IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENT TO
FLORIDA FAMILY LAW RULES OF PROCEDURE
AND FLORIDA RULES OF CIVIL PROCEDURE
AND PROPOSED NEW RULES GOVERNING
PARENTING COORDINATORS AND
ESTABLISHING STANDARDS OF CONDUCT
FOR PARENTING COORDINATORS AND
ADR NEUTRALS OTHER THAN MEDIATORS,
ARBITRATORS AND PARENTING
COORDINATORS CASE NO.: SC11-1454**

COMMENTS OF THE FAMILY LAW RULES COMMITTEE

Ashley J. McCorvey Myers, Chair, Family Law Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this comment on the report of the Committee on Alternative Dispute Resolution Rules and Policy (ADR Committee). The Family Law Rules Committee considered the ADR Committee's report at their September 23, 2011, meeting and voted 21-0 to submit this comment to the Court. The comment was reviewed by the The Florida Bar Board of Governors and approved by a vote of 25-0.

Fla. Fam. L. R. P. 1.740(f)(1) currently reads:

> **(f) Report on Mediation.**
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> (1) If agreement is reached as to any matter or issue, including legal or factual issues to be determined by the court, the agreement shall be reduced to writing, signed by the parties and their counsel, if any and if present, and submitted to the court unless the parties agree otherwise. By stipulation of the parties, the agreement may be electronically or stenographically recorded and made under oath or affirmed. In such event, an appropriately signed transcript may be filed with the court. If counsel for any party is not present when the agreement is reached, the mediator shall cause to be mailed a copy of the agreement to counsel within 5 days. Counsel shall have 10 days from service of a copy of the agreement to serve a written objection on the media-tor, unrepresented parties, and counsel. Absent a timely

written objection, the agreement is presumed to be approved by counsel and shall be filed with the court by the mediator.

The ADR Committee's proposal would delete the last three sentences of this subdivision allowing an attorney who was not present when the agreement was reached to receive a copy of the mediation agreement within 5 days and to have 10 days within which to serve any objection to the agreement.

This provision has been part of *Rule* 12.740 since the rule was originally adopted by the Court effective January 1, 1996. *See In re Family Law Rules of Procedure*, 663 So. 2d 1047, 1049 (Fla. 1995).The provision was carried over from then-existing *Fla. R. Civ. P.* 1.740, Family Mediation, which had been added to the Florida Rules of Civil Procedure effective January 1, 1988. *See Rules of Civil Procedure, In re Proposed Rules for Implementation of Florida Statutes Sections 44.301-.306*, 518 So. 2d (Fla. 1987). *Rule* 1.740 was deleted by the Court when *Rule* 12.740 was adopted. *See* 663 So.2d 1047, 1049.

The "10-day provision" has served litigants and attorneys well since its initial adoption. Although appellate opinions have discussed the provision, *see, e.g., Kalof v. Kalof*, 850 So. 2d 365 (Fla. 3d DCA 2003), there have been no reported cases criticizing the provision. An informal poll of the members the Family Law Rules Committee revealed that none of those present had experienced any problem with or abuse of the 10-day provision. Although mediation is now more commonly used and more regulated than it was in 1988, there is no reason to remove a provision that is working well for practitioners and their clients.

In family mediations, the provision is used when one or both parties choose not to have an attorney present at the mediation conference. Often, the decision is an economic one, made because of the attorney's fees. The parties may also feel that they can best resolve their differences by bargaining directly. The 10-day provision ensures that the agreement is reviewed by the parties' attorneys and that the agreement is fair and reasonable given the circumstances of the parties. It could be argued that if this provision were removed by the court, the parties could still negotiate on their own for the 10-day provision. However, parties involved in mediation of a dissolution of marriage are often emotional and in an uncomfortable situation. A party may easily forget that the attorney advised him or her to request this provision. Or, if a party asks for it and the other party objects, the entire agreement may be abrogated and the time and money spent to engage in mediation wasted.

The argument put forth by the ADR Committee for amending *Rule* 12.740 is to conform it to *Fla. R. Juv. P.* 8.290, which does not contain a 10-day provision. The Family Law Rules Committee supports the Uniform Family Court concept and is, in fact, currently engaged in developing a body of rules to facilitate implementation of family courts. Although the conformance of rules of procedure may be appropriate in some circumstances, the committee believes that in this case there is a distinction with a difference between family and dependency mediation. Although the best interests of the child is a consideration in both family and dependency mediation, the substance of the cases differ vastly.

Dependency mediation takes place within a case in which allegations of abandonment, abuse, or neglect have been made against the child's parents or caregivers. The child may have been removed from the family or the removal of the child may be threatened. The parties to the case are the parents or caregivers and the State, through the Department of Children and Families. The mediation is typically conducted either before or after adjudication. Issues may include whether the parents or caregivers will consent to a finding of dependency and the terms and conditions of the case plan. Indigent parties in dependency cases are entitled to court-appointed counsel. *See* section 39.013(9), Fla. Stat. Hence, these parties are not personally incurring attorneys' fees to have counsel present at mediation.

As the ADR Committee points out, the 10-day provision was considered by the Juvenile Court Rules Committee, which declined to change *Rule* 8.290 to include the provision. This vote, however, does not indicate any recommendation that the family law rule should be changed.

The majority of family law cases using mediation are dissolution of marriage cases. In a dissolution of marriage, the parties are husband and wife. The litigation is conducted with minimal involvement of the state, other than the court's responsibility for issues of child support and parental responsibility. In some dissolution cases, there are no children. However, the issues in a dissolution of marriage case also include spousal support, equitable distribution of marital assets and liabilities, and determination of responsibility for payment of attorneys' fees. The parties and their attorneys are best suited to determine whether counsel should be present for mediation and should not be forced to have their attorneys present to ensure that their rights are protected.

The Family Law Rules Committee respectfully requests that the Court not amend *Rule* 12.740 as requested by the ADR Committee.

Respectfully submitted _____.

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CERTIFICATE OF SERVICE

I certify that a copy of this comment was provided by U. S. mail on _____ to:

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