IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-122

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

COMMENT

These comments are being filed by Meah Tell, a former Chair of The Alternative Dispute Resolution Section of The Florida Bar, a former President of the Florida Academy of Professional Mediators, and a former Member of the ADR Rules and Policy Committee of the Florida Supreme Court and a former Member of the Mediator Ethics Advisory Committee of the Florida Supreme Court.

I thank you for the opportunity to comment on the November 15, 2021 Judicial Management Council Workgroup's ("IRCC") Final Report on Improved Resolution of Civil Cases ("IRCC Report"). These comments are purely my own and intended to assist the Court in evaluating the rule changes proposed in the IRCC Report. They are written from the perspective of an ADR professional who has (a) taught mediation as an adjunct professor and as a Florida Supreme Court approved circuit and family mediation trainer, and

(b) taught hundreds of Florida Supreme Court qualified arbitrators as an approved trainer in Florida Supreme Court approved programs regarding court-connected arbitration and voluntary trial resolution processes, and (c) been a member of the Florida Bar since 1979, practicing as a civil and family litigator, and (d) has worked as a mediator since 1989 and an arbitrator since 1984. To the extent that I assisted the ADR Section in filing their Comment, the content of this Comment and the Comment of the ADR Section may overlap.

I. **Overall**

The first thing that is apparent from the IRCC Report is an aversion to settling cases through alternative dispute resolution ("ADR"), and the desire to promote trials.

The IRCC Report links ADR to public dissatisfaction with the court system. On page 18, the IRCC Report states that member Judge Jennifer Baily identified one of the "key problems facing civil courts" as "The resulting turn to alternative dispute resolution (ADR) formats such as arbitration, mediation, and private judges. The shift to private forums involves more than the loss of court 'business' to competing modalities. The ramifications go deeper:

'Privatizing litigation has many risks, including lack of appellate safeguards, loss of the development of common law, lack of transparency, and **loss of public confidence and benefit.'**

The *Call to Action* report reflects similar sentiments, noting that '[r]unaway costs, delays, and complexity' associated with civil litigation in state courts 'are undermining public confidence and denying people the justice they seek.' People may find the prospect of navigating the civil courts 'daunting' due to a 'maze-like process that costs too much and takes too long.' In short, the public's perception is that justice from the civil courts is slow, inefficient, and not worth the cost, especially when ADR modalities are available." [footnotes deleted and emphasis supplied]

The Chair of the IRCC, Judge Robert Morris, when addressing the Tampa Bay ABOTA on February 18, 2022, portrayed mediation, arbitration and private judging as "competitors" to the courthouse, and one of the reasons that new case filings are stagnant or down. Judge Morris lamented that only .04% of cases are actually tried and told the trial lawyers that they were "Tazmanian Tigers," and "an extinct breed."

Many do not seem to share this negative view of mediation, but view mediation as a way to help the court manage cases. The best analogy I have heard is that mediation is like a pharmacist, who supports a physician in managing patient care, but never directs patient care. The Florida Supreme Court has embraced the benefits of mediation, and stated in AOSC21-17 (June 4, 2021) that the chief judge of each circuit must issue an administrative order requiring trial judges in streamlined and general civil cases to enter case management orders which specify the **deadline for when mediation must have occurred in each case.** See Section II. E. (7) a. ii. (emphasis added)

A. A Paradigm Shift for ADR

There is little mention in the IRCC Proposed Amendments of how court-connected ADR is impacted. One thing is for certain. Administrative orders, early case management orders, or standing court orders issued by the clerk and served by the plaintiff along with the complaint[1] require mediation. As a result, there is a monumental shift from early voluntary non-court ordered mediation, to mandatory court-ordered mediation in civi

[1] 14th Judicial Circuit AO 2021-00-06.

cases. Mediators, parties and their counsel must understand and comply with court rules and statutes that apply to court-ordered mediations. For this reason it is particularly important that orders be uniform, allow for ethical mediation, and comply with existing ADR rules.

The distinction between court-ordered mediations and other mediations is significant. Pursuant to F.S. 44.102 the Florida Supreme Court has the authority to promulgate rules of practice and procedure for **court-ordered mediations**. The Florida Supreme Court has promulgated 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 (for county court and small claims) and 7.090 (for small claims).

The Mediation Confidentiality and Privilege Act (Fla. Stat 44.401-44.406) applies to any mediation required by "oral or written case-specific court order or court administrative order." Fla. Stat. 44.405 provides that if a mediation is court-ordered, a violation of mediation confidentiality may subject the mediation participant to sanctions by the court, including but not limited to,

costs, attorney's fees, and mediator's fees. This is in addition to the civil remedies for the knowing and willful disclosure of a confidential mediation communication as set forth in Fla. Stat. 44.406.

The Standards of Professional Conduct promulgated the Florida Supreme Court and the disciplinary proceedings for violation of these standards for Florida Supreme Court Certified Mediators apply to any mediator selected by the parties after an order of referral to mediation. Administrative orders or case management orders which will apply early in the life of the case will cause a shift in the type of mediation services that can be offered since the Standards of Professional Conduct restrict the type of mediation services that can be rendered. For example, The Standards of Professional Conduct prevent a mediator from "offering a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue." A mediator "shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute." According to the Mediator Ethics Advisory Committee, in Opinion 2018-002, a mediator is prohibited from providing relevant case law to the parties. "In the scenario

described by the inquirer, providing case law to one or both parties would violate the standards of impartiality as doing so may assist one party to the detriment of the other party. Furthermore, providing case law would cross the line between being a mediator and an advocate. It is improper for a mediator to provide legal advice by any method within the scope of a mediation, whether such advice be by statement, question, any other form of communication, or providing case law." Non-compliance can result in disciplinary proceedings.

II. Concerns.

A. Inconsistency.

A review of the Circuit Court Judges Administrative Orders referenced in the IRCC Report,[2] do not comply with the timeframes which are set forth in 1.700, 1.710, 1.720 and 1.820.

[2] https://www.flcourts.org/ResourcesServices/Emergency-Preparedness/Administrative-Orders/Civil-Case-ManagementAdministrative-Orders (last visited May 18, 2021) promulgated pursuant to Fla. Admin. Order No. AOSC20-23, Amend. 12 (Apr. 13, 2021), which are now set forth in section II.E.(7) of Fla. Admin. Order No. AOSC21-17 (June 4, 2021),

Rule 1.700 (a)(1) requires the first mediation conference or arbitration hearing 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."

The Administrative Orders reviewed, however, do not use the date of the order of referral as the event which triggers the holding of the first mediation conference. To the contrary they use the date of the filing of the complaint as the trigger event, or count back a given number of days from the projected trial date, the calendar call date or the pretrial conference date, or use these trigger dates as the date by which mediation shall be concluded. One Administrative Order AO 2021-04 (Eighth Circuit) ties conferring about mediation dates and selection of the mediation 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. Some Administrative Orders use the language that mediation shall be "completed by" and some state that mediation "shall commence" by a given time. None of the Administrative Orders follow the Rule 1.700 and 1.710 timelines which provide for commencement of the first mediation conference or arbitration hearing within 60 days of the date of the order of referral and completion within 45 days thereafter. Are the parties and counsel supposed to follow Rules of Civil Procedure 1.700, 1.710, and 1.820 in the face of conflicting case-specific orders?

Some of the Administrative Orders use the same timelines for streamlined and general cases and some use shorter time frames for streamlines cases. AO 2021-13 (Fifth Judicial Circuit) which 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.

Many of the Administrative Orders deal solely with mediation dates, others speak of completion of ADR and others refer to non-binding 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).

It seems provident that the time frames set forth in Rules 1.700, 1.710, 1.720 and 1.820 for commencing and completing mediation and non-binding arbitration, for designating mediators and arbitrators, and for filing motions should remain uniform among all circuits for both streamlined and general cases, unless otherwise extended by court order or stipulation of the parties, so long as the ADR process is completed no later than 30 days prior to the actual trial dates. The IRCC Report emphasizes that parties and their counsel should stick to deadlines, and a lack of consistency or ambiguity in deadlines defeats this purpose.

B. ***Avoiding Complexity.***

(1) Motions and Scheduling of Hearings: Proposed Rules 1.160 and 1.161.

Rule 1.700, 1.710, 1.720, 1.730, 1.750, 1.810 and 1.820

contain language regarding filing of motions, setting hearings and seeking court orders. Proposed Rules 1.160 and 1.161 have a new, more complicated approach to the filing of motions, scheduling hearings and abandonment of motions. ADR processes are designed to decrease litigation and should not be included in this new regime. Motion/requests for trial de novo pursuant to Rule 1.820 are never set for hearing and are not abandoned if not set for hearing. Accordingly, I suggest that Proposed Rule 1.160 (a) be amended to carve out Rules 1.700, 1.710, 1.720, 1.730, 1.750, 1.810 and 1.820 motions, so that it will read 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 contradiction between this rule and a rule governing a specific type of motion, the latter prevails. Rules 1.160 (b) -1.160 (l) do not apply to the filing of a motion/request for trial de novo pursuant to rule 1.820."

C. Avoid Court Orders Creating Ethical Dilemmas.

(1) Good Faith and Sanctions Related to Court-Ordered ADR.

AO 2021-19-CIV (Amendment Two) (17th Circuit) 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 following language is contained in the Uniform Order: "FAILURE TO MEDIATE OR ARBITRATE IN GOOD FAITH …. MAY RESULT IN DISMISSAL OR DEFAULT."

I request that the Court prohibit the above language from being contained in any court orders requiring court-ordered ADR, any court-rules, or any administrative orders

This language creates an ethical conflict for Florida Supreme Court Certified and Court-Appointed Mediators.

Chapter 44 does not require mediation or arbitration in "good faith."

Mediator Ethics Advisory Committee Opinion 2004-06 stated:

> "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.

....

The Committee has advised mediators that they may not report to a court that a party has failed to negotiate in good faith for the principal reasons that 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."

(2) *Hybrid ADR Orders*.

Some judges are issuing one hybrid ADR order --ordering cases to mediation and to non-binding arbitration to the same neutral. These hybrid orders contain multiple ethical issues. It is requested that the Court prohibit hybrid ADR orders and require a single order of referral to non-binding arbitration and a single order of referral to mediation using standard orders of referral. Among the problems

with these hybrid orders is that the neutral appointed by the Court may not be both a Florida Supreme Court certified mediator and a Florida Supreme Court qualified arbitrator, and the court cannot select neutrals who are not Florida Supreme Court mediators or qualified arbitrators. Additionally, hybrid orders may contain incorrect, outdated statements which do not comport with the applicable Rules of Civil Procedure or Fla. Stat. 44.103, such as:

> 6. While the issue of attorney's fees, if appropriate, is normally reserved for the trial court, the parties can waive this right and have the arbitrator(s) render a finding on entitlement and/or the reasonable amount of attorney's fees. Such waver should be in writing and signed by the respective parties or their attorneys. See, generally, Turnberry Associates v. Service Station Aid, Inc., 651 So.2d 1173 (Fla. 1995).
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> 11. If a trial de novo is requested and the judgment at trial is not more favorable than the decision of the arbitrator(s), the Court may assess the party requesting the trial, the other party's expenses, costs and fees, including reasonable attorney's fees. *Florida Statutes, Section 44.103(6).*

For this reason it is suggested that model form mediation and non-binding arbitration orders of referral be utilized. Additionally, these orders should require the fees for the neutrals to be divided equally between named parties, unless otherwise agreed to by the

parties or ordered by the court. Model orders of referral to non-binding arbitration in PIP cases in one circuit impose 100% of the arbitrator's fee on the Plaintiff without any justification for the same.

(3) *Use of Sitting Judges in Other Divisions or Magistrates to Mediate Cases.*

The Workgroup has looked to the Federal courts as a model for their case management proposals. In the federal court system in Florida sitting judges in other divisions or magistrates are being used to mediate cases. In the state court system, sitting judges and magistrates should not participate in the mediation process. The active case management model envisioned under the proposed rules needs to prohibit trial judges from acting as mediators, negotiators, or facilitators. In the extreme, trial judges should not threaten attorneys about not recovering attorney's fees if they do not convince their clients to settle, inquire about settlement offers, keep sending parties out to negotiate settlements in the middle of the trial of a case, or send the parties to mediation more than once.

In *Evans v. State*, 603 So.2d 15, 17 (Fla. 5th DCA 1992) the appellate court stated: "Mediation should be left to the mediators and judging to the judges." The court advocated sending cases for

mediation to retired judges, and current Rule 1.720, the Code of Judicial Conduct, and the Standards of Professional Conduct for Certified and Court-Appointed Mediators address the role and constraints upon senior judges who act as mediators.

See also the concerns expressed by Judith Resnik, in "Managerial Judges," 96 Harv. L. Rev. 374, 380 (1982) about active case management judges stepping out of their neutral and impartial role as adjudicator (blindfolded justice) and stepping into the roles of mediator, negotiator, and planner, with greater opportunity "off the record" to privately press parties and their counsel for settlements.

CONCLUSION

Florida has been a leader in the field of court-connected ADR and part of this leadership is attributable to the statutes, rules, and case law, which have evolved through the hard work of ADR professionals, the Florida Supreme Court, the Florida Dispute Resolution Center, trial lawyers and trial judges. The fact that mediation and non-binding arbitration are able to reduce the number of cases that are tried is something that helps with

case management, and is not anathema to the role of the

courts in dispensing justice.

Respectfully submitted on this 1st day of June, 2022.

/s/ Meah Tell

Meah Tell
P.O. Box 25490
Tamarac, Florida 33320
7146 S. Devon Drive
Tamarac, Florida 33321
Telephone: (954) 733-5000
Email: meahtell@gmail.com; meahtell@aol.com

Certificate of Service

I certify that on June 1, 2022, the foregoing Comment was served by mail on the Workgroup Chair, the Honorable Chief Judge Robert Morris, by U.S. Mail at Second District Court of Appeals, P.O. Box 327, Lakeland, Florida 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 June 1, 2022.

/s/ Meah Tell

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Bookman Old Style, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure.

/s/Meah Tell

Meah Tell