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March 12, 1997

The Honorable Gerald Kogan
Chief Justice
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

RE: Proposed Dependency Mediation Rules Case No. 89,681

Dear Chief Justice Kogan:

I respectfully request that the Supreme Court give consideration to the following comments on the Dependency Mediation Rules:

1. Portions of the proposed rules would reduce each judicial circuit's ability to efficiently and property administer its staff and resources. It would create financial burdens on the courts without the funds to appropriately implement the rules. These portions of the proposed rules make mandatory, which presently are optional, procedures under other mediation rules.

A. The proposed rules require that "... the mediator and the mediation program shall schedule the mediation conference." The designation of the mediator to schedule mediation is optional under other mediation rules. This requirement for all cases to be scheduled by the mediator/mediation program will shift the responsibility and costs of staff and expenses to the courts. Those courts which have limited resources for postage, telephone expense, and staff time, may be hindered or unable to implement the mediation of these cases.

B. Signing the Mediation Asreement. The proposed rules would require a mediation agreement to be immediately reduced to writing and submitted to the court by the mediator. This requirement, which is optional under other mediation rules, places a burden on the parties and the mediator which again may hinder or prohibit the development of mediation programs in courts where mediators, parties, and attorneys do not have the time or the counties do not have the funds to pay to implement this portion of the rules. Mediation agreements and accompanying case plans can be 6-12 pages in length, depending on the number of parties and the contents of the agreement and may take several hours and drafts before completion.

In the 12th Judicial Circuit, twenty (20) out of the twenty (20) signed mediation agreements were prepared and signed by all of the parties days after the mediation conference was held. In no case have any of the parties not signed, nor have there been any disputes as to the contents of the mediation agreement or its terms and conditions.

Rules of Civil Procedure 1.730(b) and Family Mediation Rule 12.740 both provide for the mediation agreement to be electronically or stenographically recorded. Should the court continue to require in the proposed dependency rule that agreements be immediately reduced to writing and submitted by the mediator, the addition of this resource may facilitate the implementation of this rule in those courts which do not have the staff or resources for the immediate preparation of a handwritten or typed agreement.

C. The Court shall hold a hearing and enter an Order on a Mediation Anreement. This requirement is presently available as an option under the mediation rules and would be an additional expense to the parties and counties and would remove the court's discretion to determine whether to schedule a hearing or not upon receipt of the Mediation Agreement.

These requirements, which are procedural in nature, are optional under other mediation rules and create unnecessary burdens and expenses to judicial circuits who may not have the finances or staff to implement the rules as written. I would therefore request that the Court consider bringing these portions of the mediation rules into conformity with the other mediation rules by making these procedures optional and thereby allow courts to continue to have the flexibility to allocate its resources appropriately.

2. No provision for counsel to sign or object to Mediation Anreement. Proposed Dependency Mediation Rule 8.290l(3) provides for mediation to proceed without counsel;

however, there is no provision for counsel to object to the Mediation Agreement if counsel is not present at the mediation conference. In addition, there is no provision for counsel to sign, if present at the mediation conference, which is in conflict with Dependency Rule 8.230 which requires written papers or pleadings to be signed by the attorney representing the party.

The issues decided in dependency mediation are no less significant than those in family law cases. If the best interest of the child is the proposed standard for review of the Mediation Agreement, then I would urge the Court to implement a mechanism to review potential objections similar to the Family Mediation Rules, particularly if counsel is not present and/or unable to advise their client.

3. The appearance of the child: The proposed Dependency Rule 8.201(4) requires an Order from the court to prohibit a child's attendance in mediation, otherwise, as the Committee notes "participation of a child in mediation will be determined by the parties."

The Family Law Rules [12.407] require an order from the court based on "good cause shown" for a child to be brought to a court proceeding. The Dependency Proceedings Rules (8.255) give the Court the discretion to determine the need for a child to **be** present.

This different standard for appearance of a child in mediation creates the possibility that parents accused of abuse, neglect, and abandonment of their children, will be reviewing these incidents with their children, all without court knowledge or supervision.

I urge the Court to reject this portion of the proposed rules which establishes a different standard for child participation other than judicial discretion and court crder for children to attend mediation proceedings.

4. "The Court may modifv the terms of the aareement with the consent of all parties to the aareement." This language creates the potential for the court to propose changes to a signed mediation agreement, and therefore to be functioning as a party to the agreement. It also places the parties and the court in the awkward position of debating changes to a mediation agreement that is confidential in nature with the possible unpleasant consequences of arguing/debating issues directly with a judge in a **case.**

The proposed rules clearly state "...decision making authority rests with the parties" in mediation. I would request that the Court adopt the same standard for approval of mediation agreements which presently exist for approval of stipulations [Rule 8.325(d)] "...enforce the stipulation, modify the stipulation by supplemental agreement, or set the case for hearing on the original petition."

In all other respects I support the adoption of the proposed rules as written and commend the committee for its work in drafting these rules.

Sincerely,

William T. Bornhauser
Director, Family Mediation Program
Twelfth Judicial Circuit

WTB/mhr

c: Justice Ben F. Overton
Justice Leander J. Shaw, Jr.
Justice Stephen H. Grimes
Justice Major B. Harding
Justice Charles T. Wells
Justice Harry Lee Anstead
Kenneth R. Palmer, State Courts Administrator
Sharon Press, Dispute Resolution Center
Lawrence M. Watson, Jr. Chairman, Supreme Court Committee on Mediation/Arbitration Rules
Honorable Andrew D. Owens, Jr., Chief Judge, Twelfth Judicial Circuit
Fay P. Rice, Acting Court Administrator, Twelfth Judicial Circuit
Honorable Durand J. Adams, Chair, Family Court Steering Committee
Honorable Stephen L. Dakan, President, Conference of Circuit Judges