

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

COMMENTS DUE BY DECEMBER 30, 2011

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 ***Local Rule 1.27, Deposition Testimony, and Local Rule 2.39, Civil Mediation***, are being published for a sixty-day public comment period beginning Wednesday, November 2, 2011, through Friday, December 30, 2011.

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

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

COMMENTS MUST BE RECEIVED BY 4:30 P.M. ON FRIDAY, DECEMBER 30, 2011.

EFFECTIVE JANUARY 9, 2012

The proposed amendments to Loc. R. 1.27 and Loc. R. 2.39 will take effect on **January 9, 2012**, unless prior to such date the Court in its discretion, amends, modifies, or withdraws the local rule. In the event the Court amends, modifies, or withdraws the local rule, the revision will be published for a thirty-day notice period.

Rule 1.27 – Deposition Testimony

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I. FILING OF WRITTEN DEPOSITION TRANSCRIPT:

- A. In addition to the requirements of Civil Rules 30 – 32 and Rule 13 of the Rules of Superintendence for the Courts of Ohio, unless otherwise ordered by the Court, no written deposition transcript shall be filed prior to the deadline for filing of any pretrial statement or seven (7) days prior to trial, whichever is later.
- B. All written deposition transcripts, including attachments and/or exhibits, shall be electronically filed by the attorney of record through the Court’s authorized electronic filing system. Pursuant to Sup. R. 45(D), the attorney of record shall omit or redact all personal identifiers from the written deposition transcripts prior to filing the transcript.
- C. The Clerk shall not accept for filing any written deposition transcript unless it is accompanied by a Notice of Filing Deposition Transcript and Certification of Compliance.
 - 1. The Notice of Filing Deposition Transcript shall identify the deponent and the date the deposition was taken and include a certification that the written deposition transcript being filed is a true record of the deposition that was certified by the officer who took the deposition and that testimony has not been altered in any way.
 - 2. The Certification of Compliance shall include a certification from counsel that the written deposition transcript is being filed in compliance with this rule and [Local Rule 2.09 \(IV\)](#).

II. FILING OF AUDIO/VIDEO VERSION OF DEPOSITION TRANSCRIPT:

- A. If an audio/video version of a deposition transcript is to be presented during trial or hearing, the attorney presenting the audio/video version of the deposition transcript shall submit the audio/video version of the deposition to the Court (not the Clerk) ~~three~~ five (5) working days prior to the trial or hearing, unless otherwise ordered by the Court.
- B. The Court will not accept or permit the audio/video version of the deposition transcript to be presented during trial or hearing unless a written transcript of the deposition has been filed by the attorney of record through the Court’s authorized electronic filing system.
- C. The audio/video version of the deposition transcript shall include an attached written certification from the officer who took the audio/video deposition. The certification shall state that the witness was fully sworn or affirmed by the officer and that the audio/video version of the deposition is a true record of the testimony given by the witness. The officer’s log of the deposition shall be included with the certification.

36 D. If the audio/video version of the deposition is presented at trial or a hearing and the
37 proceedings are digitally recorded, the audio/video version of the deposition will be
38 returned to the attorney upon completion of the proceedings. If the proceedings are
39 recorded by a Court Reporter, the audio/video version of the deposition shall be marked
40 as an exhibit of the party who presented the deposition and shall be retained as
41 evidence in the trial or hearing.

42 III. PRETRIAL REQUIREMENTS:

43 A. The Court has video equipment for use at trial. It is the responsibility of the using party
44 to:

- 45 1. Notify the Bailiff of intended use within three (3) working days prior to trial;
- 46 2. Ensure that the format of the electronic version of the deposition is compatible with
47 the Court's presentation equipment;
- 48 3. Be able to operate the Court's presentation equipment.

Rule 2.39 – Civil Mediation

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51 I. REFERRAL TO MEDIATION:

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

55 ~~B. Cases may be referred to only one form of alternative dispute resolution. Therefore,~~
56 ~~cases referred to mediation will not be referred to any other alternative dispute~~
57 ~~resolution programs.~~

58 ~~C.~~B. _____ If any case in which a mediation referral is requested or ordered, all parties and
59 counsel have a continuing duty to and shall disclose to the assigned Judge, the
60 Mediator, and the mediation staff whether any of the opposing parties have either
61 resided in a common residence or are related by blood, adoption, or marriage, and have
62 known or alleged domestic abuse at any time prior to or following the referral of the
63 case to mediation and before conclusion of the mediation process. Such party shall
64 have a duty to participate in any screening required by the Supreme Court of Ohio's
65 Rules of Superintendence Rule 16 both prior to, and, in the Mediator's discretion during
66 the mediation session(s).

67 ~~D.~~C. _____ No referral to Mediation shall be made in this Division in any of the following
68 circumstances:

- 69 1. As an alternative to the prosecution or adjudication of domestic violence;
70 2. In determining whether to grant, modify or terminate a protection order;
71 3. In determining the terms and conditions of a protection order; and
72 4. In determining the penalty for violation of a protective order.

73 ~~E.~~D. _____ Nothing in Section I (D) 1 – 4 of this rule shall prohibit the use of mediation in a
74 subsequent divorce or custody case in another Division or court even though that case
75 may result in the termination of the provisions of a protection order issued by this
76 Court.

77 II. OBJECTION TO MEDIATION:

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

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

83 III. CASE MANAGEMENT OF MEDIATION CASES:

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

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

90 1. Telephone Status Conference: A telephone status conference between the ~~Court~~
91 ~~Mediator~~Mediation Department and counsel primarily responsible for the case shall
92 be scheduled approximately thirty (30) days prior to the mediation conference.
93 During the telephone status conference, the case is reviewed for readiness for
94 mediation. ~~Any substantive issues, discovery matters, or areas of conflict between~~
95 ~~counsel shall be discussed during the telephone status conference.~~ Counsel must be
96 available for any scheduled telephone status conference on a mediated case.

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

102 C. Each party shall submit a mediation conference statement via email not to exceed three
103 (3) pages to the ~~Court Mediator~~Mediation Department and all other parties no later
104 than ten (10) business days prior to the mediation conference. The statement shall set
105 forth the relevant positions of the parties concerning factual issues, issues of law,
106 damages, and the settlement negotiation history of the case, including a recitation of
107 any specific demands and offers that have been conveyed. These statements are not to
108 be filed with the Clerk of Courts and will be maintained separate and apart from the
109 case file.

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110 1. Any party that desires to convey confidential information to the assigned Mediator
111 with the provision that the information not be disclosed to the other party without
112 the submitting party's later consent, shall submit the information to the assigned
113 mediator clearly indicating the request for confidentiality. The information is not to
114 be filed with the Clerk of Courts and will be maintained separate and apart from the
115 case file.

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116 IV. MEDIATOR:

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

121 | ~~B.A.~~ In accordance with O.R.C. 2710.08 (A) and (B), the Mediator assigned by the
122 | Court to conduct a mediation shall disclose to counsel, the mediation parties, and any
123 | nonparty participants any known possible conflicts that may affect the Mediator's
124 | impartiality as soon as such conflict(s) become known to the assigned Mediator. If
125 | counsel or a mediation party requests that the assigned Mediator withdraw because of
126 | the facts so disclosed, the assigned Mediator may withdraw and request that the
127 | assigned Judge appoint another Mediator. If the assigned Mediator determines that
128 | withdrawal is not warranted, the assigned Mediator may elect to continue. The
129 | objecting party may then request the assigned Judge to remove the assigned Mediator.
130 | The assigned Judge may remove the assigned mediator and appoint another mediator
131 | from a list of qualified Mediators that is maintained by the Court. If the assigned Judge
132 | decides that the objection is unwarranted, the mediation conference shall proceed as
133 | scheduled, or, if delay was necessary, as soon after the scheduled date as possible.

134 | ~~C.B.~~ List of Qualified Mediators: The Court maintains a list of qualified Mediators
135 | which shall be maintained by the ADR Office and a copy shall be distributed to all Judges
136 | of the Court:

- 137 | 1. All persons whose names are placed on the list of qualified Mediators shall submit to
138 | the ADR Office a regularly updated Curriculum Vitae (including a list of professional
139 | or association memberships) which CV shall be provided by the ADR Office to those
140 | requesting information on the assigned Mediator's qualifications to mediate a
141 | dispute as required by O.R.C. 2710.08 (C).
- 142 | 2. The Court will review applications of persons seeking to be added to the list of
143 | qualified Mediators in accordance with the procedures adopted from time to time
144 | by the Judges of the Court.

145 | ~~D.C.~~ An assigned Mediator shall receive a fee of two hundred dollars (\$200.00) for
146 | conducting mediation conferences requiring four (4) hours or less of time. In mediation
147 | conferences requiring more than four (4) hours, an assigned Mediator shall receive a fee
148 | of four hundred dollars (\$400.00):

- 149 | 1. In cases requiring conferences of unusual duration, the assigned Judge, on petition
150 | of the assigned Mediator and for good cause shown, may allow additional
151 | compensation.
- 152 | 2. All compensation for assigned Mediators shall be paid upon proper warrant, from
153 | funds of Montgomery County, Ohio, which have been allocated for the operation of
154 | the Common Pleas Court of Montgomery County, Ohio.

155 | 3. If a case the mediation conference is continued, settled, or dismissed more than
156 | seven (7) days prior canceled with appropriate notification to the ADR Office more
157 | than forty-eight (48) hours before the scheduled mediation conference date and

158 time, the assigned Mediator shall not be entitled to compensation ~~except in cases~~
159 ~~where the ADR Office is not notified of the continuance, settlement, or dismissal by~~
160 ~~that date.~~ If a case is continued, settled or dismissed the mediation conference is
161 canceled less than seven (7) days but more than two (2) days prior to forty-eight (48)
162 hours before the scheduled mediation conference date and time, the assigned
163 Mediator shall be entitled to ~~a cancellation fee in the amount of one-half of the~~
164 compensation at the full rate for conducting the mediation conference. ~~If a case is~~
165 ~~continued, settled, or dismissed less than two (2) days prior to the scheduled~~
166 ~~mediation conference date, the assigned Mediator~~

167 4. Assessed fees due to cancellations shall be entitled to a assessed on all cases,
168 including mediation conferences scheduled before a Magistrate or other Court
169 employees. Magistrates or other Court employees shall not receive any additional
170 compensation as a result of a cancellation. Any cancellation fees assessed shall be
171 paid to the Court's ADR fund.

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

174 ~~3-6.~~ All assessed fees shall be deposited with the Clerk of Courts.

175 ~~4-7.~~ The assessed fees shall not be taxed as costs in the case. All funds generated by
176 the assessment of these fees shall be paid to the Court's ADR Fund.

177 8. If a cancellation is the result of a settlement resulting in termination of a case, the
178 cancellation fee shall be divided evenly between the parties.

179 ~~5-9.~~ If a cancellation is the result of a requested continuance or other reason, the fee
180 in the amount of the full compensation rate for conducting the mediation
181 conferences shall be assessed against the party causing the cancellation.

182 V. MEDIATION CONFERENCE:

183 A. At the mediation conference, the assigned Mediator shall help the parties identify areas
184 of agreement and explore the possibility of settling the case through mediation
185 techniques:

- 186 1. The facts and issues will be discussed by each side and a good faith effort will be
187 made to settle the case;
- 188 2. Any discovery or problems that are standing in the way of resolution will be
189 identified including whether domestic violence is a factor impacting the continuation
190 of mediation efforts;
- 191 3. Possible solutions will be discussed and pursued to agreement, if possible;

- 192 4. In the event the case is not ready for resolution, parties will identify the information
193 or discovery they require in order to be in a position to negotiate further.
- 194 5. Where appropriate, determining and encouraging referrals to legal counsel or other
195 support services for all parties, including victims of and suspected victims of
196 domestic violence. For that purpose, the ADR Office has available for distribution to
197 clients a brochure which includes local attorney referral contact information;
198 information regarding Children Services; and resource information for local domestic
199 violence prevention, counseling, substance abuse, and mental health services.
- 200 B. Any additional mediation conferences shall be scheduled within sixty (60) ~~to ninety (90)~~
201 days following the initial mediation conference, unless the assigned Mediator
202 determines that an earlier or later date is necessary. Agreed upon information
203 exchange may be required prior to the next scheduled mediation conference.

204 VI. ATTENDANCE AT MEDIATION CONFERENCES:

205 A. Parties:

- 206 1. All persons whose consent is required to resolve a dispute, whether or not named as
207 parties in the pleadings shall attend all mediation conferences, unless their
208 attendance has been excused by the assigned Mediator. This attendance
209 requirement reflects the Court's view that one of the principal purposes of the
210 mediation process is to afford litigants an opportunity to articulate their interests
211 and to learn about the interests expressed by their opposing parties.
- 212 2. If counsel or any mediation party or non-party participant becomes aware of the
213 identity of a person or entity whose consent is required to resolve the dispute, but
214 who has not yet been joined as a party in the pleadings, they shall promptly inform
215 the assigned Mediator as well as the assigned Judge of such fact.
- 216 3. Where attendance of a party is required, a party other than a natural person
217 satisfies the attendance requirement if it is represented by a person or persons,
218 other than outside or local counsel, with authority to enter into stipulations, with
219 reasonable settlement authority, and with sufficient stature in the organization to
220 have direct access to those who make the ultimate decision about settlement.
- 221 4. In accordance with R. C. 2710.09, a party shall be permitted to have in attendance at
222 a mediation session a designated attorney or counsel and/or other individual of their
223 choosing. However, parties should recognize that attendance of some individuals
224 may hinder discussion or settlement in mediation and that all parties have power to
225 decide whether to continue discussions, what terms of a proposed agreement are
226 acceptable, and whether to enter into a settlement agreement.

227 5. Failure of a party to attend a mediation conference or act in good faith during the
228 mediation conference shall be reported by the assigned Mediator to the assigned
229 Judge who may impose sanctions, which may include, but are not limited to, the
230 award of attorneys' fees and other costs, contempt or other appropriate sanctions
231 at the discretion of the assigned Judge.

232 B. Counsel:

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

236 C. Adjusters:

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

239 VII. PROCEDURE AT MEDIATION SESSIONS:

240 A. Participation in mediation pursuant to an Order of this Court shall constitute agreement
241 pursuant to O.R.C. 2710.07 by the participants that all "mediation communications" as
242 defined in O.R.C. 2710.01 (B), in addition to being subject to the privileges set out in
243 Chapter 2710, shall be treated by the parties, their counsel, the assigned Mediator, and
244 the Court as confidential and shall not be disclosed without consent of the other
245 participants in the mediation process, except for the following:

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

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

252 C. Upon reaching a settlement in mediation:

- 253 1. The assigned Mediator, upon his or her discretion, may immediately prepare a
254 written memorandum memorializing the agreement reached by the parties. The
255 memorandum shall be signed by the parties and counsel.
- 256 2. Counsel shall be instructed to present a termination entry for approval within
257 fourteen (14) days.
 - 258 a. The fact that a settlement has been reached shall be transmitted to a clerical
259 person who shall check for the filing of the termination entry at the end of the
260 fourteen (14) day period;

- 261 b. If the termination entry has not been filed, then a notice shall be sent to counsel
262 informing them that they have fourteen (14) days to file a termination entry; and
- 263 c. If no entry has been filed fourteen (14) days after notice has been sent to
264 counsel, then an administrative dismissal entry shall be sent to the assigned
265 Judge for approval.

266 VIII. CONTINUANCE OF A MEDIATION CONFERENCE, INABILITY OF MEDIATION TO PROCEED:

- 267 A. The ~~Court Mediator~~ Mediation Department may grant a continuance of a mediation
268 conference for good cause shown after a mutually acceptable future date has been
269 arranged with all concerned parties. In no event shall a mediation conference be
270 continued more than twice without a continuance entry and approval of the assigned
271 Judge.
- 272 B. If a case is settled or dismissed prior to a scheduled mediation conference, the parties
273 shall promptly file a settlement and conditional dismissal entry. Counsel for plaintiff(s)
274 shall inform the ADR Office by phone that the assigned mediation date will not be
275 needed. This contact shall be made immediately following agreed settlement. Failure
276 to ~~so~~ notify the ADR Office will result in assessment of the fees set out in
277 paragraph Section IV, C below.
- 278 ~~C. If a case is continued, settled, or dismissed less than seven (7) days prior to the~~
279 ~~scheduled mediation conference date, the following fees shall be assessed.~~
- 280 ~~1. If a case is continued less than seven (7) days prior to the scheduled mediation~~
281 ~~conference date, a fee in the amount of the cancellation fee paid to the qualified~~
282 ~~Mediator under Section IV (D) (3) of the rule will be assessed to the party requesting~~
283 ~~the continuance:~~
- 284 ~~a. If counsel appears for a mediation conference and is not prepared to proceed, a~~
285 ~~fee in the amount of the cancellation fee may be assessed.~~
- 286 ~~2. If a case is reported settled less than seven (7) days prior to the scheduled mediation~~
287 ~~conference date, a fee in the amount of the cancellation fee paid to the assigned~~
288 ~~Mediation under Section IV (D) (3) of the rule will be assessed to the parties as~~
289 ~~agreed upon by the parties. If there is no agreement among the parties, each side of~~
290 ~~the controversy will be assessed a fee in the amount of one half of the cancellation~~
291 ~~fee paid to the assigned Mediator under Section IV (D) (3) of this rule.~~
- 292 ~~3. If the case is voluntarily dismissed by the plaintiff less than seven (7) days prior to~~
293 ~~the scheduled mediation conference date, a fee in the amount of the cancellation~~
294 ~~fee paid to the assigned Mediator under Section IV (D) (3) of this rule will be~~
295 ~~assessed to the plaintiff(s).~~

296 ~~4. If the case is dismissed by the Court less than seven (7) days prior to the scheduled~~
297 ~~mediation conference date, a fee in the amount of the cancellation fee paid to the~~
298 ~~assigned Mediator under Section IV (D) (3) of this rule will be assessed to the party~~
299 ~~against whom the dismissal was granted, unless otherwise ordered by the Court.~~
300 ~~5. Assessed fees due to cancellations shall be assessed on all cases, including mediation~~
301 ~~conferences scheduled before the Court Mediator.~~
302 ~~6.1. All assessed fees shall be deposited with the Clerk of Courts.~~
303 ~~7.2. The assessed fees shall not be taxed as costs in the case. All funds generated by~~
304 ~~the assessment of these fees shall be paid to the Court's ADR Fund.~~

305 IX. WRITTEN CONFIDENTIALITY AGREEMENT:

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

313 X. GOOD FAITH:

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