

**Rule 67. Mediation, Arbitration, Settlement
Conferences, and Other Dispute Resolution
Processes Outside of Conciliation Court Services**

A. Confidentiality; *Ex parte* Communications. Mediation conferences shall be held in private, and all communications, verbal or written, shall be confidential. The mediator shall not file any written report or statement with the court, except as provided by subdivision B(6). Unless specifically stated otherwise in these rules, the provisions of A.R.S. § 12-2238 shall apply to any mediation conference held in conformance with this rule. The mediator shall not have any *ex parte* communication with the judge or commissioner assigned to a case, except as provided in subdivision B(7). The mediator may not conduct any other form of dispute resolution process in the same case, unless agreed to by the parties and approved by the court.

B. Mediation. Any issues in dispute may be subject to mediation. Mediation may be conducted by a private mediator agreed upon by the parties, a mediator assigned by the court from a roster of mediators maintained by the court, or a mediator participating in an ADR process overseen, administered, or approved by the court.

1. *Private Mediation; Roster of Mediators.* The parties may select a private mediator by agreement. The parties or counsel, if any, shall sign and file with the court a written notice that private mediation will take place, stating the name of the mediator and date set for the initial mediation conference. The parties may request the court to choose an independent mediator from a list of mediators supplied by them or from a roster of mediators maintained by the court. The parties shall contract directly with the private mediator and be responsible for payment of the fees for such mediation. Unless the court orders or the parties agree otherwise, the cost of mediation shall be equally shared by the parties. The mediator may not conduct any subsequent family assessment or evaluation in the same case.

2. *Commencement of Mediation.* On its own motion, or on motion of either or both parties to a dispute, the court may order a matter referred to mediation. The court may decline to order a matter referred to mediation if it appears that mediation is inappropriate for reasons such as parental unfitness, substance abuse, mental incapacity, domestic violence, or other good cause, or that mediation will cause undue delay.

3. *Domestic Violence.*

a. In a proceeding concerning custody or parenting time of a child, if an order of protection is in effect involving the parties or there is a finding by the court of any conduct that would form the basis for an order of protection, the court may order mediation or refer the parties to mediation only if there are policies and procedures in place that protect the victim from harm, harassment, or intimidation.

b. Every party shall be notified in writing or orally in open court prior to mediation of the ability to request a waiver of mediation or to request that reasonable procedures be in place at the mediation to protect a victim of domestic violence, as determined by the court. Neither party shall be required to appear for mediation pending determination of this matter.

c. The mediator shall reject for mediation or terminate mediation in any case the mediator deems mediation to be inappropriate because of domestic violence.

4. *Prohibition against Default.* Upon entry of an order or referral to mediation, neither party to the dispute may apply for entry of default against the other party until the mediator files a report with the court advising the court that mediation has concluded, unless otherwise ordered by the court.

5. *Scheduling of Mediation Conferences; Persons Who May Attend.* When an order or referral to mediation has been entered, the mediator will schedule a conjoint or individual conference or conferences that each party must attend. No scheduled trial or hearing shall be continued for failure to complete mediation without order of the court. Counsel for a party shall not be excluded from a mediation conference unless agreed to by the party and counsel. When appropriate, the mediator may, in his or her sole discretion, permit persons other than a party and counsel to attend or participate in a mediation conference if they agree in writing to be bound by the confidentiality provisions of this rule.

6. *Pre-Mediation Statement.* The mediator may require the parties to prepare a Pre-Mediation Statement for the mediator setting forth the information contained in subdivision D(2). The court may impose sanctions as permitted by Rule 71 for failure of a party to submit a Pre-Mediation Statement as requested by the mediator. The Pre-Mediation Statement shall not be filed with the court.

7. *Report to the Court; Agreements.* If the court refers or orders a case to mediation, the parties shall notify the court that the mediation has concluded and advise the court of any agreements reached within ten (10) days after the conclusion of the mediation and not later than ten (10) days prior to the date

set for trial or hearing. All binding agreements reached by the parties shall comply with Rule 69. As part of any agreement reached, the parties shall acknowledge that the agreement was entered into by them voluntarily and without undue influence, after full disclosure of all relevant facts and information, and is intended to be a final binding agreement pursuant to these rules, and that it is fair, equitable and in the best interests of the children. If no or partial agreement is reached during mediation, the mediator shall file a brief report with the court stating that the parties met and attempted to resolve their differences but the mediation was unsuccessful. The report shall also state any agreements reached and the issues remaining for resolution. The mediator shall not report the positions of the parties and shall not comment upon or offer any opinion about the position of any party. The mediator may also advise the court if the parties or the mediator believe that further mediation would be helpful in order to resolve the remaining issues.

8. *Failure to Appear.* After entry of an order referring a matter for mediation, the parties are required to appear at all mediation conferences scheduled by the mediator. If one or both parties fail to appear, the mediator shall report to the court the identity of each person who failed to appear, and the court may impose sanctions as permitted by Rule 71(A).

9. *Participation in the Process; Reports to the Court; Sanctions.* Although a party is required to appear for a mediation conference, participation in mediation is voluntary. The mediator may advise the court in writing about the schedule for mediation and any procedural matter related to the mediation, so long as the substance of what was said or done by the parties or their counsel during mediation remains confidential. Other than reporting to the court about matters set forth in this rule, unless otherwise agreed by the parties or required or permitted by law, the mediator shall not report to the court about anything that was said or done before or during the mediation. For violation of this rule, the court may impose appropriate sanctions as permitted by Rule 71(A).

C. Arbitration. The parties may agree to arbitrate any and all issues in accordance with the Arizona Arbitration Act, A.R.S. §§ 12-1501 to 1518 or any other law permitting arbitration. The parties or counsel, if any, shall file with the court a written notice of their agreement to arbitrate some or all of the issues before the court, attaching their written agreement to arbitrate, stating the name of the arbitrator(s), and the date(s) of arbitration. The decision of the arbitrator(s) shall be submitted to the court for a determination that said decision conforms to statute for entry of a decree or other written orders in accordance therewith. The

parties shall contract directly with the arbitrator(s) and be responsible for payment of any fees for such arbitration.

D. Settlement Conferences. Upon motion of any party, or upon the court's own motion, the court may direct the parties to attend a settlement conference. Upon agreement of the parties, the settlement conference may be conducted by the judge or commissioner presiding over the action. The court may direct that the settlement conference be conducted by another judge or commissioner of the court, or by a judge pro tempore as part of any ADR program overseen, administered, or authorized by the court.

1. *Procedures.* At the request of a party or on its own motion, the court may direct the parties, the attorneys for the parties, and any other person deemed necessary to facilitate settlement of the issues, to participate in the settlement conference. The court may enter an order setting the date for the conference and enter other orders appropriate under the circumstances of the case to facilitate the settlement conference.

2. *Memoranda.* Except as otherwise ordered by the court, at least one week before the settlement conference the parties shall furnish the settlement conference officer with their Settlement Conference Memoranda or a Pretrial Statement addressing the following:

- a. a general description of the issues in dispute, the party's position on each issue and the evidence that will be presented to support the party's position;
- b. where the issues involve financial matters, the memorandum shall include a current Affidavit of Financial Information, a list of outstanding debts and the party responsible for each debt, and an inventory of community or joint assets, including dates of acquisition, amounts of encumbrance, and present value;
- c. a summary of the negotiations that have previously occurred; and
- d. any other information the party believes will be helpful to the settlement of the issues.

The Settlement Conference Memorandum shall not be filed with the court.

3. *Ex Parte Communication.* At any settlement conference conducted pursuant to this rule, the court, with consent of all those participating in the conference, may engage in *ex parte* communication with the parties if the court determines that will facilitate the settlement of the case.

4. *Domestic Violence.* At the request of a party or on the court's own motion, in cases where there has been domestic violence between the parties, the court shall put reasonable procedures in place to protect the victim from harm, harassment, or intimidation.

5. *Agreements.* Any binding agreement that is reached by the parties shall comply with Rule 69. As part of any agreement reached, the parties shall acknowledge that the agreement was entered into by them voluntarily and without threat or undue influence after full disclosure of all relevant facts and information, that it is intended to be a final binding agreement pursuant to these rules, and that it is fair, equitable, and where there are minor children common to the parties, is in the best interests of the children. The judge, commissioner, or judge pro tempore conducting the settlement conference shall make any findings necessary to approve the agreement pursuant to A.R.S. § 25-317 and may sign any Decree of Dissolution presented that conforms to the agreements reached by the parties. Any Decree of Dissolution signed by a judge pro tempore in accordance with this rule shall have the same force and effect as a Decree signed by the judge or commissioner to whom the case is assigned.

6. *Failure to Appear.* The parties and counsel, if any, shall be required to appear in person at all settlement conferences scheduled. The court may impose sanctions as permitted by Rule 71 for failing to appear and participate in the settlement conference.

7. *Reports to the Court.* If no or partial agreement is reached in the settlement conference, the settlement conference judge or commissioner shall file a brief report with the court stating that the parties met and attempted to resolve their differences, but the settlement conference was unsuccessful. The report shall also state any agreements reached and the issues remaining for resolution. The settlement conference judge shall not report the positions of the parties and shall not comment upon or offer any opinion about the position of any party. The settlement conference judge or commissioner may also advise the court if the parties or the settlement conference judge or commissioner believe that a further settlement conference would be helpful to resolving the remaining issues.

E. Other Dispute Resolution Processes; Fees. The court may establish, approve, or administer other dispute resolution processes designed to assist the parties in resolving disputes without litigation through contested proceedings. Participants in an ADR service provided through the court may be charged a fee in accordance with the law.

Research References

West's Key Number Digest
Alternative Dispute Resolution ⇌110, 440, 470, 500

Added Oct. 19, 2005, effective Jan. 1, 2006.

COMMITTEE COMMENT

It is the intention of these drafters to create rules that encourage the use of alternative dispute resolution to resolve disputes in family law matters to the greatest extent possible. It is believed that ADR will assist in the effective management of the caseloads of the family court divisions and facilitate the resolution of family disputes. ADR services are usually less expensive, less time consuming and less traumatic than litigation. This rule is intended to establish a framework in which the parties are required to attend and voluntarily participate in the ADR process. Through their participation it is hoped that a mutually satisfactory resolution of the issues can be achieved. This rule is not intended to create, encourage, or result in ancillary court proceedings involving the motives, conduct or communications of the parties, unless otherwise required by law.

AUTHORS' COMMENTS*Analysis*

- 1 *Scope and Purpose of Rule*
- 2 *2008 Amendments*
- 3 *Confidentiality*
- 4 *Duty to Appear*
- 5 *Domestic Violence*
- 6 *Comparison with Civil Rules*

1. Scope and Purpose of Rule

Family Law Rule 67 provides a list of ADR procedures which are available through the private sector, outside of court services. ADR procedures that may be available through court services are outlined in Family Law Rule 68.

2. 2008 Amendments

Certain non-substantive wording changes were made in the 2008 amendments which became effective January 1, 2008.

3. Confidentiality

Mediation is confidential. Family Law Rule 67(D)(7) resolves the issue of confidentiality in settlement conferences by providing that the settlement conference judge or commissioner may report only that the conference took place and whether or not it resulted in any agreements. The settlement conference judge or commissioner may not comment on the positions of any party, so a settlement conference judge or commissioner is not to provide a statement in support of attorneys' fees pursuant to A.R.S. § 25-324.

4. Duty to Appear

Parties are required to appear at court-ordered mediation or a court-ordered settlement conference, but participation in both processes is voluntary. The court, therefore, can impose sanctions pursuant to Family Law Rule 71 only for a failure to physically appear at these conferences but not for a failure to participate in the process.

5. Domestic Violence

Family Law Rule 67 sets forth procedures intended to provide protection to abused parties in cases where domestic violence exists or may exist. The court makes the ultimate determination if an ADR procedure will not take place based on domestic violence, but even absent a court order to that effect, a mediator may fulfill his or her ethical duties by rejecting any case for mediation if the mediator deems it inappropriate based on domestic violence. The importance of domestic violence concerns as a consideration in family law cases is shown by the inclusion of domestic violence procedures in two places, i.e., Family Law Rule 67(B)(3) and Family Law Rule 67(D)(4).

6. Comparison with Civil Rules

There is no corresponding Civil Rule. The provisions of Family Law Rule 67 are adapted primarily from Maricopa County Local Rule 6.10.