IN RE: PROPOSED MEDIATION AND ARBITRATION RULES
CASE NO. 71,312
IN THE SUPREME COURT OF FLORIDA

SPECIAL COMMITTEE REPORT AND COMMENTS
ON PROPOSED MEDIATION AND ARBITRATION RULES

The Special Committee on the Proposed Mediation and Arbitration Rules herewith submits its report and comments.

Pursuant to the direction of the President, at the Board of Governors meeting of November 12, 1987, the following comments of the Special Committee are referred to the Executive Director of the Florida Bar to be filed with the Florida Supreme court.

Consistent with the policy of the Florida Bar, the Special Committee Chairman undersigned, intends to appear before the Florida Supreme court on the scheduled oral argument date of December 3, 1987 to represent the Florida Bar. Accordingly, time for oral argument on behalf of the Florida Bar is hereby requested.

A decision by the Florida Bar to file formal comments in connection with the proposed mediation and arbitration rules stems from the expressed concern of a strong consensus of the members of the Board of Governors regarding the potential for abuse inherent in the mediation and arbitration process legislated in §44.301 - §44.306 Florida Statutes. The Florida Bar believes that certain modifications on the proposed rules may minimize this potential.

Proposed rule 1.700 presently provides for the referral of any contested civil matter or selected issues to mediation or arbitration.

Proposed Rules 1.700(b) and (c), place the burden on the litigants to present facts and circumstances to the court which would result in the deferral or elimination of the mediation/arbitration process. The Florida Bar is concerned with the possible use of blanket referral orders by the court without regard for the facts and circumstances of a particular matter. Indeed, it is clear that not all contested civil matters are suitable for arbitration and in fact, certain classes of litigants are eliminated from the mediation process by virtue of proposed Rule 1.710(b) and from the arbitration process by virtue of proposed Rule 1.800(a).

The Florida Bar suggests that rule 1.700 be modified so as to require a hearing prior to referral to mediation or arbitration, which hearing may be scheduled sua sponte by the court, or by any party, for the purpose of determining the suitability of referral of a particular matter to either mediation or arbitration.

It is further suggested that after consultation either with counsel, the parties, or both, that the court be required to find:

1. That referral of the matter to either mediation or non-binding arbitration is likely to result either in a favorable conclusion of the matter prior to trial, or an elimination of "selected issues" which are likely to have a material effect on the outcome of the case after trial.

2. That the referral of the matter to either mediation or non-binding arbitration, will not cause undue economic hardship to any party.

The Florida Bar further believes that no action should be referred for non-binding arbitration until after the closing date for discovery and until after the action is set for trial.

The Florida Bar further believes that there should be no assessment of costs or fees as otherwise required by Florida statute §44.303(5) unless the arbitration proceedings were actually conducted after the close of discovery.

The Florida Bar further believes that the sanctions provided by Florida §44.303(5) are harsh, may have the effect of economically coercing a party to forego their constitutional right to access to the courts, and that such sanctions should be imposed sparingly, if at all.

Consistent with the Florida Bar's responsibility to the court and in an effort to be of assistance, the Florida Bar proposes the following modifications to proposed Rule 1.700:

1.700 RULES COMMON TO MEDIATION OR ARBITRATION

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

1. Prior to referral of an action to either mediation or non-binding arbitration, the court upon its own motion or upon motion of any party, shall conduct a hearing for the purpose of consulting with counsel, the parties, or both, to determine the suitability or advisability of referral of the action to either mediation or non-binding arbitration. After said hearing and as a

precondition to referral of the action, the court shall find:

(i) That referral of the matter to either mediation or non-binding arbitration is likely to result either in a favorable conclusion of the matter prior to trial, or an elimination of "selected issues" which are likely to have a material effect on the outcome of the case after trial.

(ii) That the referral of the matter to either mediation or non-binding arbitration, will not cause undue economic hardship to any party.

(iii) In the case of non-binding arbitration, that the period for discovery has closed and the action is set for trial.

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

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

(c) 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.

Respectfully submitted,

Terrence Russell, Chairman
Alan T. Dimond
Ben H. Hill, III

TERRENCE RUSSELL, Chairman

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In accordance with the Board's request, I have redrafted Rule 1.740 as follows:

> 1.740 - Family law mediation. 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.

REASON FOR CHANGE FROM MEDIATION AND ARBITRATION COMMITTEE'S RULE

The qualifications for family mediators are set forth in Rule 1.760(b). Under this rule, a person with a masters degree in social work who meets the additional qualifications set forth in that rule would qualify as a family mediator. The Board of Governors' position is that non-attorney mediators do not have the qualifications and training to determine the issues of alimony, child support, equitable distribution, special equity, partition, pension, attorneys' fees and other issues which arise in connection with a dissolution of marriage. These issues are outside the scope of a mental health professional's expertise. The law in these areas is constantly changing and evolving, and mental health professionals do not have the same training or continuing legal education requirements as attorneys to decide these complicated issues. In addition, the division of the parental responsibility issues and visitation, and the financial issues, should be separated wherever possible, so that the children are not used as bargaining issues to be traded against property and support issues. While the issues pertaining to parental responsibility, primary physical residence and visitation are subject to modification by the courts, all other issues other than child support and alimony, if awarded initially, are waived if not properly addressed in the initial dissolution of marriage proceedings. While the Board of Governors supports the attempt of the mediation process to remove the issues surrounding a dissolution of marriage from the strict adversarial process, such removal should not be at the risk or expense of litigants trying to reach an agreement with the assistance of a mediator who does not possess the legal training of a lawyer.

Respectfully submitted,

Bette Ellen Quiat, Chairman