

Petition For Amendment to The Florida Rules for Certified
And Court-Appointed Mediators

The Florida Supreme Court Standing Committee on Mediation and Arbitration Rules (hereinafter the "Committee") respectfully submits:

1. This is a matter within the exclusive jurisdiction of this Court pursuant to Article V, Section 2, Florida Constitution.
2. The Committee was established as a Standing Committee of the Supreme Court by administrative order of July 26, 1989. Among other duties, the Committee is responsible for submitting recommendations to the Supreme Court concerning procedural and ethical rules for court-ordered mediation and arbitration in Florida.
3. This Petition encompasses the Committee's recommendations for three proposed revisions to the Florida Rules for Certified and Court-Appointed Mediators: a) revisions to the existing Mediator Standards of Professional Conduct, b) revisions to the existing "Good Moral Character" standard for mediators, and c) revisions to current rules governing the Mediator Qualifications Advisory Panel.
4. The existing code of professional conduct for Florida's mediators was originally adopted in 1992. It was one of the first comprehensive sets of ethical standards for mediators created in the United States. In the years that followed, the use of mediation as a major dispute resolution system has increased substantially. After seven years of firsthand experience, the Committee and Florida's dispute resolution community as a whole, have now developed a more refined understanding of the ethical responsibilities involved in the mediation process. In March of 1997, the Committee elected to build on that experience by organizing a two-year program to review and consider revisions to the ethical standards for mediators. At the same time, the Committee planned a systematic review of certain proposals received from the Mediator Qualifications Board and the Supreme Court Committee on Mediation and Arbitration Training for a revision of the rules for determining whether a candidate possesses "good moral character," along with other administrative rule changes recommended by the Mediator Qualifications Advisory Panel.
5. By far, the largest task undertaken by the Committee was the review and revision of Florida's ethical standards for mediators. To assure maximum input into this review, liaison members to the Committee were appointed from the Mediator Qualifications Board, the

Mediator Qualifications Advisory Panel, the Florida Association of Professional Family Mediators, the Florida Academy of Professional Mediators, the American College of Civil Trial Mediators, and the Trial Lawyers Section of the Florida Bar. Each group was invited and encouraged to submit written materials, comment on all revision drafts, and join the Committee in its discussions.

6. The Committee formally convened nine times over the period from May 1997 to October 1998 for meetings specifically dedicated to considering possible revisions to the standards of professional conduct. The liaison members were invited to all Committee meetings and the first four meetings of 1997 were advertised and held as public forums. Those meetings were announced through *The Resolution Report*, a newsletter with a statewide circulation of 10,000, including everyone who has completed a Supreme Court of Florida certified mediation training program. The public meetings took place in Tallahassee (May), Fort Lauderdale (June), Tampa (July), and Orlando (August). In addition to nine full committee meetings, numerous drafting subcommittee meetings were held which were also open to any parties interested in attending.

7. At the conclusion of its deliberative efforts, the Committee sought still more input from the dispute resolution community with separate publications of both original and revised drafts of its proposed rule revisions. Each draft was specifically distributed to a nationwide mailing list of dispute resolution professionals, educators, administrators and other interested parties. In response to the publication of its first draft of revisions, the Committee received over 65 written comments from persons both in and outside Florida. Each and every response was individually reviewed and weighed by the Committee before the final draft was prepared. The results of these efforts are appended to this Petition as the Committee's proposed amendments to the ethical rules.

8. In addition to reviewing and revising the text of individual ethical rules, the Committee also undertook an overall reorganization of the grouping and order in which the rules appear. A new numbering system was adopted, some entirely new rules were created, and ethical concepts were moved from rule to rule. The Committee's work effectively amounted to a complete rewrite of the existing ethical standards. The final product of the Committee's efforts is presented in three-column format in Appendix "A." The table of contents preceding Appendix "A" presents an overview of the substantial reorganization of the rules. Appendix "B" is in legislative format and is preceded by a table of contents limited to how the rules will appear if all the proposed changes are adopted. In order to ensure the Court fully appreciates all proposed revisions, however, this petition will include a detailed explanation of each substantive change. Appendices "A" and "B" both include the 1999 Committee Notes, which trace the history of

newly-adopted provisions, elaborate on their meaning, and provide the consensus of the Committee's reasoning behind their adoption.

9. As noted, the Committee has also proposed adoption of a procedure to determine whether or not an applicant to become a certified mediator has the requisite "good moral character" now required by the Rules. These proposed additions and amendments to our existing rules are shown in the standard "strikethrough and underline" format. The proposed new rules include both factors to be considered in determining good moral character and procedures to be followed in making such a determination.

10. Finally, the Committee has proposed certain other amendments dealing with the panel created to provide advisory ethics opinions. This proposal, also shown in "strikethrough and underline" format, comes to the Committee via the Mediator Qualifications Advisory Panel and is designed to allow that body to more efficiently and effectively perform its designated function.

Revisions to Mediator Standards of Professional Conduct Part II Florida Rules for Certified and Court Appointed Mediators

11. In an overall sense, the Committee proposes that the ethical standards for mediators be more logically grouped according to specific areas of a mediator' ethical responsibilities. The proposed new rules have thus been reorganized into the following areas:

- General Provisions - 10.200 et. seq.
- Responsibility to the Parties - 10.300 et. seq.
- Responsibility to the Process - 10.400 et. seq.
- Responsibility to the Courts - 10.500 et. seq.
- Responsibility to the Profession - 10.600 et. seq.

This structure allows for easier accessibility to the rules for both mediators and the public. The new grouping and headings, however, are also intended to remind mediators that their ethical standards are not abstract rules operating in a vacuum. Instead, these standards define specific responsibilities arising from the performance of mediation services that directly affect both the public at large and other actors in the mediation process.

12. **Rule 10.200, Scope and Purpose; rule 10.210, Mediation Defined; rule 10.220, Mediator's Role; rule 10.230, Mediation Concepts**, are general provisions which enunciate the scope and purpose of the rules, broadly describe the role of mediation and the mediator, and set

forth underlying concepts of the process. These rules are taken, with only minor changes, from the present rule 10.020 (Preamble). The definition of mediation found in rule 10.210 is based on the statutory definition in section 44.1011(2), Florida Statutes. The Committee has also included a Committee Note to rule 10.200 which sets forth a brief overall history of Florida's ethical standards for mediators and the rationale behind the proposed major revision presently before the Court.

13. **Rule 10.300, Mediator's Responsibility to the Parties**, is the first substantive ethical standard set forth in the proposed new rules. The rule speaks to what the committee believes is the most important of the various ethical responsibilities undertaken by the mediator, that owed to the parties. This rule, as well as introductory rules 10.400, 10.500, and 10.600 in the succeeding sections, is designed to introduce each area of a mediator's responsibility and provide a summary of its contents.

14. **Rule 10.310, Self-Determination**, is taken from present rule 10.060 and 10.090(c) with minor changes. It is the Committee's belief that protecting the consensual nature of mediation is among the most important ethical responsibilities a mediator assumes. In subdivision (b) of the proposed new rule, the Committee has expanded the existing prohibition against party coercion to include participation in the mediation process itself, as well as any decision made during the process. Subdivision (d), which would require a mediator to cancel or postpone a mediation if a party is unable to freely exercise self-determination, is a modified form of existing rule 10.090(c). The old provision required termination by the mediator if one of the parties is unable to participate for psychological or physical reasons. The Committee believes the triggering event for cancellation or postponement should be the inability of the party to exercise self-determination, irrespective of the reason.

15. The proposed Committee Note to rule 10.310 deals with three pragmatic issues impacting party self-determination which have arisen with the expansion of mediation as a dispute resolution system. The so-called "evaluative" mediation style referenced here, is discussed in more detail in relation to rule 10.370 - its inclusion in this Committee Note serves to emphasize the importance of reading the rules in *pari materia*. The note to rule 10.310 also makes reference to the situation where, at the request of the parties, a mediator is pointedly asked to make a judgment defining a settlement outcome or deciding designated issues along the way. Colloquially referred to as "Med-Arb," this process essentially involves the mediation converting, at the request of the parties, into an arbitration. The parties' right to self-determination is thus exercised to remove their right to self-determination. While the Committee does not believe this situation merits a separate rule, it did want to suggest the mediator ensure that all parties are made aware that the mediation will be over, and that their right to self-determination will have

ended. Importantly, the Committee's decision to discuss this process in the note was motivated solely by the desire to provide guidance if the process is encountered - not to sanction or encourage its use. The final paragraph of the note is intended to establish an affirmative duty to cancel or postpone a mediation if a party's self-determination is compromised due to domestic or physical violence, substance abuse, or any undue psychological dominance.

16. **Rule 10.320, Nonparticipating Parties**, is taken from present rule 10.060(e), which places a responsibility on the mediator to promote "consideration" of interests of persons who, while not participating in the mediation process, may nonetheless be affected by the outcome. The proposed new rule would require the mediator to promote "awareness" of those interests, which the Committee believes to be a more appropriate responsibility on the mediator.

17. **Rule 10.330, Impartiality**, is taken from current rules 10.070(a) and 10.070(b)(5) dealing with mediator impartiality. Although a number of suggestions were received by the Committee to change the word "impartial" to "neutral," the fact that there have been no substantive problems experienced with the current term after seven years led the Committee to conclude that no change was necessary. The dictionary definition of "impartial" as, "not inclined to favor one party more than the other" is appropriately descriptive of the role of the mediator in a mediation. Rule 10.330(b) however, has been changed in a significant manner. This provision seeks to define when a mediator is obliged to withdraw from an engagement due to an impairment of impartiality. The existing rule established an entirely subjective test for withdrawal - when the mediator "believes" impartiality is breached. The Committee has concluded that a more objective test for withdrawal would be more useful - when the mediator's impartiality "is" breached. The proposed change in the rule would make possible some outside review of a refusal to withdraw. Under the present rule, such a review is extremely difficult, if not impossible. The determinative test here should be whether or not the circumstances in a given situation would reasonably require a mediator to withdraw - not whether or not the mediator "believed" he or she should withdraw.

18. Proposed rule 10.330(c), which combines old rules 10.070(a)(3) and 10.070(b)(5), seeks to clarify the prohibition against giving and accepting gifts to and from parties to a mediation, as well as the prohibition against soliciting future business during a mediation. Read in conjunction with the Committee Note, it is hopefully clear that *de minimus* gifts, or incidental items provided to facilitate the mediation, are not prohibited by the rule. The new Committee Note to rule 10.330 has been drafted to aid in the overall understanding of the rule.

19. **Rule 10.340, Conflicts of Interest**, is a substantial rewriting of rule

10.070(b)(1-4) of the present rules. The proposed rule requires that a mediator decline an engagement to mediate any case presenting a clear conflict of interest - even in instances when a full disclosure has been made and a waiver by the parties received. Subdivision (d) of the rule was intended to replace an existing specific prohibition against providing counseling, therapy or legal services to any party during a mediation with a broader rule. The proposed revision prohibits a mediator from creating any conflict of interest during a mediation (for example, by offering or soliciting any unrelated outside services to one party) and limits a mediator to providing services directly related to the mediation process.

20. The Committee has also substantially expanded the Committee Note to present rule 10.070 in order to help provide a greater understanding of the ethical issues surrounding impartiality and conflicts of interest. In addition to carrying over certain portions of the original Committee Notes, the Committee has added new comments dealing with the issues of disclosure, the timing of disclosure, conflicts which cannot be waived, and providing non-mediation services.

21. **Rule 10.350, Demeanor**, is a new rule dealing with mediator demeanor which, in the final analysis, is aspirational. While admittedly subjective in nature, the Committee's research and experience led it to believe that a guideline concerning demeanor during a mediation would be helpful.

22. **Rule 10.360, Confidentiality**, presents a minor, non-substantive rewriting of present rule 10.080 dealing with mediation confidentiality.

23. **Rule 10.370, Professional Advice or Opinions**, which replaces present rules 10.090(a), (b) and (d) dealing with a mediator offering opinions and advice to the parties, was the subject of extensive and intense debate within and outside the Committee. As mediation has expanded throughout the nation, different styles, techniques and practices have evolved and been implemented by mediators in the course of providing their services. These differing mediation practices have been created and driven by a wide range of influences. The nature of the case, the parties involved, market demands for mediation services, and the mediator's training, experiences, professional background, personality, and practice skills, have all contributed to the differing techniques individual mediators now employ in their practices. In professional dispute resolution circles, a substantial controversy has arisen concerning the propriety of one such emerging mediation practice - the so-called "evaluative" mediation approach. In this mediation style, the mediator, often at the request of the parties, makes and offers an independent judgment on the merits of issues under consideration and, arguably, shifts the process from facilitation to adjudication. This nationwide debate came to a head in the

Committee within the context of consideration of the ethical propriety of a mediator offering, "opinions and advice."

24. The Committee's approach to this question was to first reconfirm the fundamental proposition that mediators guiding disputing parties toward reconciliation must first and foremost preserve and respect the parties' right to self-determination - their right to independently agree or not to agree to a resolution of the conflict. Any mediation technique or practice that impairs the parties' right to self-determination is inappropriate and unethical. Whether or not a given mediator's evaluative input to a given mediation is appropriate, is thus dependent on whether or not the parties' right to self-determination has been compromised in the process. Rule 10.037 was shaped accordingly.

25. Rule 10.370(a) thus allows a mediator (who is professionally qualified to do so) to provide "information" to parties in a manner consistent with maintaining impartiality and preserving their rights to self-determination. Rule 10.370(c) would similarly allow a mediator to discuss the merits of a claim or defense with the parties only if the discussion is conducted in a manner in which the impartiality of the mediator is maintained and the parties right to self-determination not violated. Personal opinions of the mediator that are intended to coerce, decide, or direct a resolution are prohibited. In addition, the Committee voted to retain the prohibition against the mediator offering an opinion as to how the court in which the case is filed would decide the matter.

26. **Rule 10.380, Fees and Expenses**, is derived entirely from present rule 10.100 with some minor changes. The proposed guiding principles for setting fees have been re-prioritized by the realignment of the subdivisions to the rule, and a simplification of the rule requiring a written explanation of fees has been added. Additionally, the mediator's responsibility for providing a written explanation of fees and costs could under the proposed rule be invoked by a request from the "parties or their counsel" in recognition of the fact that mediators often deal with counsel rather than the parties.

27. **Rule 10.400, Mediator's Responsibility to the Mediation Process**, outlines the mediator's responsibility to the mediation process and provides an introduction for succeeding rules in the section. The Committee Note describes the process by which this rule section was created.

28. **Rule 10.410, Balanced Process**, is a rewritten version of present rule 10.060(d) and (f), which call for a mediation procedure to be conducted in an evenhanded and mutually respectful manner. The new rule adds the additional requirement that the mediator encourage the

participants to conduct themselves in a collaborative and non-coercive manner. The Committee Note emphasizes the presence or threat of domestic violence or abuse can affect the balanced nature of the process and thus should be a matter of concern to the mediator.

29. **Rule 10.420, Conduct of Mediation**, is taken from present rules 10.050(a), 10.050(b), 10.110(a)(1), 10.110(a)(3), 10.110(b)(1), and 10.110(b)(2) which all deal with beginning and ending the mediation process. Subdivision (a) of the proposed rule provides a checklist of fundamental items a mediator would be required to inform all participants of at the outset of a mediation session. The consensual and confidential nature of the process and the non-adjudicatory role of the mediator are considered to be essential parts of the mediation process that every participant should understand. During its deliberations, the Committee encountered legitimate concerns expressed about the aspect of dictating what might be termed "good mediation practices" through ethical rules. In this instance, however, it was the consensus of the Committee that these fundamental underlying principals of mediation were sufficiently important to warrant a requirement that the mediator take reasonable steps to make them a part of the process. Subdivision (b) of the new rule makes a distinction between situations calling for outright termination of a mediation as opposed to a temporary adjournment. A mediation *shall be adjourned* (temporarily delayed) upon agreement of the parties. A mediation *can be either terminated or adjourned* when it becomes apparent that the mediation would result in unreasonable emotional or monetary costs, when the case is unsuitable for mediation, or when any party is unable or unwilling to participate in a meaningful manner. Finally, a mediation *must be terminated* when the physical safety of any participant is threatened. The proposed rule concludes with the requirement that the mediator take an active role in seeing that any agreements reached are properly documented.

30. The Committee Note to rule 10.420 contains additional points intended to clarify the rule. The mediator's responsibility in the orientation session is underscored once again, with the added suggestion that a mediator may wish to use the orientation session to generally inform the parties about the mediator's inability to provide non-mediation services during the mediation. The last point contained in the Committee Note is taken from the present note to rule 10.110, updated to include the juvenile and family rules with respect to the requirement that all settlement agreements be reduced to writing.

31. **Rule 10.430, Scheduling Mediation**, comes in part from existing rule 10.050(c), dealing with the requirement that a mediator perform mediation services in a timely fashion. The proposed new rule would add a further requirement that mediations be scheduled in a manner so as to allow adequate time for the parties to fully exercise their rights to self-determination. The refinement of the present rule is designed to address both the concern of unnecessarily

prolonging a mediation as well as the problem of rushing parties through a mediation. The Mediator Qualifications Board, and the Committee itself, have received comments expressing concern over scheduling practices which "stack" two or even three mediations in one day creating an inappropriately hurried environment for some parties.

32. **Rule 10.500, Mediator's Responsibility to the Courts**, advances the general requirement that a mediator is accountable to the courts for the proper discharge of his or her responsibilities with the understanding that any interactions with the court would be subject to these ethical rules. All communications with the presiding court concerning a case in mediation, for example, would be subject to applicable rules of confidentiality.

33. **Rule 10.510, Information to the Court**, is taken from present rule 10.040, and simply requires complete candor in all exchanges between the mediator and the presiding judge concerning the mediator's qualifications, schedule availability and general administration of a pending matter.

34. **Rule 10.520, Compliance with Authority**, which requires mediators to comply with all relevant rules, regulations and laws, is derived from current rules 10.030(a)(2)(A) and 10.040. The word "observe" has been changed to "comply" to avoid any confusion as to a mediator's responsibility. This rule would incorporate requirements found in Chapter 44, Florida Statutes, various rules of court (civil, family, juvenile), local court rules, and administrative judicial orders, and would add ethical ramifications for such violations.

35. **Rule 10.530, Improper Influence**, is also derived from former rule 10.040. The proposed rule replaces the former specific restriction against "giving gifts to court personnel" with a more broad restriction against "any activity which has the appearance of improperly influencing a court" to secure work. The new Committee Note clarifies this concern by allowing "*de minimus*" gifts as part of an overall business development plan.

36. **Rule 10.600, Mediator's Responsibility to the Mediation Profession**, serves to introduce a series of ethical standards the Committee views as a means of protecting the quality of the mediation profession. Among the concepts included are appropriate standards of advertising, developing professional competence, maintaining appropriate relationships with other mediators and related professionals, and contractual restrictions against future practice of mediation.

37. **Rule 10.610, Advertising**, is a rewritten version of present rule 10.130 with grammatical changes. The essence of the rule continues to be that any advertising by a mediator

must be accurate and honest.

38. **Rule 10.620, Integrity and Impartiality**, is taken almost verbatim from present rule 10.030(a)(1) that requires mediators to perform their services without compromising integrity and impartiality.

39. **Rule 10.630, Professional Competence**, which requires a mediator to maintain professional competence and participate in educational activities promoting professional growth is conceptually derived from present rules 10.030(a)(2) and 10.120(b). The rule is basically aspirational in the absence of a continuing mediator education requirement.

40. **Rule 10.640, Skill and Experience**, has substituted the phrase "skill or experience" for the word "competence" found in the present rule 10.030(a)(3) requirement that mediators refrain from accepting engagements beyond their capabilities. It is the Committee's belief that the new phrase more accurately and understandably expresses this concept.

41. **Rule 10.650, Concurrent Standards**, is a rewrite of present rule 10.030(b) which requires a mediator to comply with other applicable ethical standards. The proposed rule adds the admonishment, however, that these ethical rules for mediators prevail when a mediator is performing mediation services, despite the existence of other conflicting professional standards.

42. **Rule 10.660, Relationship with Other Mediators**, would replace present rule 10.140(a), which deals with a mediator's ethical responsibility toward other mediators. Rather than attempting to cover all such instances in which an interaction between two mediators would occur, the Committee believes it preferable to make the general aspirational statement that mediators are members of a profession, and, as such, should show mutual respect for each other.

43. **Rule 10.670, Relationship with Other Professionals**, is a distillation of present rule 10.140(b)(1). It reduces to a general rule the requirement that mediators should respect other professionals and promote mutual cooperation.

44. **Rule 10.680, Prohibited Agreements**, is a rewritten version of present rule 10.140(b)(2), which specifically prohibits employee agreements restricting the rights of a mediator to mediate after the termination of a contract or employment. The proposed rule contains a more general proscription against a mediator restricting or limiting another mediator's practice following termination of a professional relationship. The Committee Note for the first time specifically references covenants not to compete so that there is no confusion as to what the rule covers.

45. **Rule 10.690, Advancement of Mediation**, is a combination of present rules 10.120(c) and 10.150. Subdivision (a) of the proposed rule encourages mediators to provide mediation services pro bono or at a reduced rate, and subdivision (b) encourages mediators to provide mentorship services for new mediators. Subdivision (c) is a verbatim restatement of the present rule, which sets the general aspirational goal of supporting the advancement of mediation.

46. In order to present a complete picture for the Court, the Committee would point out that certain concepts from the present rules have not been transferred to the proposed rules. One provision not carried over from rule 10.040 is the requirement that a mediator must observe judicial standards of fidelity and diligence. Upon further reflection, the Committee was of the opinion that these terms, particularly as they would apply to a mediator, are not easy to understand, and thus would be difficult to follow. In addition, the Committee believes that the provisions found in 10.050(b), which requires the mediator to assist the parties in evaluating the benefits, risks and costs of mediation and alternative methods of problem solving available to them, should be deleted because they would invoke a function which a mediator may not be capable of doing and therefore should not be required to do. For similar reasons, the Committee believes that rule 10.090(c), which allows mediators to refer parties to appropriate resources if necessary, should also be deleted.

Revisions to Rules for Determining Good Moral Character

47. Upon recommendation of the Supreme Court Standing Committee on Mediation and Arbitration Training, the Committee also submits the following proposed amendments dealing with the process for determining the "good moral character" of a applicant for mediator certification. The changes suggested call for slightly amending certain existing rules and creating two new rules to put a complete "good moral character" standard in place.

48. Under the current rules, the requirement for an applicant to possess "good moral character" is set forth without definition as to its scope, meaning, or enforcement. To remedy this situation, the Committee recommends the adoption of proposed rule **10.110, Good Moral Character**, which defines the purpose, use, and meaning of the "good moral character" standard, and **rule 10.800, Good Moral Character; Professional Discipline**, which outlines the process for determining the existence of "good moral character."

49. The Committee also proposes the adoption of a new subdivision (e) to rule 10.100. This addition would require notice and submission of any suspension, revocation, or disciplinary charges brought against a certified mediator which relate to outside professional

licenses or certifications necessary for qualification as a mediator, to the Qualifications Complaint Committee, a committee of the Mediator Qualifications Board. Assume, for example, a circuit court mediator, who must be a member of the Florida Bar pursuant to the requirements of rule 10.100(c)(2), is suspended from the practice of law. Such suspension will trigger a case-by-case consideration of that mediator's qualifications to continue as a certified mediator under the criteria established in proposed rule 10.110(c)(4). Under the present rules, it is not clear that continued licensure is necessarily required beyond initial certification as a mediator. While losing such licensure as a result of disciplinary action may have an impact on an individual's qualifications to continue as a court-certified mediator, a simple desire to retire from another profession to become a full-time mediator may not. The Committee proposes to clarify the situation through the adoption of rule 10.100(e), which provides for a flexible evaluation on a case-by-case basis.

50. The criteria established to determine whether an applicant meets the "good moral character" requirement, as outlined in rule 10.110(c), contains both objective and subjective elements. Objectively, subdivisions (c)(2) and (c)(3) make any person convicted of a felony automatically ineligible for certification until restoration of civil rights, or, if the applicant is on felony probation, until termination of that probation. More subjectively, subdivision (c)(4) lists factors to be considered in relation to any conduct which may raise a question regarding "good moral character." In arriving at the list of these factors, the Committee was influenced by the provisions of rule 3-12, Rules of the Supreme Court Relating to Admissions to the Bar, which are used in determining fitness to practice law. In establishing a test for "good moral character" with both objective and subjective elements, the Committee believes that persons who clearly should not become certified mediators will be eliminated, while others will have their applications considered on a case-by-case basis within a structured format.

51. The second proposed rule dealing with "good moral character" is rule 10.800, which would establish a procedure for making determinations as to whether applicants and certified mediators possess the required "good moral character." With respect to new applicants, the "good moral character" determinations are presently being made by the Training Committee. No current mechanism exists, however, for confirming that established mediators continue to meet their "good moral character" qualifications.

52. Rule 10.800 would establish a process to refer all questions concerning "good moral character" to the Mediator Qualifications Board (MQB). The MQB has been chosen as the best candidate for handling these inquiries for a number of reasons. First, unlike the Training Committee, the MQB enjoys statutory immunity pursuant to section 44.107, Florida Statutes. The MQB was created by this Court, pursuant to present rule 10.190 (to be renumbered as

10.730), as a disciplinary body for mediators and thus enjoys the protection of statutory immunity in the performance of its duties. Second, and also unlike the Training Committee, the MQB already possesses the administrative infrastructure to perform the function of making "good moral character" determinations. Rule 10.200 (to be renumbered as 10.740) specifically grants the MQB numerous powers, including subpoena power, authority to initiate contempt proceedings, and adjudicatory responsibility. Third, the MQB has developed a certain experience level in evaluating disciplinary issues similar to those which would involve a "good moral character" determination, while the Training Committee has historically been occupied with primarily policymaking functions such as establishing training standards. Finally, the MQB is more flexible, presently operating in three and five-member bodies and easily adaptable to sitting in the three-member Qualifications Complaint Committee proposed to handle these matters. The nine-member Training Committee does almost all its work in full committee.

53. Proposed rule 10.800(a) outlines the procedure to be followed when a "good moral character" issue arises in relation to both applicants and certified mediators. Subdivision (a)(1) would give the Dispute Resolution Center the authority to review all new mediator applications, obtain additional information if warranted, and forward questionable matters to the MQB in the form of a complaint. Similarly, upon becoming aware of any credible evidence questioning the current "good moral character" of a certified mediator, the Center would be authorized to forward that information to the MQB. The matter would then be referred to a specially-constituted Qualifications Complaint Committee, which would have essentially the same options as a standard MQB Complaint Committee, that is, the power to dismiss the complaint or send it to a hearing panel. The five-member panel, upon receiving a probable cause determination from the Qualifications Complaint Committee that an applicant or certified mediator lacks "good moral character," would conduct a hearing under established procedures and take appropriate action. Such action could include dismissing the charges, denying certification of an applicant, or imposing sanctions upon a certified mediator.

54. As noted above, the Committee recommends, as part of its "good moral character" package, the creation of a Qualifications Complaint Committee. Under the provisions of newly-created rules 10.720(j), 10.730(e), and 10.740(b), that committee will be appointed for a period of one year. It would consist of three members (one from each division) and be given exclusive authority to determine probable cause in relation to "good moral character" issues involving both applicants and certified mediators. The Qualifications Complaint Committee would then proceed as if the matter were an ordinary complaint, except to the extent the rules may dictate otherwise. If a hearing is deemed necessary, it would occur before a five-member panel in the same manner as a disciplinary hearing. The only significant change in the rule is the addition of subdivision (m) which replaces the normal "clear and convincing evidence" standard

utilized in mediator disciplinary cases with the "preponderance of the evidence" standard in relation to applicants. The Committee believes that the lower standard is appropriate in light of the fact that applicants, by definition, have no vested interest in certification and thus are entitled to lesser protection.

55. There are a number of conforming amendments, specifically amendments to rules 10.220, 10.230, 10.240, 10.260 and 10.290 (renumbered as 10.810, 10.820, 10.830, 10.850, and 10.890) which amend the respective rules in a manner consistent with the proposed "good moral character" rules.

56. One additional change has been proposed dealing with the Mediator Qualifications Board. This new provision would add one or more dependency mediators to each geographic division of the MQB. Presently, the board contains three representatives per division from the categories of circuit, family and county certified mediators. As this Court is aware, the category of dependency mediator was created in July of 1997. Adding dependency mediators to the MQB ensures that a dependency mediator against whom a grievance is filed faces, at least in part, a jury of his or her peers and that at least one member of the hearing panel has specific knowledge of mediation in the area of the charge. The proposed amendment to rule 10.190(b)(5), renumbered as 10.730(b)(5), would thus include dependency mediators in MQB functions. Due to the small number of dependency mediators (presently 70 are certified statewide), the Committee believes that the Chief Justice should have the discretion of appointing from one to three such mediators from each division.

Revisions to Rules Concerning the Mediator Qualification Advisory Panel

57. Rule 10.300 (renumbered as 10.900), which presently provides the authority for the Mediator Qualifications Advisory Panel, has been substantially rewritten. These proposals which include a change of name for the Panel, originated with the Mediator Qualifications Advisory Panel itself, which has been operating under the existing rules since it became effective July 1, 1994. The proposed amendments, which were approved by the Committee, are designed to increase the effectiveness and efficiency of the panel.

58. The title of the new advisory body would be the "Mediator Ethics Advisory Committee," which more accurately describes the function it performs, reduces confusion with the mediator disciplinary body, and provides consistent nomenclature with its judicial counterpart. The membership of the new committee under rule 10.900(c) would consist of at least one dependency mediator along with circuit, family, and county mediators.

59. The Committee proposes that rule 10.900(d), as renumbered, be amended to

specifically allow for meeting by telephone conference, which method has historically composed over half of the panel's meetings. The rule would also define a quorum and authorize the chair to have the authority to decide the method of voting. New subdivision (e) would have a specific requirement that a majority of all members, rather than of those members present at any meeting, are required to concur in any advisory opinion. While this has been the actual practice, it is not specifically covered in the present rule.

60. Finally, the Committee also recommends that renumbered rule 10.900(g) be adopted to clarify the extent of the confidential nature of requests for opinions. The present rule on this subject, 10.300(f), provides that all references to the requesting mediator be deleted from the opinion. Practice has made it clear that the identity of the mediator is not necessarily the only identity that may legitimately need protection. Accordingly, it is recommended that confidentiality be extended to the request for an opinion, including any reference to any real person, firm, organization, or corporation identified. Deletions made to protect that confidentiality should be made not only from the advisory opinion itself, but from any other document published in connection with the opinion as well. The Committee also believes that this rule should be retroactively applied to all opinions ever issued by the advisory panel and would incorporate such provision into the rule.

61. This petition is filed at the direction of the Florida Supreme Court Standing Committee on Mediation and Arbitration Rules.

Respectfully submitted,
Lawrence M. Watson, Jr., Chairman
Mediation and Arbitration Rules Committee