IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-122

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

COMMENTS OF THE EXECUTIVE COUNCIL OF THE ALTERNATIVE DISPUTE RESOLUTION SECTION OF THE FLORIDA BAR

Patrick Russell, Chair of the Alternative Dispute Resolution Section of The Florida Bar ("ADR Section"), submits these comments on behalf of the Executive Council of the ADR Section[1], as follows.

The ADR Section of The Florida Bar is pleased to have this opportunity to comment on the November 15, 2021, Judicial Management Council Workgroup's Final Report on Improved Resolution of Civil Cases ("IRCC Report"). The Section appreciates the Workgroup's efforts yielding the detailed and comprehensive proposed changes to the Florida Rules of Civil Procedure and supports constructive means to improve the resolution of civil cases.

We limit our comments to the impact of the proposed rule changes on court-ordered mediation and court-ordered nonbinding

[1] These comments are submitted on behalf of the Section only, and do not express the position of The Florida Bar.

arbitration in county and circuit court cases since the subject matter of the proposed rule changes is court-mandated alternative dispute resolution in county and circuit court matters.[2]

SUMMARY

The Section recognizes the need for case management and the timely resolution of cases. Alternative Dispute Resolution processes, specifically mediation and arbitration, can play a key role in case resolution during the pre-trial process, as recently demonstrated by the exponential growth of virtual mediation conferences during the COVID-19 pandemic.

Mediation, in particular, provides parties the opportunity for self-determination by seeing through the eyes of the other, assessing the case weaknesses as well as strengths, working collaboratively to identify issues, and exploring resolutions meeting each party's unique needs and interests. Typically, even when the parties do not completely resolve their case during the first mediation session, they may reach a partial agreement limiting the issues for court

[2] Chapter 44, Florida Statutes, also provides for voluntary binding arbitration and voluntary trial resolution processes. We limit our comments to court-ordered alternative dispute resolution processes

determination, may settle through negotiation following mediation, and may agree to return to mediation to further explore agreement options. The statistics provided by the Office of the State Court Administrator in the FY 2019-20 Statistical Reference Guide confirm that 72.6% of all circuit civil cases were dismissed prior to resolution by the judge or a jury, a statistical confirmation of mediation's impact on the resolution of cases.

Indeed, the courts' enduring interest in providing parties access to the court, along with timely and fair case resolution, is bolstered through the use of mediation and by the fact that all courts in Florida refer civil cases to mediation at some point during the life of the litigation. While no one can guarantee parties will believe they received outcome justice, parties should believe they received process justice. Mediation provides the forum for the parties to have their voices heard, meaningfully participate in problem solving, and self-determine the outcome.

Similarly, cases resolved through court-ordered nonbinding arbitration are cases removed from the trial docket, leaving room for other cases requiring court determination. Resolution through nonbinding arbitration occurs when parties accept the arbitrator's

award, the parties voluntarily settle or dismiss cases prior to, during or after the arbitration hearing, or decide to mediate and settle their disputes after having received the arbitration award.

The IRCC Report establishes case management orders which will provide for mandatory court-ordered mediation which may occur early in the litigation process. Mediation is court-ordered when there is an order of referral to mediation. The Florida Supreme Court has promulgated rules of practice and procedure relating solely to court-ordered mediation, as found in Chapter 44.102, Florida Statutes.[3] Currently, some circuits require that standing orders, which include the requirement for mandatory court-ordered mediation, be issued by the clerk and served by the plaintiff along with the complaint[4]. As a result of the rule amendment proposed by the IRCC, there will be a monumental shift from early voluntary non-court ordered mediation to mandatory court-ordered mediation.

The landscape for mediation necessarily will change to require adherence to court rules, court orders, and other regulatory schemes

[3] F.S. 44.102 (1) "Court-ordered mediation shall be conducted according to rules of practice and procedure adopted by the Supreme Court."

[4] 14th Judicial Circuit AO 2021-00-06.

that apply to court-ordered mediations as opposed to how voluntary, non-court ordered mediations procedures are conducted presently.

In light of the foregoing, the ADR Section was surprised to see little mention in the IRCC Report, except as it relates to small claims cases, of the monumental impact of the proposed rule changes on mediation of civil cases in the Florida courts. Florida has long been recognized as a leader and model for court-ordered mediation, with other states looking to our statutory law, rules of court, professional, ethical, and disciplinary rules for mediators, and extensive body of case law for guidance. It is unclear to the Section why the IRCC Report does not address mediation in the extensive rule changes being proposed. Is it because mediation in Florida is ubiquitous and such an entrenched part of the litigation process that no changes are needed? Is it because the authors of the Report believe mediation works so well that no changes, or mention of it in the rule changes it proposes, are necessary?

The Section welcomes an affirmative statement by the Supreme Court of Florida regarding the efficacy and value of court-ordered mediation, which provides the parties with a sense of process justice, an opportunity for them to be heard by a neutral and impartial third

person, and to gain further knowledge about their disputes in a confidential setting resulting in their empowerment to resolve their own disputes in their own way.[5]

COURT-CONNECTED ADR PROCESSES

The two goals guiding the Workgroup were the fair and timely resolution of cases through effective case management and the promotion of accountability. The proposed rules focus on administrative orders in each circuit which require the early differentiation of cases, early case management orders, compliance with those orders, active case management by the presiding judge, and the use of alternative dispute resolution processes.

This Comment addresses the issues that arise from the proposed rules as they relate to court-ordered mediation and court-ordered nonbinding arbitration. In addition, the ADR Section

[5] Resolution of disputes by parties to a mediation often result in generating options which are not available in the traditional litigation setting, such as accepting payments of outstanding debts over time. The authority of judges and juries is limited whereas parties to a mediation maintain flexibility and control of the outcome of the litigation and can reach terms of agreement unavailable to either a judge or a jury.

proposes additional rule changes related to court-connected ADR to better meet these goals.[6]

A. The Enabling Statute.

By way of background, Chapter 44, bears the title "Mediation Alternatives to Judicial Action." In fact, Chapter 44's scope is broader, relating to court-ordered mediation (F.S. 44.102), court-ordered nonbinding arbitration (F.S. 44.103), voluntary binding arbitration, and voluntary trial resolution (F.S. 44.104).

Chapter 44.106 provides the statutory basis for the Florida Supreme Court to establish minimum standards and procedures for qualifications, certification, professional conduct, discipline, and training for mediators and arbitrators who are "appointed pursuant to this chapter." For this reason, mediators who are not Florida Supreme Court certified mediators are not subject to the Standards of Professional Conduct for Certified and Court Appointed Mediators, unless they are court-appointed, i.e., selected to mediate a case after an order of referral to mediation is entered. Similarly, arbitrators who

[6] We have commented on the rules amendment petition in Case SC21-990 regarding use of electronic communication in court-ordered ADR and do not reiterate our comments here. See http://onlinedocketssc.flcourts.org.

arbitrate court-ordered nonbinding and voluntary binding arbitrations provided for in Chapter 44 are subject to Standards of Professional Conduct and discipline contained in Rules 11.030 to 11.130; however, these ethical rules do not apply to voluntary trial resolution judges.

B. Rules of Civil Procedure

Court-ordered mediation is governed by Rules of Civil Procedure 1.700 (Rules Common to Mediation and Arbitration), 1.710 (Mediation Rules), 1.720 (Mediation Procedures), 1.730 (Completion of Mediation) and 1.750 (County Court Actions) and Florida Small Claims Rule 7.090 (Appearance; Defensive Pleadings; Trial Date).

Court-ordered nonbinding arbitration is governed by Rules of Civil Procedure 1.700 (Rules Common to Mediation and Arbitration), 1.800 (Exclusions from Arbitration), 1.810 (Selection and Compensation of Arbitrators) and 1.820 (Hearing Procedures for Non-Binding Arbitration). Voluntary binding arbitration is governed by Rule 1.830 of the Rules of Civil Procedure.

1. Rule of Civil Procedure 1.700

a). Rules 1.710, 1.720 and 1.730 apply to court-ordered mediation; they do not apply to non-court-ordered, voluntary

mediation of circuit civil cases. The Florida Supreme Court only has authority pursuant to Fla. Stat. 44.102 to promulgate rules of procedure for court-ordered mediations. Because this is an area of confusion among judges and lawyers, The ADR Section recommends the following revisions to Rule 1.700:

b). Rule 1.700 titled RULES COMMON TO MEDIATION AND ARBITRATION should be re-titled RULES COMMON TO COURT-ORDERED MEDIATION AND COURT-ORDERED NONBINDING ARBITRATION.

c). Rule 1.700 (a) should be revised as follows:

(a) ~~**Referral by Presiding Judge or by Stipulation**. Except as hereinafter provided or as otherwise prohibited by law, the presiding judge may enter an order referring all or any part of a contested civil matter to mediation or arbitration. The parties to any contested civil matter may file a written stipulation to mediate or arbitrate any issue between them at any time. Such stipulation shall be incorporated into the order of referral.~~

(a) **Referral to Court-Ordered Mediation and Court-Ordered Nonbinding Arbitration by Court or by Stipulation**.
Except as hereinafter provided or as otherwise prohibited by law, the court may enter an order referring all or any part of a contested civil matter to mediation or court-ordered nonbinding arbitration. Court-ordered mediations include those referred to mediation by administrative orders or case-specific oral or written orders issued by the presiding judge. The parties may also file a written stipulation agreeing to mediation or nonbinding arbitration, Such stipulation shall be deemed court-ordered when the parties proceed to mediation or non-

binding arbitration pursuant to the stipulation even if an order of referral is not issued.

d). New Rule 1.700 (e) should be added as follows:

1.700 (e). Application. Court-ordered mediation is governed by Rules of Civil Procedure 1.700, 1.710, 1.720, 1.730 and 1.750 and 7.090, as applicable. Parties in county court cases and small claims cases may stipulate to be governed by Rules of Civil Procedure 1.700, 1.710, 1.720.1.730. Court-ordered nonbinding arbitration is governed by Rules of Civil Procedure 1.700, 1.800, 1.810 and 1.820.

e). The IRCC's proposed revision to Rule 1.200 provides for the parties to meet and confer to address the appropriate use of alternative dispute resolution, early preparation of uniform case management orders, or in lieu thereof, the use of circuit-wide administrative orders which address the use and timing of alternative dispute resolution. The ADR Section strongly recommends the proposed changes make abundantly clear that **all** court orders of referral to mediation or nonbinding arbitration, whether oral, written, or by written stipulation, will be governed by the appropriate Rules of Civil Procedure so as to eliminate any confusion for the parties, attorneys, and mediators, as to which rules of civil procedure apply to the case being referred to mediation. The rule should also state that in the event of a conflict between the Rules of Civil

Procedure and a conflicting court order, the Rules of Civil Procedure will apply.

The Section's recommended change to the IRCC's proposed Rule 1.200 is consistent with the provisions of Fla. Stat. 44.402, providing that mediation conducted pursuant to oral or written case specific referral orders or court administrative orders are governed by the Mediation Confidentiality and Privilege Act , Sections 44.401-44.406, Florida Statutes.

f). Timelines for commencement of court-ordered ADR and completion of court-ordered mediation are no longer consistent among the Circuits. The ADR Section has reviewed the Administrative Orders promulgated by the Chief Judge of the twenty judicial circuits, set forth in the IRCC Report, as they relate to ADR processes. The Circuit Court Administrative Orders do not comply with the timeframes which are set forth in Rules of Civil Procedure 1.700, 1.710, 1.720 and 1.820.

More specifically, Rule 1.700 (a)(1) requires the first mediation conference or arbitration hearing to be held within 60 days of the order of referral. Rule 1.710 (a) provides that "Mediation shall be completed within 45 days of the first mediation conference unless

extended by order of the court or by stipulation of the parties." Rule 1.820 (g) requires that arbitration "shall be completed within 30 days of the first arbitration hearing unless extended by order of the court on motion of the chief arbitrator or of a party. No extension of time shall be for a period exceeding 60 days from the date of the first arbitration hearing."

Some examples of the inconsistencies and conflicting timelines found in the Rules of Civil Procedure and the various Circuit Court Orders illuminate the problem. Many of the Administrative Orders reviewed do not use the date of the order of referral as the event which triggers the holding of the first mediation conference, as does Rule 1.700(a)(1). To the contrary, some orders use the date of the filing of the complaint as the trigger event; some orders count back a given number of days from the projected trial date, the calendar call date, or the pretrial conference date. Some Administrative Orders use the language that mediation shall be "completed by" and some state that mediation "shall commence" by a given time. One Administrative Order AO 2021-04 (Eighth Circuit), ties conferring about mediation dates and selection of the mediator to 10 days after completion of

depositions of the parties and scheduling a mediation no later than 30 days after the completion of all discovery. Few of the Administrative Orders address or follow the timelines in Rule 1.700 and 1.710 (which address commencement of the first mediation conference or arbitration hearing and completion within 45 days thereafter).

Some of the Administrative Orders use the same timelines for streamlined and general cases and some use a shorter time frame for streamlined cases. AO 2021-13 (Fifth Judicial Circuit), provides that mediation shall be completed within 270 days after the complaint is filed in streamlined case, and within 450 days after the complaint is filed in general cases are typical time frames. **Neither timeline complies with the Rules of Civil Procedure**.

Many of the Administrative Orders deal solely with mediation dates; others speak of completion of ADR; and others refer to nonbinding arbitration and the establishment of dates by which the process must be completed. See for example, the Agreed Case Management Order contained in Administrative Order 1.13 Amended (Twentieth Circuit).

The ADR Section strongly recommends that the time frames set forth in Rules 1.700, 1.710, 1.720 and 1.820 for commencing and completing mediation, for designating mediators, as well as for filing motions relating to the mediation process, be adhered to by all court orders referring civil case to mediation. This approach maintains consistency and uniformity among all circuits. A carve-out can be extended by court order or stipulation of the parties in a specific case so long as the ADR process is completed no later than 30 days prior to the commencement of the trial. The proposed amendments to the rule should make it clear that in the event of a conflict with the timelines in the Rules of Civil Procedure and court orders referring a case to mediation, the Rules of Civil Procedure will apply notwithstanding the timelines in the court's order. This clarification will ensure uniformity and consistency in all judicial circuits across the state and in all trial courts. For the reasons set forth above, the ADR Section would welcome the creation of a uniform order of referral to mediation consistent with our comments.

2. Motions and Scheduling of Hearings: Proposed Amended Rule 1.160 and New Rule 1.16X

Rules 1.700, 1.710, 1.720, 1.730, 1.750, 1.810 and 1.820 contain language regarding filing motions or seeking court orders. As further addressed below, some of the rules also contain provisions regarding sanctions. Proposed Rule 1.160 has a new approach to the filing of motions that is not workable for certain motions relating to mediation and arbitration. Accordingly, the ADR Section suggests Proposed Rule 1.160 (a) be amended further to carve out motions based on Rules 1.700, 1.710, 1.720, 1.730, 1.750, 1.810 and 1.820 from the procedures the new rule contemplates. The Section recommends Proposed Rule 1.160 be amended further as follows:

> (a) Application. This rule shall apply to all motions other than motions made pursuant to rules 1.480, 1.500, 1.510, 1.525, 1.530, 1.535, 1.540, 1.700, 1.710, 1.720, 1.730, 1.750, 1.810 and 1.820. In the event of a conflict between this rule and a rule governing a specific type of motion, the latter prevails. Rules 1.160(j) and 1.160(k) relating to scheduling hearings and abandonment of motions do not apply to the filing of a motion for trial de novo pursuant to rule 1.820.

3. Good Faith and Sanctions Related to Court-Ordered ADR

a). Florida Supreme Court Certified Mediators and Court-Appointed Mediators have an ethical obligation to comply with statutes, court rules, local court rules, and administrative orders

relevant to the practice of mediation. See Rule 10.520, Standards of Professional Conduct for Certified and Court Appointed Mediators.

b). Some court orders referring civil cases to mediation place mediators in an ethical dilemma of having to choose whether to adhere to the court's order or to follow the settled case law and the opinions of the Mediator Ethics Advisory Committee (MEAC) on the subject. MEAC Opinion 2004-06 states the issue succinctly:

> There are no statutes, rules, or common law governing court-ordered mediation that require the parties to negotiate in good faith. See Avril v. Civilmar, 605 So. 2d 988, 989-90 (Fla. 4th DCA 1992) (quashing order imposing sanctions for failure to negotiate in good faith at mediation as a departure from essential requirements of law and stating that '[t]here is no requirement that a party even make an offer at mediation, let alone offer what the opposition wants to settle.') See also MEAC Opinion 2001-004.

One example of the ethical dilemma created for Florida Supreme Court Certified Mediators is AO 2021-19-CIV (Amendment Two) (17th Circuit). The Administrative Order contains a Uniform Order Setting Pretrial Dates and Related Requirements in General County Civil cases. The Uniform Orders are required as part of the case management process. The Order states that the ""FAILURE TO MEDIATE OR ARBITRATE IN GOOD FAITH …. MAY RESULT IN DISMISSAL OR DEFAULT." This language conflicts with the case law,

see Avril v. Civilmar, supra, and the MEAC opinions addressing the subject. The referenced Order is just one of many that individual judges and some administrative orders render demonstrating the need for uniformity and consistency in the Rules of Civil Procedure as they relate to case management of civil case.

Indeed, the MEAC has advised mediators repeatedly that they may not report to a court that a party has failed to negotiate in good faith because the mediator's report would: (1) constitute a breach of confidentiality; (2) impair parties' right to self-determination; and (3) destroy mediator impartiality, in appearance and in reality. Moreover, Chapter 44, Florida Statutes, does not require mediation or arbitration in "good faith". See also, Erica Dunlap and Robert Sturgess, "Good-Faith Mediation Order in Florida Civil Federal Courts: Let Judges Do the Judging and Mediators Do the Mediation" (September/October 2015) 89: 8, Fla BJ 28.

Accordingly, the ADR Section requests that the Rules of Civil Procedure be amended to require that no case management order, order of referral to mediation, administrative order, or other court order, may contain language requiring the parties to mediate in "good faith." Such language creates an ethical conflict for Florida Supreme

Court Certified and Court-Appointed Mediators and exposes the mediation participants to the potential for the improper imposition of sanctions by the trial court.

4. Proposed Change to Rule 10.420 of the Standards of Professional Conduct for Certified and Court-Appointed Mediators

a). The IRCC Workgroup has recommended Rule 10.420, Florida Rules for Certified and Court-Appointed Mediators be amended to allow for a group orientation session in small claims cases.

The proposed amendment to Rule 10.420 reads:

> For mediations that are to be conducted in conjunction with pretrial conferences pursuant to Florida Small Claims Rule 7.090(f), a mediator may present the orientation session in multiple cases as a group, either in person, by remote or virtual appearance, or by means of a prerecorded video presentation.

b). The ADR Section cannot support this change as it violates the Mediation Confidentiality and Privilege Act, Sections 44.101-106, Florida Statutes. The ADR Section agrees with MEAC Opinion 2016-006, which stated if the orientation session (or any part of a mediation session) occurs with other parties from unrelated cases, **confidentiality is compromised**. See Mediation Confidentiality and Privilege Act, Sections 44.401-406, Florida Statutes.

The Mediation Confidentiality and Privilege Act covers any mediation communication made "during the course of a mediation, or prior to mediation if made in furtherance of a mediation." See Fla. Stat. 44.403 (1). It would cover the orientation session in each small claims dispute which is mediated.[7]

Confidentiality and privilege are the bedrocks of mediation, and unless disclosure of mediation communications **is required or permitted by law**, or the confidentiality and privilege is waived by the parties, a mediator cannot disclose his/her mediation communications to other third parties in other disputes. See Mediator Ethics Advisory Opinion 2004-011, and Rule 10.360, Florida Rules for Certified and Court-Appointed Mediators. There is no statutory basis for the proposed amendment which would waive mediation confidentiality and privilege in one small claims group orientation session for multiple mediations. Waiver of confidentiality is more than just sitting through a group orientation; it requires

[7] "Mediation" is defined in Fla. Stat. 44.1011 (2) as "a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties."

express consent of the individual mediation participants and not just sitting mute. See Mediator Ethics Advisory Opinion 2003-005.

c). Given the requirements in the Rules for Certified and Court-Appointed Mediators, even if Rule 10.420 is amended as the IRCC suggests, it does not relieve the mediator assigned to the specific case from fulfilling their ethical obligation to abide by the rules of court and deliver an orientation. Thus, the very reason the IRCC gives for the amendment is negated by the fact that other rules require the mediator give an orientation for the specific mediation session. **No efficiency is achieved in the court's processes by the implementation of the proposed rule change.**

CONCLUSION

On behalf of the ADR Section of The Florida Bar, we thank you for allowing mediators and arbitrators to continue to deliver court-connected ADR services to assist the courts of this state in achieving the Workgroup's stated goals, including its primary goal of "Examining this state's laws, rules of court, and practices relating to civil procedure and case management to determine whether changes can be made to improve the resolution of civil cases." These comments are offered in the spirit of insuring consistency and

fairness during active case management in the State of Florida. It is well-known throughout the United States that Florida is the leader in court-connected Alternative Dispute Resolution. It is hoped that the perspective of the ADR professionals who are members of the ADR Section of The Florida Bar will assist the Court in evaluating the efficacy of the proposed civil rules changes.

WHEREFORE, the ADR Section of The Florida Bar respectfully submits these comments for the Court's consideration.

Certificate of Service

I certify that the forgoing Comments of The Alternative Dispute Resolution Section of The Florida Bar was 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 May 26, 2022.

Certificate of Font Compliance

I certify that this comment was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045(b).

Respectfully submitted,

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