Report of the Mediation and Arbitration Committee
of the Supreme Court

October 15, 1987

The Mediation and Arbitration Committee of the Supreme Court submits its report, pursuant to the Administrative Order entered July 24, 1987.

Several operating principles were important in our deliberations, and are reflected in the proposed rules and standards.

We believe that the system should be designed to handle the great majority of cases, not the exceptional case which will require special management by our Circuit and County Judges. We have depended on counsel to bring to a Court's attention the case, or aspect of a case, which should not be offerred mediation or arbitration.

Ample provision has been made to permit the Judge to exercise discretion, broadly, over the conduct of the business of the Court. However, we have sought wherever possible not to add to a Judge's burden by the fashion in which we crafted these rules. We have sought to make the most probable course of action in the majority of cases occur without specific judicial intervention. Authoritative initial decisions will be initially required to designate which cases might best be diverted to which forms of assistance, after which the system could be operated clerically to acheive the desired procedural results.

We strongly believe that the pilot program, and other programs to follow, will provide the best guidance for future modifications to the rules and standards. Our draft is a point of beginning, and should be seen as such. We look forward to the contributions of other minds and skills as the work unfolds. We, therefor, have deliberately taken a minimalist approach in drafting. We know that the best structure for the system of people, rules and processes envisioned and proposed by our Legislature will become clearer as Judges, mediators and arbitrators begin to do the work of successfully operating the system.

The Committee recommends that the Legislature amend the provisions of Section 44.303(5). We believe that this Section should be amended to provide that "the party having filed for a trial de novo may (currently, "shall") be assessed... costs... and ... fees...." when less successful than the award in non-binding arbitration.

If non-binding involuntary arbitrations were to strictly follow the rules of evidence and procedure, we would be less apprehensive about the effect of taxing these costs against an unsuccessful litigant. However, the procedures for the non-binding arbitration are intended to be relaxed, and informal. It is anticipated that little or no actual testimony will be presented. The arbitrators will be making few if any judgments concerning the beleivability of witnesses.

It seems to us the Court should be granted more discretion in determining whether to award attorneys' fees, costs and other expenses, as provided by the statute, where the actual trial de novo will communicate much larger quantities of information, and will permit a Judge or jury to make determinations of credibility of witnesses. We are concerned that a requirement that Judges assess these items against a party unsuccessfully concluding a trial de novo could have a chilling effect on the overall success of the non-binding arbitration feature of this legislation. In passing, we observe that the court-annexed non binding arbitration offerred in the Federal Middle District of Florida has no sanctions or penalties, and functions fully without them.

The Committee concluded that the statute's ceiling of "not more than $75 per day" (for arbitrators' fees), Section 44.303(2), is not consistent with the long-term success of non-binding arbitration. It is of note that no similar limitation was placed upon the compensation of mediators.

Although the Bar in the Federal Middle District of Florida is currently supporting that Court's experiment in non-binding arbitration, at the rate of $75 per day per attorney-arbitrator, it is not reasonable to expect that the Bar can continue to provide such a generous service in the future. An attorney's payments to staff and for the other costs of operation can easily exceed several multiples of that figure.

We believe the Legislature should determine that arbitrators should be reasonably compensated, in an amount to be determined by the Court in the absence of agreement between the parties and the arbitrators. Inasmuch as non-binding arbitration has resulted in the resolution of better than ninety percent of the cases submitted to it in many jurisdictions, this would seem to be a justifiable public expense, when any party involved is unable to afford the arbitrators' fees.

The Committee is concerned for the liability of mediators and arbitrators. Florida law does not appear to clearly provide them with judicial immunity, although Florida precedent permits a strong argument to be made in favor of unqualified judicial

immunity. We believe that a statute should be adopted, clearly stating that mediators and arbitrators, while performing their duties pursuant to Chapter 44, enjoy the same unqualified immunity as that enjoyed by full-time judicial officers.

The Committee's ability to propose further rules and standards for mediator training, qualifications and conduct, as well as for refinements in the rules of procedure, will be enhanced by the forthcoming National Workshop on Standards of Practice for Dispute Resolution Programs and Practitioners. The Workshop will be conducted at Florida State University Conference Center at a date, to be announced, in February of 1988. Professor James Alfini, Director of Education and Research for the Dispute Resolution Center, will be in charge of the Workshop. National figures will participate in the Workshop, and we believe its proceedings should be considered by our Committee for possible inclusions in future recommendations of Rules and Standards to the Court.

As your Chairman, it was my pleasure to work with the members of this Committee. They were diligent, hard working and exceptionally resourceful.

No less helpful, by any means, were the personnel of the office of the State Court's Administrator and those of the Dispute Resolution Center. Particular thanks should be paid to Mike Bridenback and Jim Soltis.

Respectfully Submitted:

David U. Strawn
Chairman

PROPOSED RULES FOR THE

IMPLEMENTATION OF

FLORIDA STATUTES §§ 44.301-.306

(Final Draft)

Submitted by the Mediation and Arbitration Committee of the Supreme Court pursuant to Administrative Order of the Chief Justice entered on July 24, 1987

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1.700 Rules common to mediation or arbitration.

(a) Referral by presiding judge. Except as hereinafter provided, the presiding judge may refer any contested civil matter or selected issues for assignment to mediation or arbitration.

(1) Hearing date. The first mediation conference or arbitration hearing shall be held within 60 days of referral, unless sooner ordered by the court.

(2) Notice. Within 10 days after the case has been referred for either mediation or arbitration, the court or its designee shall notify the parties and either the mediator or arbitrator in writing of the date, time and place of the conference.

(b) A party may move, within 15 days after the order of referral, to dispense with mediation and with arbitration, respectively, if the issue to be considered has been previously mediated or arbitrated pursuant to Florida law.

(c) Waiver or deferral of mediation or arbitration. Within 15 days of the court order assigning the case to mediation or arbitration, any party may file a motion with the court to defer or forego the process. Such motion shall set forth, in detail, the facts and circumstances supporting the motion. Mediation or arbitration shall be tolled until disposition of the motion.

(d) Calculation of times. All times hereunder shall be calculated in accordance with Rule 1.090(a) Fla. R. Civ. P.

(e) Disqualification of a mediator or arbitrator. Any party may move the court to disqualify a mediator or an arbitrator using the procedures of Fla. R. Civ. P. 1.432. If the court rules that a mediator or arbitrator is disqualified from hearing a case, an order shall be entered setting forth the name of a qualified replacement. Nothing in this provision shall limit the discretion of a mediator or arbitrator to refuse any assignment. A mediator or arbitrator may elect voluntary disqualification, which is final upon service upon the parties and the court. The time for mediation or arbitration shall be tolled during any periods in which mediation or arbitration is deferred pending determination of a disqualification motion.

1.710 Mediation Rules

(a) Completion of mediation. Mediation shall be completed within 30 days of the first mediation conference unless extended by order of the court on motion of the mediator or of a party.

No extension of time shall be for a period exceeding 60 days from the first mediation conference. The mediator's report shall be filed with the court within 5 days of completion of mediation.

(b) Exclusions from mediation. The following categories of claims shall not be referred to mediation except upon petition of all parties.

(1) Appeals from rulings of administrative agencies
(2) Bond estreatures
(3) Forfeitures of seized property
(4) Habeas corpus and extraordinary writs
(5) Bond validations
(6) Declaratory relief
(7) Any litigation expedited by statute or rule, except issues of parental responsibility
(8) Such other matters as may be specified by order of the Chief Judge in the Circuit

(c) Discovery. Discovery pursuant to Rule 1.280 Fla. R. Civ. P. may continue throughout mediation. Such discovery may be delayed or deferred upon agreement of the parties. All discovery shall be held in abeyance, and the times tolled, upon submission of a written settlement agreement to the court.

1.720 Mediation Procedures.

(a) Interim or emergency relief. Either party may apply to the court for interim or emergency relief at any time. Mediation shall continue while such motion is pending absent a contrary order of the court, or a decision of the mediator to adjourn pending disposition of the motion. Time for completing mediation shall be tolled during any periods where mediation is interrupted pending resolution of such motions.

(b) The court, upon written notice from the mediator that any party has failed to appear after receiving written notice and without good cause may apply appropriate sanctions as provided by the Florida Rules of Civil Procedure including taxing of the fees and costs of the mediator.

(c) Adjournments. The mediator may adjourn the mediation conference at any time and may set times for reconvening the adjourned conference. No further notification is required for parties present at the adjourned conference. The mediator may suspend or terminate mediation whenever in the opinion of the mediator, the matter is not appropriate for further mediation.

(d) Counsel. The mediator shall at all times be in control of the mediation and the procedures to be followed in the mediation. Counsel for each party may attend the mediation conference and

shall at all times be permitted to privately communicate with their clients.

(e) Communication with parties. The mediator may meet and consult privately with any party or parties or their counsel. With consent of the parties, the mediator may speak with designated third parties about substantive issues involved in the mediation. Mediators are not restricted in their communication with third parties concerning procedural or administrative matters.

(f) Appointment and compensation of mediator. The presiding judge may appoint any person as a mediator who meets the qualifications set forth in these rules. The mediator may be an uncompensated volunteer, a government employee or may be compensated according to the written agreement of the parties. In the absence of such written agreements or of any objections served on the mediator and other parties by any party within 15 days of the order referring the matter to mediation, the mediator shall be compensated at the hourly rate set by the presiding judge in the referral order. Where appropriate, each party shall pay a proportionate share of the total charges of the mediator.

1.730 Completion of mediation

(a) Report of no agreement. In cases where the parties do not reach any agreement as to any matter as a result of mediation, the mediator shall report such to the court without any comment or recommendation.

(b) Report on Agreement. In cases where agreement or partial agreement is reached as to any matter or issue, including legal or factual issues to be determined by the court, such agreement shall be reduced to writing, signed by the parties and their counsel, if any, and be immediately submitted to the court. Counsel, may at the time of signing said agreement, reserve the right, in writing, to reject all or part of the agreement. Such right may be exercised by written notice to be filed and served not more than 10 days after the date of the agreement. If counsel neither signs nor objects, in writing, to the agreement within 10 days of its date, then the agreement is conclusively presumed to be approved by counsel. Once the agreement becomes binding upon the parties by their execution and that of their counsel, it may only be set aside by the court pursuant to these rules. The agreement shall set forth all relevant statements of fact and statements of future courses of conduct as agreed upon by the parties.

(c) Court's Action. Within 10 days after receiving the agreement, the court shall determine whether the terms are lawful, within the jurisdiction of the court, and in the best

interests of all parties concerned, where court approval is required by law. If the court has not filed a written objection within 10 days after receiving the report, the agreement shall become binding on the parties. If the judge rejects or fails to adopt any part of the agreement, either party may, within 10 days of receipt of the order, give notice to all parties declaring the agreement void.

Committee Note

After making the determination called for in this rule, the court may consider it appropriate to take any of the following courses of action: approving or rejecting the agreement in whole or in part; holding an evidentiary hearing to determine the appropriate course of action; requiring the parties to return to mediation to settle any unresolved issues; modifying either the sanctions or remedies contained in the agreement; requiring the parties to submit any unresolved issues to arbitration under Rule 1.800; or setting the case for trial.

(d) Imposition of Sanctions. In the event of any breach or failure to perform under the stipulated agreement, as approved by the judge pursuant to subdivision (c) of this rule, the sanctions agreed upon or such other remedy as the court may deem appropriate, shall be imposed by order of the court.

1.740 Family law mediation. Every effort should be made to expedite mediation of parental responsibility issues. In cases in which there are complex or substantial tax, financial or property issues, the court shall refer such issues to a lawyer mediator. The court may refer parental responsibility issues to a non-lawyer mediator in such cases.

1.750 Small Claims Matters

(a) Scheduling. The mediator shall be appointed and the mediation conference held during or immediately after the pretrial conference unless otherwise ordered by the court. In no event shall the mediation conference be held more than 14 days after the pretrial conference.

(b) Settlement Authority. If a party gives counsel or another representative authority to settle the matter, the party need not appear in person. Counsel or the other representative may speak for the party in the mediation conference notwithstanding the limitations on counsel's participation contained in Rule 1.720(d).

(c) Agreement. Any agreements reached as a result of Small Claims Mediation shall be written in the form of a stipulation.

After court review pursuant to Rule 1.740(c), the stipulation shall be entered as an order of the court.

1.760 Mediator qualifications

(a) County court Mediators. For certification by the Supreme Court, a mediator of county court matters must:

(1) have completed a minimum of a 20 hour training program certified by the Supreme Court; and

(2) have observed a minimum of three mediation conferences conducted by a court certified mediator; and

(3) have conducted a mediation conference under observation of a court certified mediator; and

(4) have been certified by the Chief Judge of the Circuit pursuant to Section 44.302(3) Fla. Stat. (1987)

(5) or, be certified as a circuit court mediator

(b) Family Mediators. For certification by the Supreme Court, a mediator of family and dissolution of marriage issues must

(1) have a Masters Degree in social work, mental health or psychological sciences; or be a physician certified to practice adult or child psychiatry; or be an attorney; and

(2) hold a current license in Florida in a mental health field or be a member in good standing of The Florida Bar; and

(3) have at least five years practice experience in the licensed professional field; and

(4) have completed a minimum of 40 hours in a mediation training course certified by the Supreme Court; or have received a Masters Degree in family mediation from an accredited college or university; and

(5) have been certified by the Chief Judge of the Circuit pursuant to Section 44.302(3)

(c) Circuit Court Mediators. For certification by the Supreme Court, the mediator of Circuit Court matters, other than family matters, must

(1) be a former judge of a court having jurisdiction over family matters, or a trial court with general jurisdiction who was a member of the bar in the state in which he presided; or a member in good standing of the Florida Bar with at least five years Florida practice;

(2) complete a minimum of a 40 hour mediation training program certified by the Supreme Court

(d) Special Conditions. Prior to January 1, 1989, the Chief Judge of each Circuit may certify any mediator who is currently mediating in an established mediation program and who

(1) has been actively engaged in the practice of mediation for the preceding year; and

(2) completes the minimum training specified in these rules for the particular type of mediation. Mediators presently practicing pursuant to section (1) of this subsection may continue to do so for no more than 6 months past the date upon which the Supreme Court certifies a training program appropriate to their needs.

1.770 Standards for Mediation Training Programs

(a) Circuit Court Mediators. Mediation training for mediators of circuit court matters, other than family matters, should consist of a minimum of 40 hours training in a program approved the Supreme Court. That training should address the following:

(1) mediation theory
(2) mediation process and techniques
(3) standards of conduct for mediators
(4) conflict management and intervention skills
(5) community resources and referral processes
(6) successful completion of an examination

(b) Family Mediators. Mediation training for mediators of family matters should consist of a minimum of 40 hours of training in a program approved by the Supreme Court. That training should address those areas required in subsection (c) of this rule and in addition the following:

(1) psychological issues in separation, divorce and family dynamics
(2) issues concerning the needs of children in the context of divorce

(3) family law, including issues of custody, child support, and asset evaluation and distribution as it relates to divorce
(4) family economics
(5) successful completion of an examination

(c) County court mediators. Mediation training for county court mediators should consist of a minimum of 20 hours training in a program approved by the Supreme Court. That training should address the following:

(1) written and oral communication
(2) mediation theory
(3) the mediation process and techniques
(4) standards of conduct for mediators
(5) conflict management and intervention skills
(6) the court process
(7) community resources and referral processes
(8) successful completion of an examination

1.780 Duties of the Mediator

(a) The mediator has a duty to define and describe the process of mediation and its cost during an orientation session with the parties before the mediation conference begins. The orientation should include the following:

(1) the differences between mediation and other forms of conflict resolution, including therapy and counseling;

(2) the circumstances under which the mediator may meet alone with either of the parties or with any other person;

(3) the confidentiality provision as provided by Florida law;

(4) the duties and responsibilities of the mediator and of the parties;

(5) the fact that any agreement reached will be reached by mutual consent of the parties;

(6) the information necessary for defining the disputed issues.

(b) The mediator has a duty to be impartial.

1.800 Case Eligibility for Court-ordered Non-binding Arbitration

(a) Exclusions from arbitration. The following categories of claims shall not be referred to non-binding arbitration except upon petition of all parties:

(1) Appeals from rulings of administrative agencies
(2) Bond estreatures
(3) Forfeitures of seized properties
(4) Habeas corpus or other extraordinary writs
(5) Bond validations
(6) Declaratory relief
(7) Collection matters supported by duly executed promissory obligations
(8) Mortgage foreclosures
(9) Condemnation actions
(10) Proceedings under Chapter 61, 63, 88 and 742
(11) Name changes
(12) Any litigation expedited by statute or rule
(13) Cases in which there has been previous statutorily mandated arbitration
(14) Civil or criminal contempt
(15) Such other matters as may be specified by order of the Chief Judge in the Circuit
(16) Cases referred to mediation pursuant to Rule 1.700(a) of these rules

1.810 Selection, qualification, training and compensation of arbitrators.

(a) Selection. The chief judge of the circuit or his designee shall maintain a list of qualified persons who have agreed to serve as arbitrators. Cases assigned to arbitration shall be assigned to an arbitrator or to a panel of three arbitrators . The court shall determine the number of arbitrators and designate them within 15 days after service of the order of referral in the absence of an agreement by the parties. In the case of a panel, one of the arbitrators shall be appointed as the chief arbitrator.

(b) Qualification. Arbitrators shall be members of the Florida Bar, except where otherwise agreed by the parties. The chief arbitrator shall have been a member of the Florida Bar for at least five years. Individuals who are not members of the Florida Bar may serve as arbitrators upon the agreement of all parties.

(c) Training. All arbitrators shall have a minimum of 20 hours of training in a program approved by the Supreme Court of Florida.

(d) Compensation. The chief judge of each judicial circuit shall establish the compensation of arbitrators subject to the

limitations in Florida Statute §44.303(2) (1987).

1.820 Hearing procedures for non-binding arbitration

(a) Authority of the Chief Arbitrator. The chief arbitrator shall have the authority to commence and adjourn the arbitration hearing and carry out other such duties as are prescribed by Florida Statute § 44.303. The chief arbitrator shall not have authority to hold any person in contempt or to in any way impose sanctions against any person.

(b) Conduct of the Arbitration Hearing.

(1) The chief judge of each judicial circuit shall set procedures for determining the time and place of the arbitration hearing and may establish other procedures for the expeditious and orderly operation of the arbitration hearing to the extent such procedures are not in conflict with any Rules of Court.

(2) Hearing procedures established by the court should be disseminated to the local bar and shall be included in the notice of arbitration hearing sent to the parties and arbitration panel.

(3) Individual parties or authorized representatives of corporate parties shall attend the arbitration hearing unless excused in advance by the chief arbitrator for good cause shown.

(c) Rules of evidence. The hearing shall be conducted informally. Presentation of testimony shall be kept to a minimum, and matters shall be presented to the arbitrator(s) primarily through the statements and arguments of counsel.

(d) Orders. The chief arbitrator may issue instructions as are necessary for the expeditious and orderly conduct of the hearing. The chief arbitrator's instructions are not appealable. Upon notice to all parties the chief arbitrator may apply to the presiding judge for orders directing compliance with such instructions. Instructions enforced by a court order are appealable as other orders of the court.

(e) Default of a party. Where a party fails to appear at a hearing, the chief arbitrator may proceed with the hearing and the arbitration panel shall render a decision based upon the facts and circumstances as presented by the parties present.

(f) Record and Transcript. Any party may have a record and transcript made of the arbitration hearing at the party's expense.

(g) Completion of the arbitration process.

(1) 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.

(2) Upon the completion of the arbitration process, the arbitrator(s) shall render a decision. In the case of a panel, a decision shall be final upon a majority vote of the panel.

(3) Within ten days of the final adjournment of the arbitration hearing, the arbitrator(s) shall, in writing, notify the parties of their decision on a form approved by the Supreme Court. The arbitration decision may set forth the issues in controversy and the arbitrator(s)'s conclusions and findings of fact and law. The arbitrator(s)'s decision and the originals of any transcripts shall be sealed and filed with the clerk at the time the parties are notified of the decision.

(h) Time for filing motion for trial de novo. Any party may file a motion for a trial de novo. If a motion for a trial de novo is not made within 20 days of service on the parties of the decision, the decision shall be referred to the presiding judge who shall enter such orders and judgments as may be required to carry out the terms of the decision as provided by Florida Statute § 44.303(4) (1987).

Committee Note

Arbitration proceedings should be informal and expeditious. The court should take into account the nature of the proceedings when determining whether to award costs and attorneys fees after a trial de novo. Counsel are free to file exceptions to an arbitration decision or award at the time it is to be considered by the court. The court should consider such exceptions when determining whether to award costs and attorneys fees. The court should consider Rule 1.442, Fla. R. Civ. P. concerning offers of judgment and Section 45.061 Fla. Stat. (1985) concerning offers of settlement, as statements of public policy in deciding whether fees should be awarded.

1.830 Voluntary binding arbitration.

(a) Absence of party agreement.

(1) Compensation. In the absence of an agreement by the parties as to compensation of the arbitrator(s), the court shall determine the amount of compensation subject to the provisions of Fla. Stat. 44.304(3)(1987).

(2) Hearing procedures. Subject to these rules and Florida Statute 44.304, the parties may, by written agreement before the hearing, establish the hearing procedures for voluntary binding arbitration. In the absence of such agreement, the court shall establish the hearing procedures.

(b) Record and transcript. A record and transcript may be made of the arbitration hearing if requested by any party or at the direction of the chief arbitrator. The record and transcript may be used in subsequent legal proceedings subject to the Florida Rules of Evidence.

(c) Arbitration decision and appeal.

(1) The arbitrator(s) shall serve the parties with notice of the decision and file the decision with the court within 10 days of the final adjournment of the arbitration hearing.

(2) A voluntary binding arbitration decision may be appealed within 30 days after service of the decisions on the parties. Appeal is limited to the grounds specified in Fla. Stat. 44.304(10) (1987).

(3) If no appeal is filed within the time period set out in subsection (2) of this rule, the decision shall be referred to the presiding judge who shall enter such orders and judgments as required to carry out the terms of the decision as provided under Fla. Stat.Section 44.304(11) (1987).