

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC22-122**

IN RE: REPORT AND  
RECOMMENDATIONS OF THE  
WORKGROUP ON IMPROVED  
RESOLUTION OF CIVIL CASES

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**COMMENTS ON THE PROPOSED AMENDMENT TO RULE  
10.420, FLORIDA RULES FOR CERTIFIED AND COURT-  
APPOINTED MEDIATORS**

The Supreme Court Committee on Alternative Dispute Resolution Rules and Policy (Committee) by and through its undersigned Chair, The Honorable Michael S. Orfinger, hereby respectfully submits its comments regarding the amendment to Rule 10.420, Florida Rules for Certified and Court-Appointed Mediators, proposed in the Final Report filed by the Workgroup on Improved Resolution of Civil Cases (Workgroup) as the petition herein. This comment was approved by the Committee by a vote of 15 to 0.

First, the Committee would like to thank the Workgroup for their work on this important project. This comment is specifically directed to the proposed amendment to Rule 10.420, Florida Rules for Certified and Court-Appointed Mediators, proposed in section IV.E.4. of the Final Report,<sup>1</sup> and to the impacts the proposed amendment will have on mediations conducted in conjunction with pretrial conferences in small claims cases conducted under rule 7.090(f), Florida Small Claims Rules. The Final Report recommends, in small

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<sup>1</sup> The amended text of the subject rule, as proposed in the Final Report, may be found in Appendix 1 to the Final Report at page 184 and in Appendix 2 to the Final Report at page 145.

claims cases, that the mediator conduct a group orientation rather than an individual orientation as Rule 10.420 currently requires for all cases. While the goal of the amendments is to “speed up” the mediation process, group orientations involving multiple cases and multiple litigants will not necessarily improve the resolution of civil cases and will instead compromise the mediator’s ethical responsibilities to both the process and the parties. The Committee’s sentiments are captured by the following comment from one of the Committee members:

Most small claims cases involve at least one, and often two, parties who are unrepresented and quite unfamiliar with the litigation process. Many are overwhelmed with appearing at a courthouse for the first time, have no idea what is happening the morning they appear, and have little to no understanding about why they are being forced into a room with a person called a mediator. The mediator’s orientation session is critical to allaying their concerns, putting them at ease, allowing the mediator to establish rapport with the participants, and making sure they understand the true role of the mediator - to serve as a neutral facilitator.

Dispensing with an opening statement might save, at most, three to five minutes per mediation. However, it may be even less than that because no one would expect to commence a mediation without at least doing introductions (30 seconds to one minute) and making sure everyone is present that needs to be present and dealing with any extra players who have attended the session.

Simply tossing these people into a room with a mediator who will conduct no orientation session will leave the participants suspicious of the mediator, leave them wondering about the mediator’s neutrality, and may result in the

mediator having to spend valuable caucus time establishing a rapport that could have been established in a brief opening session. If the participants lack confidence in the mediator and the process, the mediation could be expected to produce fewer settlements.

While the Committee lauds the Workgroup's desire to improve the resolution of cases, the Committee believes the Workgroup's recommendation will have the opposite effect. By quickening the pace of pre-trial conference hearings, the proposed change would likely confuse small claims litigants who largely appear pro se. Further, the recommended change will unintentionally cause breaches of mediation confidentiality and the mediator's ethical obligation to maintain confidentiality. The Committee believes this will ultimately lead to fewer settlements in the mediations held. In short, the Workgroup's effort to increase the number of mediations processed will likely reduce the quality of mediation outcomes and invariably reduce the public's trust in the mediation process.

The Committee also observed that the Workgroup's recommendation is contrary to Mediator Ethics Advisory Committee (MEAC) Opinion 2016-006, which states that "if the orientation session (or any part of a mediation session) occurs with other parties from unrelated cases, confidentiality is compromised." MEAC Op. 2016-06 cites the Mediation Confidentiality and Privilege Act, sections 44.401-406, Florida Statutes, in support of this proposition. Section 44.404, Florida Statutes, states that court-ordered mediation begins "when an order is issued by the court." Section 44.405, Florida Statutes, states "all mediation communications [are] confidential" except when disclosure is required or permitted by law. Efficiency is not one of the permitted exceptions under this statute. The orientation sessions contemplated in the Workgroup's recommendation occur after referral, and therefore after confidentiality has attached to the proceeding.

In addition, rule 10.360(a), Rules for Certified and Court-Appointed Mediators, places the burden on mediators to safeguard the confidentiality of each mediation. Rule 10.360(a) states, “a mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties.” It is antithetical to have confidential mediation communications shared among multiple cases, multiple litigants, and multiple mediators in open court.

### **CONCLUSION**

WHEREFORE, the Committee respectfully submits these comments to the proposed amendments, as detailed above, to the Florida Rules for Certified and Court-Appointed Mediators, and requests that the proposed amendment to Rule 10.420, Florida Rules for Certified and Court-Appointed Mediators, addressed herein, not be adopted.

Respectfully submitted on behalf of the Committee this  
2nd day of May 2022.

/s/ Michael S. Orfinger  
Michael S. Orfinger, Circuit Judge  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above Comments were served upon the Hon. Chief Judge Robert Morris, on behalf of the Workgroup as its Chair, by U.S. Mail at Second District Court of Appeals, P.O. Box 327, Lakeland, Fl 33802; and upon Tina White, OSCA Staff Liaison, Workgroup on Improved Resolution of Civil Cases, and all other interested parties through the Florida Courts E-Filing Portal, on this 2nd day of May 2022.

**CERTIFICATE OF COMPLIANCE**

I certify that this rule was read against *Thomson Reuters' Florida Rules of Court—State* (2022 Edition). I certify that this response was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045(b).

/s/ Thomas A. David  
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