

August 19, 1991

Ms. Tracy Nichols
Holland & Knight
1200 Brickell Avenue
P.O. Box 015441
Miami, Florida 33101

Dear Ms. Nichols:

I am writing in response to your letter of July 22, 1991. You pose some interesting questions with respect to mediation programs.

In relation to formulating a cost and delay reduction plan, section 473 (a)(6) of the Civil Justice Reform Act specifically provides that every district court "shall consider and may include ... authorization to refer appropriate cases to alternative dispute resolution programs that - (B) the court may make available, including mediation, minitrial, and summary jury trial." This provision clearly authorizes and encourages the district courts to experiment with various alternative dispute resolution programs such as mediation. Although the Act does not direct that the alternative dispute programs be mandatory or voluntary, there does not appear to be any legal obstacle to a mandatory mediation program. As you noted in your letter, courts have upheld mandatory mediation programs against constitutional attack.

Several courts have already instituted mandatory mediation programs. The programs in the District of Connecticut, the Middle District of Florida, the Eastern District of Pennsylvania, and the Western and Eastern Districts of Washington are mandatory. In each instance local rules provide the authority for the program. We are not aware of any legal objections which have been raised to the mandatory nature of the programs. I am certain these courts would provide you with assistance in implementing your program and discuss why they chose to make the programs mandatory.

Of the mandatory programs noted in the Federal Judicial Center material, only the Middle District of Florida requires that the mediators' fees be split evenly between the parties. Mediators serve *pro bono* in the other programs. The Eastern District of Washington has been successful in recruiting volunteer attorneys, in part, by offering mediator training as continuing legal education.

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In the Middle District of Florida program, the mediators are compensated at a rate provided by a standing order of the court. *See* Local Rule 9.02 (f). It appears that a court does have the authority to order the parties to share the mediation expenses. In *Woods v. Holy Cross Hospital et al.*, 591 F.2d 1164, 1179 n.27 (5th Cir. 1979), the Fifth Circuit rejected appellant's claim that mediation fees assessed against the parties under a Florida Medical Malpractice Law unduly burdened a party's access to the court. The court noted, in comparison, that when a federal court orders the use of a special master it may order a party to compensate the special master for his services. *See* Fed. R. Civ. P. 53(a).

The Office of General Counsel concurs with the substance of this response. Please let me know if I can be of further assistance.

Sincerely,

Abel Mattos
Chief
Court Programs Branch

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