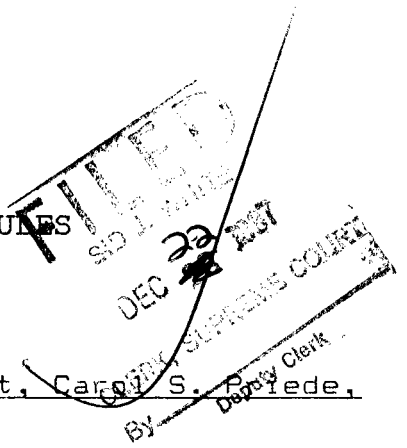
SUMMARY OF COMMENTS ON PROPOSED RULES



Rule 1.700 (a)(2)

Proposed by the Thirteenth Judicial Circuit, Carol S. Poziede, Director of Family Court Services:

-That the words "and either the mediator or arbitrator" be deleted from the third line of the rule.

From Memo prepared for the Eleventh Circuit, prepared by Donald Pollock and Leslie Ratliff: They wondered whether (a)(1) of this rule applied to voluntary binding arbitration.

The Board of Governors propose that this rule be modified so as to require a hearing prior to referral for the purpose of determining the suitability of referring a particular matter. The Board further suggests that no matter be referred to non-binding arbitration until after the closing date for discovery and the action is set for trial. The Family Law Section concurs in the opinion of the Board.

1.700(b) - it is proposed that this be clarified as to whether it concerns only actions between the same parties to a previous mediation or arbitration and thus comports with the same concerns as do res judicata and collateral estoppel.

1.700(c) - it is suggested that this provision is unduly vague and it is proposed that language be inserted that would limit the grounds upon which a party may defer or forego the process. The asserted rationale is that such language would comport with the policy implicit in these rules; namely to encourage expeditious resolution of disputes. It is asserted that limiting language will reduce the number of cases in which a motion to defer or forego is filed and thus reduce judicial time by not having to hear so many motions. It is suggested that such limitations include the following factors: complexity of the case, value of the claim, number of parties, presence of a request for injunctive or declaratory relief that is not ancillary to the claim for damages. It is also suggested that language be inserted that would state that denial of a motion to defer or forego mediation is not reviewable.

R. 1.700 (e)

Proposed by the Family Law Section of the Bar:

-That there be added to this subsection a provision that would

require that a person appointed as a mediator or arbitrator shall have the duty to disclose to the court any circumstances likely to affect his or her impartiality.

Proposed by the Florida Association of Professional Family Mediators:

-That the mediator be consulted before any scheduling is done. The proposal is based on the observation that most mediators have their schedules booked weeks in advance.

-it is proposed that an explicit time period (e.g. 20 days) be set in which a replacement must be named.

1.710 (a)

Proposed by the Thirteenth Judicial Circuit, Carol S. Priede, Director of Family Court Services:

-That the time for filing the mediator's report be changed from 5 to 11 days. According to Ms. Priede's oral argument, this change is proposed so that the time for the filing of the report will be in line with the time that a party's attorney has to file an objection to an agreement. See: R. 1.730(b).

Proposed by the Florida Association of Professional Family Mediators:

-That the completion of mediation be changed to 60 days with a 30 day extension. The rational is that several mediation sessions are often necessary and the logistics of scheduling mediators together with both parties precludes the possibility of getting a successful mediation in the presently prescribed time.

1.710(b)

Comment from HRS, Jos. Boyd and Wm. Branch, attorneys:

-Child support matters brought pursuant to Title IV-D should be specifically exempted from mediation and arbitration. HRS contends that the legislative intent of Fla. Stat. §61.183 was that such matters should be resolved by the trier of fact and not by mediation. Furthermore, there are federal time standards for the handling of such cases and the department fears that if these cases are required to go through mediation, the federal standards might not be met and federal funding will thus be lost.

1.720 (c) - it is proposed that the mediator certify to the court within five days of suspension or termination of the conference that such action has been taken.

R. 1.720 (d)

Proposed by the Thirteenth Judicial Circuit, Carol S. Priede, Director of Family Court Services:

-That the words "at all times" be deleted from the second to the last line of this subsection and instead have inserted the words "during a mediation recess." following the last word of the rule as it presently stands. (The Fla. Assoc. of Professional Family Mediators agrees that attorneys should not be permitted at mediation conferences. The association suggests a compromise that would permit attorneys to be present at an initial orientation session and at a final session.)

-Also that a new subsection be inserted that would read:
" Recess. The mediator shall allow recesses, if requested, during each session and counsel shall be permitted time to confer with their client prior to the signing of the agreement."

Ms. Priede commented that attorney participation during the mediation session could be disruptive, and that the confidentiality issues with the attorney being present are in question.

Proposed by Mary Cadwell, Court Mediator and Susan Ferrante, Court Administrator, both from the Fifteenth Circuit:

-That the following paragraph be added to this rule: "As the nature of Family Mediation stresses resolution of the issues by the family members, counsel may attend only at the express request of both parties."

-That the following paragraph also be added: "Where Family Mediation is offered as a free service of the County or Circuit, that attending counsel shall waive their fees to clients for attendance at such mediation conferences."

The rationale here is that County Commissioners may look unfavorably upon continuation of funding a family mediation program when that program becomes a source of both information and revenue for private attorneys.

They also argue that the process of resolution in family mediation is such that often considerable time must be spent exploring the dynamics of the family and that family members will be less open and also less willing to spend the time necessary for full exploration of the relationships if attorneys are present. This is especially so if the parties envision the meter ticking away attorney's fees as they talk to the mediator.

Comment from Melvin A. Rubin, Esquire of the South Florida Council on Divorce Mediation:

-That having attorneys present during the mediation conference would be disruptive of the proceedings and transform the atmosphere from one of conciliation to one more adversarial in nature. Furthermore, given the other safeguards provided by the rules (the respective attorneys pass on the agreement before it goes to the court, parties may consult with their attorneys), it is unnecessary for counsel to be present at the conference.

R. 1.720(e)

Comment from Melvin A. Rubin, Esquire of the South Florida Council on Divorce Mediation:

-That there be a notice and consent requirement before any ex parte communications between a mediator and a party or counsel. and that consent be written.

R. 1.730 (b)

Proposed by the Thirteenth Judicial Circuit, Carol S. Priede, Director of Family Court Services:

-That the words "be immediately" in the 5th line of the rule be stricken and instead the words "within 11 days" be inserted.

Comment from Melvin A. Rubin, Esquire of the South Florida Council on Divorce Mediation:

-That the attorney should not have the ability to reject an agreement since the purpose of mediation is to effect an agreement between the parties. Thus, if the parties are satisfied with the agreement, an attorney should have no greater right than he would as counsel for a litigating party in a dissolution proceeding.

R. 1.730 (c)

Proposed by the Family Law Section of the Bar:

-That this subsection be reworded so that the court would have the power to consider whether a mediation agreement serves the best interests of the minor children involved as well as that of the parties.

R. 1.740

Proposed by the Board of Governors, via Bette Quiat:

-that this rule be redrafted as follows:
"Every effort should be made to expedite mediation of parental responsibilities. The court may refer the issues of parental responsibility, primary physical residence and visitation to nonlawyer mediators. All other issues shall be referred to a lawyer mediator.

Ms. Quiat's argument is that because of the complexity and constant evolution of the law in this area, non-lawyer mediators are unqualified to deal with those issues. She also argues that financial issues should be separated from the interpersonal issues anyway so that custody and visitation will not be used as bargaining chips during discussions on financial issues.

Proposed by the Family Law Section:

-That this rule be amended so as to specifically state that parental responsibility issues be given priority over all other issues in family law cases with the sole exception of emergency matters.

Comment from Melvin A. Rubin, Esquire of the South Florida Council on Divorce Mediation:

-That a mediator sits as such not as a lawyer (i.e. one who dispenses legal advice) nor as a mental health professional (i.e. one who provides psychological counseling), but rather as a separate and independent professional, namely a professional mediator. Thus the distinction in this rule is artificial since a trained professional mediator should be able to mediate all matters and also should be sensitive enough to refer a party for consultation with his or her attorney as necessary.

R. 1.760

Proposed by the Thirteenth Judicial Circuit, Carol S. Priede, Director of Family Court Services:

-that subsection (2) of this rule be changed so that observation of five rather than three mediation conferences be required.
-that another subsection be inserted that would read: "have co-mediated three conferences under the supervision of a court certified mediator: and"

Comment from Melvin A. Rubin, Esquire of the South Florida Council on Divorce Mediation:

-That the five year requirement is discriminatory and unduly restrictive since an attorney can represent a litigant in a dissolution matter the very day that he becomes licensed. Furthermore, since mental health professionals generally are required to undertake a two year program of experience before they are licensed, the result is requiring 7 years experience for mental health professionals.

Proposed by Florence Kaslow, a mediator and trainer from W. Palm Beach, also past president of The Florida Association of Professional Family Mediators:

-That the words "a minimum of" be inserted after the word "have" in (b)(1)

-That the words "or the Academy of Family Mediators." be inserted following the words "Supreme Court" in (b)(4). The rationale here is that the Academy is the major organization of trained professional family mediators in the country and has been certifying programs for the past 5 years.

-that the words "or licensed as a family mediator by the State of Florida" be added to this subsection. This is suggested in anticipation of passage of a law licensing mediators in this state. Such a bill has apparently been introduced into the legislature a number of times.

Comment from Bruce W. Talcott, Esquire, an out of state member of the Florida Bar:

-That this rule discriminates against out of state members in that the requirement of five years Florida practice for a Circuit Court mediator is in conflict with the requirement for family mediators that requires that the attorney be a member of the Bar in good standing and five years experience (not necessarily in Florida.) Mr. Talcott thus requests that the Florida practice requirement in (c)(1) of this rule be stricken.

Proposed by Gary Harman of Holland & Knight:

-That subsection (c)(1) of this rule be amended so as to permit former judges of courts of limited jurisdiction to be eligible to mediate in circuit court.

-That subsection (d)(2) be clarified concerning what happens to present mediators once the six months have passed.

It is proposed that a provision be added to this rule that would require that the chief judge of the circuit maintain a list of qualified mediators who have agreed to be mediators.

R. 1.770 (a)(6), (b)(5), and (c)(8)

Comment from Melvin A. Rubin, Esquire of the South Florida Council on Divorce Mediation:

-That none of the training programs that the members of the Council have participated in include the administering of an exam.

Proposed by the Thirteenth Judicial Circuit, Carol S. Priede, Director of Family Court Services:

-that the words "or have a Bachelor's Degree in social, mental health or psychological sciences and five years practical experience in one of the above mentioned fields" be inserted after the words "psychological sciences" in the second line of the rule as it now stands.

-that subsections (2) and (3) be deleted since the insertion just mentioned would cover those aspects.

Ms. Priede commented that the qualifications, as they now stand, limit and jeopardize the continuation of present court based mediation programs and future hiring of mediators for these programs. She further commented that salary ranges for court based Family Mediators are not commensurate with these qualifications. She also noted that the proposed rules did not address whether the training is to be taken before or after the mediator is hired and the availability of such training.

Proposed by Mary Cadwell, Court Mediator and Susan Ferrante, Court Administrator, both from the Fifteenth Circuit:

-That "sociology" be inserted after the words "mental health" in the second line of (b)(1) and that "or allied fields" be inserted after the words "psychological sciences" in (b)(1).

-That the licensure requirement in (b)(2) be stricken altogether and that (b)(3) be changed to read: "Have at least 4 years of experience in juvenile and family counseling, family law, family mediation, or in a related area: and"

Ms. Cadwell and Ms. Ferrante argue that the generally accepted national standard is a Master's Degree in a Behavioral Science or a law degree. They also argue that, as a practical matter, those persons who meet the proposed standards would be more apt to draw

higher salaries form the private sector.

Proposed by the Family Law Section:

-That this rule be amended so as to allow C.P.A.s to mediate tax, financial and property issues so long as they have received the requisite training as a family mediator. (If this is adopted, it should be reflected in R. 1.740 as well.)

-That an attorney mediator in family law cases be either Board Certified in the area of marital and family law or that he or she has devoted at least 50% of his practice to family law for the period of 5 years

R. 1.770(a)

Proposed by the 17th Circuit, Carol Ortman, Court Administrator:

-that training for Circuit Court mediators include training in court processes and written and oral communication.

R. 1.800

Proposed by the Family Law Section:

-That this rule be amended to provide that where any arbitrable claims are joined with claims which are non-arbitrable but that are subject to mediation, then all claims will be mediated (or resolved by the court) and that there will be no splitting of claims in the same action between mediation and arbitration.

This proposal arose from the observation that family law matters are excluded from arbitration but equity actions, such claims for injunctive relief, which are often joined with dissolution of marriage claims, are not so excluded.

Proposed by David Henretta, Jr., President of the Association of Retired Attorneys through Judge Gilbert Smith of the Twelfth Circuit:

-That Rules 1.760(b)(2), 1.760 (c)(1) and 1.810 (b) be amended to include retired attorneys who are in good standing in the Bar of any other State. Also, that the words "or practice in the State in which he held Bar membership." be added at the end of 1.760(c)(1)

Mr. Henrietta argues that these changes would permit these

retired attorneys to be available on a volunteer basis thus resulting in cost savings and enhancement of the public image of the state judicial system.

R. 1.820(c)

Proposed that the following language be added to the rule: "The rules of evidence shall be liberally construed to promote the ends of justice. Relevance, fairness, and reliability shall be the primary considerations for admission of evidence.

1.820(e)

-it is proposed that language be inserted that the arbitrator may proceed in the absence of a party only if that party had due notice of the hearing pursuant to R. 1.700(a)(2). It is also suggested that the rules specify that imposition of liability or the granting of damages against a party in default not be based solely on that party's absence.

1.820(g)

-it is proposed that notice be sent to the parties along with the arbitration decision, of the party's right to request a trial de novo.

-it is also suggested that a provision relating to discovery, similar to 1.710(a) be inserted for arbitration.

SOME ADDITIONAL CONCERNS SUBMITTED BY THE ELEVENTH CIRCUIT

How do these rules apply to existing programs? That is, would mediators in the Personal Injury Mediation Project, for instance, be subject to compliance with certification requirements? (It is noted that the mediators serve pro bono and party participation is voluntary and also that the mediators have resisted any training requirements.)

It is suggested that the rules should clarify how and when mediation training programs will be approved and certified.

What happens if there are no persons who are willing to serve as mediators in a specific geographic area? Can the qualification and training requirements be waived if the need arises?

Are the time standards in R. 1.700 and 1.710 jurisdictional? What sanctions are imposed for violation?

Rule 1.810(a)
Does the requirement that the chief judge shall maintain a list of qualified arbitrators (and the corresponding section regarding mediators) exist only if there is a program implemented in the circuit?

Rule 1.830 Voluntary binding arbitration

Must a circuit make provision for a voluntary, binding arbitration option? And if such a program is required to be established, must it be court-annexed?

-The premise for this question is that the language of the statutes (i.e. in §44.303(1) "...subject to the availability of funds" and in §44.302(1) "...if an appropriate mediation program has been established" as well as language stating that the judge may refer contested civil cases) is discretionary language and thus appears to leave it to the individual circuits whether to make funding available or to implement a program. Arguably, however, the implementation of §44.304(1), which deals with voluntary binding arbitration, is required since the parties and not the court are cast in the role of the initiator.

Must the chief arbitrator in voluntary binding arbitration meet the qualification and training requirements ?

It is suggested that the rules should specify the amount of the fee referred to in §44.304(5). (these are the fees paid to the clerk with the application for voluntary binding arbitration.)

If the application for voluntary binding arbitration is filed after a suit has been filed, should it be filed as part of the pending lawsuit or should it get a separate case number and be treated as a separate civil action?

If the application is filed prior to the filing of the lawsuit, should the application be treated as the filing of a suit and thus be assigned a case number and division?

If the controversy is not settled by the arbitration should it be assigned a new and separate case number and should any credit be given for payment of the filing fee specified in §44.304(5)?

Is the tolling of the statute of limitations called for in §44.304(6) automatic upon filing of an application for voluntary binding arbitration or is some further court action necessary?