for joint custody, but the family court judge who is to try your case never awards joint custody in a contested case, and rarely grants anything beyond “standard visitation”. And for that matter, you’ve drawn a judge who has a reputation for rarely, if ever, awarding alimony.

Let's complicate the matter somewhat.

You're also charging your client \$200 an hour for out-of-court time, \$250 an hour for in-court time, and \$90 an hour for paralegal time. Your bill is now up to \$7,500 (which is about 37.5 hours of pre-trial time not counting your paralegal's time), but you've been paid only a \$2,500 retainer to date. You've also incurred pre-trial costs of over \$2,000 to date. Your case is well over a year old and you have received a 365-day benchmark letter from your clerk of court informing you that your client's case is to be dismissed. Your client has been recently (and maybe longer) second-guessing your skill level (all settlement negotiations have so far been a bust, the depositions didn't go so well, and you're having some "witness problems").

Now - and you knew this was coming - consider this for just one moment:

What if, just what if:

- You could pick your decider.
- You could pick the date, time and location for the final "hearing" of your case.
- You can choose not to worry about following strict rules of evidence (no "I object, your Honor, that's irrelevant"...or no, "and Mrs. Smith what value would you place on that set of used Tupperware?").
- You choose not to have a hearing record.
- You could schedule your "hearing" without ever worrying about docket time, without ever worrying about what you will tell your client when he/she asks you "what's taking so long".
- You can get a final decision within 30 days of your "hearing".
- The total fees and litigation expenses incurred by the parties will be far less than if this same, identical case went to a trial inside a family courtroom...oh, and what if you have a much better chance of being fully paid.

Would you believe that, except in the unusually complex case, it can be far less expensive to arbitrate a case than mediate it...or take it to trial? And, yes, I'm talking about your "these parties only have a mobile home and a mountain of debt" case.

Having participated in any number of ADR cases over the past 2 ½ years, I remain convinced that, prior to the beginning of the mediation process, the better prepared and more knowledgeable your mediator is with the case-at-hand, the greater the opportunity to foresee potential obstacles, avoid them, move forward and settle your case in its entirety.

Conversely, in arbitration, your arbitrator needs to have an arbitration order in place, review the pleadings and know the issues beforehand...and start.

Just take a moment to think about it...take just a moment of your time.

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