O/a 12-3-87

IN THE SUPREME COURT OF FLORIDA

IN RE:

Proposed Rules for Implementation of Florida Statues Sections 44.301-.306

Florida Bar No. 116042

Case No. 71,312

Comments on the Proposed Rules

COMES NOW, Melvin A. Rubin, an attorney duly admitted to practice law in the State of Florida, and presents these comments on behalf of the South Florida Council on Divorce Mediation, an organization over five (5) years old with members in Dade, Broward and Monroe Counties, comprised of professionals in both the legal and mental health fields, and files these Comments on the Proposed Rules for Implementation of Florida Statutes Sections 44.301-.306 states as follows:

1. First and foremost, the members would clearly like to state that they view mediation as a separate discipline and profession. While it draws from the legal and mental health professions, that does not negate its independence or compromise its professionalism any more than a doctor-lawyer or a CPA-lawyer is any less a lawyer.

As a result, the trained professional neutral mediator sits in mediation neither as a lawyer nor a mental health

professional but rather indeed as a professional mediator. The mediator is not there to dispense legal counsel or provide psychological counselling. This concept is essential in either the regulation or licensure of the mediation profession or the promulgation of court rules dealing with mediators. Because of this a Rule defining mediation might be considered.

This independence being at the very core of the new profession of mediation, comment must be expressed as to Rule 1.740 and the language therein which accentuates the distinction of a lawyer-mediator versus a non-lawyer mediator. It is respectfully suggested that the distinction used in this rule reflects a possible misunderstanding as to the scope and purpose of the mediation process and the professional mediatior. If the mediator happens to be a lawyer he is still prohibited from functioning as a lawyer and dispensing counsel. Neither is the psychologist mediator there to give counselling. Either, with proper training and experience, should be sufficiently sensitive to direct the participants for information or questions to consult with their own attorney or such experts as necessary. It is the parties who are negotiating and not the lawyers. This also relates to the comments in reference to Rule 1.720 (d).

Therefore, the requirement that the court may ony refer to lawyer-mediators those "complex or substantial tax,

financial or property issues" is an unwarranted and indiscriminate designation. Moreover, would a lawyer-mediator who comes from the legal specialty of probate have a superior ability to mediate such issues as against a trained professional non-lawyer mediator who had five years experience in this field? The interplay of Rule 1.720 (e) should also be considered. A fundamental tool utilized often in the mediation process is the calling in of professional third-party consultants. This might include accountants, appraisers, etc. Certainly, this is no more different than a family lawyer deferring to such expertise.

The Rule also has the implication of a bifurcation in the mediation. That is the lawyer-mediator doing finances and the non-lawyer doing the parental responsibility issue. A well trained professional mediator should be capable in mediating all the issues.

2. Mediation is committed to a process by which both have attorneys during the entire process. However, it is believed that section 1.720 (d) unnecessarily impedes the mediation process. Mediation both promotes and requires the assistance and direct involvement of attorneys for both participants. However, mediation is a process by which the two participants with the help and assistance of the trained neutral mediator can negotiate and discuss those problems

which they specifically designate in a confidential non-threatening setting which promotes communication and compromise. The presence of one attorney would necessitate the presence of the other party's attorney. With both attorneys, both parties and the mediator present, the tone and atmosphere of mediation would most probably be transformed into a more adversarial relationship and take away the ability of the parties to negotiate and conclude their own agreement. That very relationship between the parties is what mediation is attempting to obviate. Moreover, the legal rights of each participant in mediation is adequately protected by at least the following safeguards:

a. The fact that all participants are required to have counsel.

b. That they are encouraged to visit and talk with their attorneys according to their own needs and desires.

c. That nothing in writing is ackowledged, agreed to, or signed by either participant until after their respective counsels have reviewed it and provided them with advice. Oftentimes, mediators will not require the mediation participants to sign any documents. Rather they will draft a non-legal memorandum of understanding which is then forwarded to each participant's lawyer for review and subsequent reformation into a legal document (property settlement agreement).

d. The mediators, depending upon their personal style, may entertain direct communication with the attorneys, with the participants'knowledge. Moreover, the participants are encouraged to bring to the mediation sessions any and all specific questions or requests made by their respective attorneys. The presence of attorneys in the mediation process would negate and impede the mediation process.

In addition, the presence of the lawyers with the mediator may very well result in such an expensive proposition that the mediation process itself would become unattractive to those considering it as an alternative to dispute resolution by way of litigation.

3. In reference to section 1.760 (a) (3), it is believed that the five year practice requirement is a discriminatory and restrictive condition. By comparison, an attorney who obtains his license to practice law can represent a litigant in a dissolution matter the very next day. However, the language as reflected in the above section requires a minimum of five years experience in either law or mental health before one can mediate. Without being aware of the committee's deliberations as to the basis for this requirement, it would appear to be discriminatory.

In addition, the five year experience requirement should take into consideration the special situation of mental health professionals. In general, they are required to undertake a two year program of experience before they are licensed. Therefore, the combination of licensure with the five year requirement would result in mental health professionals being required to have seven rather than five years' experience. Provision should therefore be made in reference to that particular situation.

4. In reference to the requirement of an examination under section 1.770, the membership have indicated that in none of their training programs was an examination administered. None was required for either their admission or completion of the training program. Again, this organization's membership covers a broad geographical and professional spectrum. Moreover, the members have all been trained in various programs, including the American Bar Association's training program at Harvard; several local training programs sponsored by the South Florida Council and various Palm Beach training programs. None of those have administered any sort of an examination as it appears contemplated under the proposed rule. Each of the above programs have been put on and led by nationally known experts and trainers and recognized by the Academy of Family Mediators and other state mediation organizations.

The belief in a uniform state examination is in conformity with the belief and desire that mediators be considered as separate and apart from other disciplines or professions. Continuing education courses are now offered and should continue to be offered as well as required of the professional mediator. This may include courses from allied fields as well as within the mediation field itself.

It is also the desire of professional mediators that their discipline receive the same treatment as any of the other professions within the state. This would include ethical requirements; a separate professional board of review; licensure; state wide organizations; peer review, and other similar professional requirements.

5. In reference to Rule 1.720 (e), it is believed that any private communication "with any party or parties or their counsel" must be with the consent and knowledge of all the mediation participants. Communications with any of the lawyers is also done after notice and knowledge to the parties. Therefore, all separate or private communications of any sort by the mediator in regard to the mediated case should be done after notice and knowledge is given the parties themselves.

6. The basic concept of mediation in allowing the participants themselves to negotiate and conclude an agreement between themselves, with the assistance and advise of private

counsel, appears to be restricted by the language of rule 1.730 (b). The language of that rule indicates that counsel seems to retain or reserve the right to "reject all or part of the agreement". It then spells out the basis upon which said agreement may be either accepted and approved, rejected or no comment at all. The rule does not seem to provide what occurs if an attorney rejects the agreement. Regardless of what the effect of the rejection is, the mere ability of an attorney to reject the agreement is in conflict with the mediation principle that the parties should have the right to conclude their own agreement. This would in no way hinder, prevent or restrict the court itself from the review of the agreement, making such inquiry as it feels is necessary and approving or rejecting the agreement as the court has such power in any other dissolution proceeding. However, the right of an attorney should be no greater in the mediation process than his right as counsel for a litigating party in an dissolution proceeding.

The above comments have been submitted to this Honorable Court with the belief and hope that the Court give as much time and consideration as possible before the final Rules are implemented. The undersigned and the South Florida Council on Divorce Mediation, would welcome the opportunity to contribute any additional ideas or thoughts in reference to the pending Rules. It would also be requested that the plethora of literature, standards and guidelines already in

existence for the professional mediator be considered by this Court. Much of that information has been provided this Court and to the extent that any additional information is requested, this organization would welcome responding.

The undersigned and the Council would respectfully ask the indulgence of this Court in considering these comments filed one day late. The organization had its' membership meeting on November 19th, which caused the delay. Because of the importance of this issue, to the general public and in particular to the professional mediator, request is made to consider these comments as timely filed.

RESPECTFULLY SUBMITTED,

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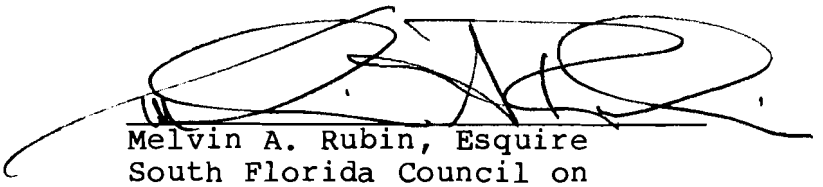

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