

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-

IN RE: AMENDMENT TO THE FLORIDA FAMILY LAW RULES AND FLORIDA RULES OF CIVIL PROCEDURE AND ESTABLISHING STANDARDS OF PROFESSIONAL CONDUCT FOR NEUTRALS ENGAGED IN ADR PROCESSES FOR WHICH NO OTHER SUPREME COURT RULES OR STANDARDS OF PROFESSIONAL CONDUCT EXIST

**PETITION OF THE COMMITTEE ON
ALTERNATIVE DISPUTE RESOLUTION RULES AND POLICY
TO
AMEND THE FLORIDA FAMILY LAW RULES OF PROCEDURE AND
THE FLORIDA RULES OF CIVIL PROCEDURE,
AND TO
ESTABLISH STANDARDS OF PROFESSIONAL CONDUCT FOR
NEUTRALS ENGAGED IN ADR PROCESSES FOR WHICH NO OTHER
SUPREME COURT RULES OR STANDARDS OF PROFESSIONAL
CONDUCT EXIST**

The Supreme Court Committee on Alternative Dispute Resolution Rules and Policy (ADR Committee), by its undersigned Chair, the Honorable William D. Palmer, respectfully files this petition pursuant to In re Committee on Alternative Dispute Resolution Rules and Policy, Fla. Admin. Order No. AOSC13-40 (September 4, 2013). (See Appendix C.) This order and its predecessor orders direct the ADR Committee to monitor court rules governing alternative dispute resolution (ADR) policies and procedures, and make recommendations as necessary to improve the use of mediation, arbitration and other forms of ADR to supplement the judicial process.

In May of 2006, the ADR Committee directed a subcommittee on ADR “Systems” (Systems Subcommittee) to address and make recommendations on proposed rules and standards of professional conduct for the range of ADR

options, in addition to mediation and arbitration, which may be ordered by a court to promote collaborative approaches to dispute resolution. The Systems Subcommittee presented recommendations in 2010 which were adopted by the ADR Committee. Revisions to these recommendations were adopted by unanimous vote by the ADR Committee on September 12, 2014.

Proposed amendments to court rules and a new set of standards of professional conduct are included in this petition. These proposed amendments constitute an effort to establish a set of uniform rules and standards of professional conduct applicable to any dispute resolution process selected by a court for which no Supreme Court rules or standards of professional conduct exist and are intended to instill and promote public confidence in the use and participation in such processes.

The ADR Committee believes that the proposed rules and standards of professional conduct which are contained in this petition will improve and increase the use of ADR, increase party self-determination in the selection of an ADR method or methods, and provide safeguards for parties selecting ADR neutrals performing services for ADR processes for which no other Supreme Court rules or standards of professional conduct exist.

Jurisdiction

The Florida Supreme Court has authority to adopt rules for practice and procedure in all courts under Article V, Section 2(a) of the Florida Constitution, which includes authority to promulgate new rules establishing standards of professional conduct for ADR processes.

Background

While the use of mediation by litigants in the state court system in Florida far eclipses any other alternative process and it may be the best option for the majority of litigants, other ADR processes may exist which, depending on the facts and circumstances of a case, may be more effective. Chapter 44, Florida Statutes (2014), includes ADR processes such as court-ordered non-binding arbitration (§ 44.103), and voluntary binding arbitration and voluntary trial resolution (§44.104). Additional processes sometimes utilized by courts include the mini-trial, early neutral evaluation, summary jury trial, and other “ad hoc” processes as agreed to by the parties. While rules or standards of professional conduct exist for mediation, arbitration and parenting coordination, no Supreme Court rules or

standards of professional conduct exist to govern other potential court-appointed ADR processes.

The ADR Committee believes that the time is ripe for revising the procedural rules to address court referral to all types of ADR processes and to ensure that, as other forms of ADR processes emerge, standards of professional conduct will exist to govern the neutral's conduct in such ADR processes. The ADR Committee is proposing new rules and a set of standards of professional conduct which would apply to those processes for which no other Supreme Court rules or standards of professional conduct exist at the time of referral. If, in the future, rules or standards of professional conduct are promulgated for a process, these rules and standards would then be inapplicable to that process.

This petition elaborates on ideas and recommendations that date back to the development of court mediation rules and procedures in the 1980's. For example, in the Final Report of the Florida Legislature Study Commission on Alternative Dispute Resolution submitted to the Florida Supreme Court in 1986, at 4, the Commission wrote: "A precept of the system is that all forms of alternative dispute resolution should not be applied to any given case, in that each type of case will eventually prove to be more susceptible to appropriate disposition by one form of dispute resolution mechanism than by another."

Florida would not be the first state to address forms of ADR processes other than mediation, arbitration and parenting coordination. For example, Kansas Supreme Court Rule 902 (2014 Kansas Court Rules) defines seven different ADR methods and provides that parties have "free choice of process, program and the individual neutral." Similarly, rule 114.02(a)(1) – (10), Minnesota General Rules of Practice, enumerates ten different ADR methods and rule 114.04(a) provides that attorneys are required to meet and confer to agree on an ADR process. If they cannot agree, the court can then order them to a "non-binding process" such as mediation. See rule 114.04(b).

Earlier drafts of these rules and standards of professional conduct were published in the Florida Bar News, distributed to various Florida Bar Committees, posted on the website of the Florida Dispute Resolution Center, and presented at various conferences. All feedback was carefully reviewed by the ADR Committee and incorporated as appropriate.

The recommended rules and standards of professional conduct are contained in the proposed new set of standards of professional conduct (See Appendix A-1-

21, Appendix B-1-23), the proposed new Florida Family Law Rules of Procedure (See Appendix A-22-26, Appendix B-24-31) and the proposed new Florida Rules of Civil Procedure (See Appendix A-27-30, Appendix B-32-39).

Given that multiple forms of ADR processes are already authorized in both the Florida Family Law Rules of Procedure and the Florida Rules of Civil Procedure, revisions are needed to incorporate the proposals contained in this petition in both sets of procedural rules.

Given the unique nature of dependency proceedings, the ADR Committee does not recommend any changes to the Florida Rules of Juvenile Procedure.

New Florida Family Law Rules of Procedure: 12.760, 12.770, and 12.780

New proposed Florida Family Law Rule of Procedure 12.760, *Referral to an Other ADR Process*, allows the court to refer the parties to an Other ADR Process and additionally allows the parties to select their own process with court approval. The rule provides a specific list of other ADR processes which can be utilized. However, if the parties want to utilize a specific ADR process not contained on the list, they can request court approval to do so. (See Appendix A-22, Appendix B-24)

New proposed Florida Family Law Rule of Procedure 12.770, *Rules Common to Other ADR Processes*, includes provisions for the timeframe for the process, motions to dispense with an Other ADR Process, motions to defer an Other ADR Process, disqualification of a neutral, completion of an Other ADR Process and exclusion from an Other ADR Process of actions for injunctions for protection. As a last item, the new proposed rule provides that discovery is not suspended during an Other ADR Process unless stipulated by the parties or ordered by the court. (See Appendix A-24, Appendix B-27)

New proposed Florida Family Law Rule of Procedure 12.780, *Procedures for Neutrals in Other ADR Processes*, includes provisions regarding the authority of the neutral and for the conduct of the Other ADR Process chosen or ordered. (See Appendix A-26, Appendix B-30)

The new proposed Florida Family Law Rules of Procedure for Other ADR Processes were adopted by the ADR Committee at the September 12, 2014, meeting by a unanimous vote.

New Florida Rules of Civil Procedure 1.840, 1.850, and 1.860

New proposed Florida Rule of Civil Procedure 1.840, *Referral to an Other ADR Process*, allows the court to refer the parties to an Other ADR Process and additionally allows the parties to select their own process with court approval. The rule provides a specific list of other ADR processes which can be utilized. However, if the parties want to utilize a specific ADR process not contained on the list, they can request court approval to do so. (See Appendix A-27, Appendix B-32)

New Florida Rule of Civil Procedure 1.850, *Rules Common to Other ADR Processes*, includes provisions regarding the timeframe for the process, motions to dispense with an Other ADR Process, motions to defer an Other ADR Process, disqualification of a neutral, completion of an Other ADR Process, and exclusions from an Other ADR Process. As a last item, the new proposed rule provides that discovery is not suspended during an Other ADR Process unless stipulated by the parties or ordered by the court. (See Appendix A-28, Appendix B-34)

New proposed Florida Rule of Civil Procedure 1.860, *Procedures for Neutrals in Other ADR Processes*, includes provisions regarding the authority of the neutral and the conduct of the Other ADR Process chosen or ordered. (See Appendix A-30, Appendix B-38)

The new proposed Florida Civil Rules of Procedure for Other ADR Processes were adopted by the ADR Committee at the September 12, 2014, meeting by a unanimous vote.

Rules for Court-Appointed Alternative Dispute Resolution Neutrals Engaged in Alternative Dispute Resolution Processes for Which No Other Supreme Court Rules or Standards of Professional Conduct Exist

The purpose of the proposed new standards of professional conduct is to provide standards of professional conduct to which all individuals will be held accountable when performing court-ordered neutral services for which no other Supreme Court standards of professional conduct exist.

Having standards of conduct for a range of ADR processes is not a new concept. For example, Minnesota rule 114, General Rules of Practice, Appendix, Code of Ethics, provides for a set of standards that apply to neutrals providing a

range of ADR services in order to ensure there is “broad public confidence in the integrity and fairness of the process.” See Introduction at 1.

Part I, *Standards of Professional Conduct*, emphasizes the importance of all neutrals being held to and embracing standards of professional conduct which will encourage public use, understanding, satisfaction with, and confidence in new court-ordered ADR processes as they emerge. The proposed rules both guide the neutral and protect the consumer. Neutrals practicing an established form of ADR (such as mediation, arbitration, or parenting coordination) are held to their own standards of professional conduct. The proposed new rules track the standards of professional conduct for certified and court-appointed mediators where appropriate and encompass a variety of subjects including the neutral’s role, misrepresentation, impartiality, conflicts of interest, demeanor, privacy, fees, and conduct of the ADR process (including orientation, adjournment, termination, and scheduling). The standards also cover compliance with applicable statutes, court rules and orders, marketing, integrity, impartiality, skill and experience. (See Appendix A-1-20, Appendix B-1-22)

Part II, *Appointment and Discipline*, places responsibility for enforcement of these standards of professional conduct on the court appointing the ADR neutral. This method of enforcement is consistent with the court supervision of other quasi-judicial and non-judicial officers such as court reporters, court interpreters, some expert witnesses, public guardians, civil traffic hearing officers, child support hearing officers, child custody evaluators and court-appointed magistrates. (See Appendix A-21, Appendix B-23)

These proposed rules were adopted by the ADR Committee at the September 12, 2014, meeting by unanimous vote.

Input, Posting of Rules, Comments, and Response to Comments

Input from The Florida Bar was received through its Committees in letters to the ADR Committee. The Florida Bar Family Law Rules Committee response is attached as Appendix E, The Florida Bar Civil Procedure Rules Committee response is attached as Appendix F. In addition, the proposed rules were posted on the DRC website from May 20, 2011, to June 8, 2011. One personal comment was received as a result of the posting, which is attached as Appendix G.

These proposed rules and standards of professional conduct were originally submitted to the Court in In re Amendments to Fla. Rules of Civil Pro., Fla. Family

Law Rules of Pro., New Fla. Rules for Qualified & Court-Appointed Parenting Coordinators, New Fla. Rules for Other Court-Appointed Alternative Dispute Resolution Neutrals, 104 So. 3d 1043 (Fla. 2012), in a petition which also addressed an inconsistency between the Florida Family Law Rules of Procedure and the Florida Rules of Juvenile Procedure, and rules and standards of professional conduct for parenting coordination. The opinion issued on the original petition addressed the inconsistency, but declined to adopt the proposed rules and standards of professional conduct contained therein and referred them back to the ADR Committee for further study and consideration. (See Appendix H) The ADR Committee subsequently submitted a petition addressing the parenting coordination rules and standards of professional conduct which have recently been approved by the Court. See In re Amendments to the Florida Family Law Rules of Procedure; New Rules for Qualified and Court-Appointed Parenting Coordinators, 142 So. 3d 831 (Fla. 2014). The Court granted the ADR Committee's request for an extension of time to September 30, 2014, to submit its petition regarding the rules and standards for Other ADR Processes. (See Appendix I)

WHEREFORE, the Committee on Alternative Dispute Resolution Rules and Policy respectfully requests this court consider and adopt the proposed new Florida Family Law Rules of Procedure, new Florida Rules of Civil Procedure, and new Standards of Professional Conduct for Other ADR Processes.

Respectfully submitted this 19th day of September, 2014.

/s/ William D. Palmer, Appellate Court Judge
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by e-mail through the Florida Courts E-Filing Portal this 19th day of September, 2014, to Elizabeth Ann Blackburn, Chair, The Florida Bar Family Law Rules Committee, Revis & Blackburn, P.A., 648 S. Ridgewood Avenue, Daytona Beach, FL 32114-4932, eblackburn@revisblackburnpa.com ; Kevin Bayly Cook, Chair, The Florida Bar Civil Procedure Rules Committee, Bedell, Dittmar, Devault, et al, 101 E. Adams Street, Jacksonville, FL 32202-3303, kbc@bedellfirm.com ; Dana Dowling, Staff Liaison, Families and Children in the Court Steering Committee, 500 South Duval Street, Tallahassee, FL 32399, dowlingd@flcourts.org ; Elena Rodriguez, Commenter, 10420 S.W. 140 Road, Miami, FL 33176, drmeqr@bellsouth.net ; and John F. Harkness, Jr., Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300, jharkness@flabar.org .

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify this petition has been prepared in MS Word using Times New Roman 14-point font, which complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.100(1).

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