

**PROPOSED AMENDMENTS TO LOCAL RULES OF PRACTICE AND PROCEDURE
FOR THE GENERAL DIVISION OF THE MONTGOMERY COUNTY
COURT OF COMMON PLEAS**

COMMENTS DUE BY MAY 4, 2007

COMMENTS REQUESTED: Pursuant to Loc. R. 1.03, Local Rules of Practice and Procedure for the General Division of the Montgomery County Court of Common Pleas, proposed amendments to **Loc. R. 2.39, Civil Mediation**, are being published for a sixty-day public comment period beginning **Wednesday, March 7, 2007, through Friday, May 4, 2007**.

Comments on the proposed amendments to the local rule can be submitted via email to rulecom@montcourt.org or in writing to:

James W. Drubert, Court Administrator
Montgomery County Common Pleas Court
41 N. Perry Street
P.O. Box 972
Dayton, OH 45422

Comments must be received by 4:30 p.m. on Friday, May 4, 2007.

EFFECTIVE JUNE 11, 2007

The proposed amendments to the local rule will take effect on **June 11, 2007**, unless prior to such date the Court in its discretion amends, modifies, or withdraws the local rule. In the event the Court amends, modified, or withdraws the local rule, the revision will be published for a thirty-day notice period.

Deletions are shown with the following attributes and color:

Strikeout, Blue.

Deleted text is shown as full text.

Insertions are shown with the following attributes and color:

Double Underline, Redline, Red.

RULE 2.39 **CIVIL MEDIATION**

1 I. REFERRAL TO MEDIATION

2 A. Any civil case may be referred to mediation pursuant to a party's motion,
3 or by agreement of the parties, or on the Court's own motion. The referral
4 to mediation may occur at the pretrial scheduling conference or at any
5 other time prior to trial.

6 B. Cases may be referred to only one form of alternative dispute resolution.
7 Therefore, cases referred to mediation will not be referred to arbitration. If
8 all parties advise the Court that they would prefer arbitration, the Court
9 may order the case to arbitration under Mont. C.P.R. 2.35.

10 C. In any case in which a mediation referral is requested or ordered, all
11 parties and counsel have a continuing duty to and shall ~~advise~~disclose to
12 the assigned Judge ~~or the Mediator~~ of any domestic violence allegations
13 known to them ~~to exist or to have existed in the past, or which become~~
14 known to them following entry of the order but, the Mediator, and the
15 mediation staff whether any of the opposing parties have either resided in
16 a common residence or are related by blood, adoption, or marriage, and
17 have known or alleged domestic abuse at any time prior to or following the
18 referral of the case to mediation and before conclusion of ~~all~~the mediation
19 proceedings, ~~which allegations involve any two or more persons whose~~

20 attendance is process. Such party shall have a duty to participate in any
21 screening required by the Supreme Court of Ohio's Rules of
22 Superintendence Rule 16 both prior to, and, in the Mediator's discretion,
23 during the mediation session(s).

24 D. No referral to Mediation shall be made in this Division in any of the
25 following circumstances:

26 1. As an alternative to the prosecution or adjudication of domestic
27 violence;

28 2. In determining whether to grant, modify or terminate a protection
29 order;

30 3. In determining the terms and conditions of a protection order; and

31 4. In determining the penalty for violation of a protection order.

32 E. Nothing in Section I. D: 1 - 4 of this rule shall prohibit the use of mediation
33 in a subsequent divorce or custody case in another Division or Court even
34 though that case may result in the termination of the provisions of a
35 protection order issued by this Court.

36 II. OBJECTION TO MEDIATION

37 A. For good cause, a party may object to the referral to mediation by the
38 Court on its own motion by filing a written request for reconsideration
39 within ten (10) days of the date of the Court's order of referral to
40 mediation.

41 B. Mediation processes shall be stayed pending decision on the request for
42 reconsideration, unless otherwise ordered by the Court.

43 III. CASE MANAGEMENT OF MEDIATION CASES

44 A. For those cases referred to mediation, the assigned Judge will continue to
45 manage the case in the appropriate manner by setting a future trial date
46 and establishing appropriate deadlines.

47 B. In cases identified for mediation, a specific order of referral shall go out to
48 counsel indicating the case has been referred to mediation and notifying
49 them of the date and time of the following events.

50 1. Telephone Status Conference: A telephone status conference
51 between the Court Mediator and counsel primarily responsible for
52 the case shall be scheduled approximately thirty (30) days prior to
53 the mediation conference. During the telephone status conference,
54 the case is reviewed for readiness for mediation. Any substantive
55 issues, discovery matters, or areas of conflict between counsel
56 shall be discussed during the telephone status conference.
57 Counsel must be available for any scheduled telephone status
58 conference on a mediated case.

59 2. Mediation Conference: A mediation conference shall be scheduled
60 no later than ninety (90) days prior to the scheduled trial date,
61 unless otherwise ordered by the Court. Parties and persons
62 necessary with authority to settle the case, as well as counsel for
63 all parties, are required to be present at the mediation conference.

64 C. Each party shall submit a mediation conference statement not to exceed
65 three (3) pages to the Court Mediator and all other parties no later than
66 ten (10) business days prior to the mediation conference. The statement

67 shall set forth the relevant positions of the parties concerning factual
68 issues, issues of law, damages, and the settlement negotiation history of
69 the case, including a recitation of any specific demands and offers that
70 have been conveyed. **These statements are not to be filed with the**
71 **Clerk of Courts and will be maintained separate and apart from the**
72 **case file.**

73 1. Any party that desires to convey confidential information to the
74 assigned Mediator with the provision that the information not be
75 disclosed to the other party without the submitting party's later
76 consent, shall submit the information to the assigned Mediator
77 clearly indicating the request for confidentiality. **The information is**
78 **not to be filed with the Clerk of Courts and will be maintained**
79 **separate and apart from the case file.**

80 IV. MEDIATOR

81 A. Mediation conferences for cases referred to mediation will be conducted
82 by the Court Mediator. In the event that the Court Mediator is not available
83 to conduct a mediation conference prior to the scheduled trial date, the
84 assigned Judge may appoint another Mediator from a list of qualified
85 Mediators that is maintained by the Court.

86 B. In accordance with O.R.C. 2710.08 (A) and (B), the Mediator assigned by
87 the Court to conduct a mediation shall disclose to counsel, the mediation
88 parties, and any nonparty participants any known possible conflicts that
89 may affect the Mediator's impartiality as soon as such conflict(s) become
90 known to the assigned Mediator. If counsel or a mediation party requests

91 that the assigned Mediator withdraw because of the facts so disclosed,
92 the assigned Mediator may withdraw and request that the assigned Judge
93 appoint another Mediator. If the assigned Mediator determines that
94 withdrawal is not warranted, the assigned Mediator may elect to continue.
95 The objecting party may then request the assigned Judge to remove the
96 assigned Mediator. The assigned Judge may remove the assigned
97 Mediator and appoint another Mediator from a list of qualified Mediators
98 that is maintained by the Court. If the assigned Judge decides that the
99 objection is unwarranted, the mediation conference shall proceed as
100 scheduled, or, if delay was necessary, as soon after the scheduled date
101 as possible.

102 C. List of Qualified Mediators: The Court maintains a list of qualified
103 Mediators which shall be maintained by the ADR Office and a copy shall
104 be distributed to all Judges of the Court.

105 1. All persons whose names are placed on the list of qualified
106 Mediators shall submit to the ADR Office a regularly updated
107 Curriculum Vitae (including a list of professional or association
108 memberships) which CV shall be provided by the ADR Office to
109 those requesting information on an assigned Mediator's
110 qualifications to mediate a dispute as required by O.R.C. 2710.08
111 (C).

112 2. The Court will review applications of persons seeking to be added
113 to the list of qualified Mediators in accordance with the procedures
114 adopted from time to time by the Judges of the Court.

- 115 D. An assigned Mediator shall receive a fee of two hundred dollars (\$200.00)
116 for conducting mediation conferences requiring four (4) hours or less of
117 time. In mediation conferences requiring more than four (4) hours, an
118 assigned Mediator shall receive a fee of four hundred dollars (\$400.00)
- 119 1. In cases requiring conferences of unusual duration, the assigned
120 Judge, on petition of the assigned Mediator and for good cause
121 shown, may allow additional compensation.
 - 122 2. All compensation for assigned Mediators shall be paid upon proper
123 warrant, from funds of Montgomery County, Ohio, which have been
124 allocated for the operation of the Common Pleas Court of
125 Montgomery County, Ohio.
 - 126 3. If a case is continued, settled, or dismissed more than seven (7)
127 days prior to the scheduled mediation conference date, the
128 assigned Mediator shall not be entitled to compensation except in
129 cases where the ADR Office is not notified of the continuance,
130 settlement, or dismissal by that date. If a case is continued, settled,
131 or dismissed less than seven (7) days but more than two (2) days
132 prior to the scheduled mediation conference date, the assigned
133 Mediator shall be entitled to a cancellation fee in the amount of
134 one-half of the compensation rate for conducting the mediation
135 conference. If a case is continued, settled, or dismissed less than
136 two (2) days prior to the scheduled mediation conference date, the
137 assigned Mediator shall be entitled to a cancellation fee in the
138 amount of the full compensation rate for conducting the mediation
139 conference.

140 V. MEDIATION CONFERENCE

141 A. At the mediation conference, the assigned Mediator shall help the parties
142 identify areas of agreement and explore the possibility of settling the case
143 through mediation techniques.

144 1. The facts and issues will be discussed by each side and a good
145 faith effort will be made to settle the case;

146 2. Any discovery or problems that are standing in the way of
147 resolution will be identified including whether domestic violence is a
148 factor impacting the continuation of mediation efforts;

149 3. Possible solutions will be discussed and pursued to agreement, if
150 possible;

151 4. In the event the case is not ready for resolution, parties will identify
152 the information or discovery they require in order to be in position to
153 negotiate further.

154 5. Where appropriate, determining and encouraging referrals to legal
155 counsel or other support services for all parties, including victims of
156 and suspected victims of domestic violence. For that purpose, the
157 ADR Office has available for distribution to clients a brochure which
158 includes local attorney referral contact information; information
159 regarding Children Services; and resource information for local
160 domestic violence prevention, counseling, substance abuse, and
161 mental health services.

162 B. Any additional mediation conferences shall be scheduled within sixty (60)
163 to ninety (90) days following the initial mediation conference, unless the
164 assigned Mediator determines that an earlier or later date is necessary.
165 Agreed upon information exchange may be required prior to the next
166 scheduled mediation conference.

167 VI. ATTENDANCE AT MEDIATION CONFERENCES

168 A. Parties

169 1. All persons whose consent is required to resolve a dispute, whether
170 or not named as parties in the pleadings shall attend all mediation
171 conferences, unless their attendance has been excused by the
172 assigned Mediator. This attendance requirement reflects the
173 Court's view that one of the principal purposes of the mediation
174 process is to afford litigants an opportunity to articulate their
175 interests and to learn about the interests expressed by their
176 opposing parties.

177 2. If counsel or any mediation party or non-party participant becomes
178 aware of the identity of a person or entity whose consent is
179 required to resolve the dispute, but who have not yet been joined
180 as a party in the pleadings, they shall promptly inform the assigned
181 Mediator as well as the assigned Judge of such fact.

182 3. Where attendance of a party is required, a party other than a
183 natural person satisfies the attendance requirement if it is
184 represented by a person or persons, other than outside or local
185 counsel, with authority to enter into stipulations, with reasonable

186 settlement authority, and with sufficient stature in the organization
187 to have direct access to those who make the ultimate decision
188 about settlement.

189 4. In accordance with R.C. 2710.09, a party shall be permitted to have
190 in attendance at a mediation session a designated attorney or
191 counsel and/or other individual of their choosing. However, parties
192 should recognize that attendance of some individuals may hinder
193 discussion or settlement in mediation and that all parties have
194 power to decide whether to continue discussions, what terms of a
195 proposed agreement are acceptable, and whether to enter into a
196 settlement agreement.

197 5. Failure of a party to attend a mediation conference shall be
198 reported by the assigned Mediator to the assigned Judge who may
199 impose sanctions, which may include, but are not limited to, the
200 award of attorneys' fees and other costs, contempt or other
201 appropriate sanctions at the discretion of the assigned Judge.

202 B. Counsel

203 1. Counsel who is primarily responsible for each party's case shall
204 attend all mediation conferences and shall be prepared and
205 authorized to discuss all relevant issues, including settlement.

206 C. Adjusters

207 1. Unless excused by the assigned Mediator the responsible adjuster
208 handling the case for an insurer shall be present at the mediation
209 conferences.

210 VII. PROCEDURE AT MEDIATION SESSIONS

211 A. Participation in mediation pursuant to an Order of this Court shall
212 constitute agreement pursuant to O.R.C. 2710.07 by the participants that
213 all “mediation communications” as defined in O.R.C. 2710.01 (B), in
214 addition to being subject to the privileges set out in Chapter 2710, shall be
215 treated by the parties, their counsel, the assigned Mediator, and the Court
216 as confidential and shall not be disclosed without consent of the other
217 participants in the mediation process, except for the following:

- 218 1. Information that is statutorily mandated to be reported.
- 219 2. Information that is permitted to be reported by O.R.C. 2710.06 (B).
- 220 3. Information that is not privileged pursuant to O.R.C. 2710.05.

221 B. If the assigned Mediator determines that further mediation efforts would
222 be of no benefit to the parties, he or she shall inform all interested parties
223 and the Court that the mediation is terminated.

224 C. Upon reaching a settlement in mediation:

225 1. The assigned Mediator, upon his or her discretion, may
226 immediately prepare a written memorandum memorializing the
227 agreement reached by the parties. The memorandum shall be
228 signed by the parties and counsel.

229 2. Counsel shall be instructed to present a termination entry for
230 approval within fourteen (14) days.

231 a. The fact that a settlement has been reached shall be
232 transmitted to a clerical person who shall check for the filing

233 of the termination entry at the end of the fourteen (14) day
234 period;

235 b. If the termination entry has not been filed, then a notice shall
236 be sent to counsel informing them that they have fourteen
237 (14) days to file a termination entry; and

238 c. If no entry has been filed fourteen (14) days after notice has
239 been sent to counsel, then an administrative dismissal entry
240 shall be sent to the assigned Judge for approval.

241 VIII. CONTINUANCE OF A MEDIATION CONFERENCE, INABILITY OF MEDIATION TO PROCEED

242 A. The Court Mediator may grant a continuance of a mediation conference for
243 good cause shown after a mutually acceptable future date has been
244 arranged with all concerned parties. In no event shall a mediation
245 conference be continued more than twice without a continuance entry and
246 approval of the assigned Judge.

247 B. If a case is settled or dismissed prior to a scheduled mediation
248 conference, the parties shall promptly file a settlement and conditional
249 dismissal entry. Counsel for plaintiff(s) shall inform the ADR Office by
250 phone that the assigned mediation date will not be needed. This contact
251 shall be made immediately following agreed settlement. Failure to so
252 notify the ADR Office will result in assessment of the fees set out in
253 paragraph C below.

254 C. If a case is continued, settle or dismissed less than seven (7) days prior to
255 the scheduled mediation conference date, the following fees shall be
256 assessed.

- 257 1. If a case is continued less than seven (7) days prior to the
258 scheduled mediation conference date, a fee in the amount of the
259 cancellation fee paid to the qualified Mediator under [Section](#)
260 [IV\(D\)\(3\)](#) of the rule will be assessed to the party requesting the
261 continuance.
- 262 a. If counsel appears for a mediation conference and is not
263 prepared to proceed, a fee in the amount of the cancellation
264 fee may be assessed.
- 265 2. If a case is reported settled less than seven (7) days prior to the
266 scheduled mediation conference date, a fee in the amount of the
267 cancellation fee paid to the assigned Mediator under [Section](#)
268 [IV\(D\)\(3\)](#) of the rule will be assessed to the parties as agreed upon
269 by the parties. If there is no agreement among the parties, each
270 side of the controversy will be assessed a fee in the amount of one-
271 half of the cancellation fee paid to the assigned Mediator under
272 [Section IV\(D\)\(3\)](#) of this rule.
- 273 3. If the case is voluntarily dismissed by the plaintiff less than seven
274 (7) days prior to the scheduled mediation conference date, a fee in
275 the amount of the cancellation fee paid to the assigned Mediator
276 under [Section IV\(D\)\(3\)](#) of this rule will be assessed to the
277 plaintiff(s).
- 278 4. If the case is dismissed by the Court less than seven (7) days prior
279 to the scheduled mediation conference date, a fee in the amount of
280 the cancellation fee paid to the assigned Mediator under [Section](#)

281 [IV\(D\)\(3\)](#) of this rule will be assessed to the party against whom the
282 dismissal was granted, unless otherwise ordered by the Court.

283 5. Assessed fees due to cancellations shall be assessed on all cases,
284 including mediation conferences scheduled before the Court
285 Mediator.

286 6. All assessed fees shall be deposited with the Clerk of Courts.

287 7. The assessed fees shall not be taxed as costs in the case. All
288 funds generated by the assessment of these fees shall be paid to
289 the Court's ADR Fund.

290 IX. WRITTEN CONFIDENTIALITY AGREEMENT

291 A. In furtherance of the confidentiality agreement imposed by resort to the
292 mediation process ordered by the Court, a written confidentiality
293 agreement shall be executed by all those in attendance prior to beginning
294 the mediation session. If new or different persons attend a subsequent
295 session, their signatures shall be obtained prior to proceeding further in
296 the process. The form of agreement is available for review by any
297 prospective participant by logging onto the mediation tab of the ADR
298 pages of the Court's website at www.montcourt.org.

299 X. GOOD FAITH

300 A. Each party shall proceed with mediation in good faith to reach an
301 agreement. Any party who participates in mediation shall perform all
302 obligations expeditiously and shall not use the mediation process for
303 purposes of delay or discovery in any manner other than in a good faith
304 attempt at resolution. Failure to comply with any portion of this rule may
305 result in appropriate sanctions.