IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-875

IN RE: AMENDMENTS TO FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS

RESPONSE OF THE SUPREME COURT COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION RULES AND POLICY TO COMMENTS OF THE ELEVENTH JUDICIAL CIRCUIT AND THE FLORIDA BAR ALTERNATIVE DISPUTE RESOLUTION SECTION

The Supreme Court Committee on Alternative Dispute Resolution Rules and Policy (ADR Committee) by and through its Chair, the Honorable Rodney Smith, hereby respectfully submits its collective Response to the Comments of the Eleventh Judicial Circuit (Eleventh Circuit) and The Florida Bar Alternative Dispute Resolution Section (Bar ADR Section) filed herein.

PRELIMINARY BACKGROUND OVERVIEW

The ADR Committee points out to this honorable court that many of the comments filed by both the Eleventh Circuit and Bar ADR Section reflect a misunderstanding as to: the composition of the mediators who will be subject to the proposed amendments; the composition of the committee which drafted the proposed amendments as well as the ADR Committee which vetted, revised and approved the same; the important distinctions between a mediator's certification and a professional license; and the actual quasi-judicial nature of the grievance proceedings provided for in the Florida Rules for Certified and Court-Appointed Mediators (the Rules) and the limited due process afforded in such proceedings. As will be demonstrated herein, some of the Eleventh Circuit's and Bar ADR Section's comments reflect the desire to afford applicants for mediator certification

and certified mediators with more due process in these quasi-judicial grievance proceedings than that enjoyed by attorneys in The Florida Bar's disciplinary proceedings, judges in Judicial Qualifications Commission (JQC) disciplinary proceedings, or other licensed professionals in Department of Business and Professional Regulation disciplinary proceedings. Indeed, in other instances, the Eleventh Circuit and Bar ADR Section additionally seek to afford applicants for certification and certified mediators with more due process than that enjoyed by criminal defendants whose very liberty may ultimately be at stake.

Thus, to correct the misunderstandings and address some of the concerns raised in the comments, as well as to place the ADR Committee's opposition to other comments into a proper perspective, the ADR Committee makes some preliminary observations and clarifications. The ADR Committee addresses specific areas of substantial disagreement with those comments which will either: (1) hinder the Mediator Qualifications Board's (MQB) objective in fairly, efficiently and effectively ensuring that any mediator certified by this honorable court has and continues to maintain the highest level of ethical standards when serving the general public in confidential mediations; and (2) burden the Dispute Resolution Center's (DRC) limited resources in effectuating this goal. The ADR Committee also notes those areas of concern or comments of the Eleventh Circuit which are factually incorrect.

It is important to note that the Rules were originally and are now written: (1) to afford an applicant or mediator as much confidentiality as possible until a finding of probable cause is made; (2) to encourage the amicable resolution of matters in an effort to avoid a finding of probable cause; and (3) to allow applicants and mediators (many mediators are not attorneys) to be able to defend their positions without the need to retain the services of an attorney until such time as probable cause may be found.

BACKGROUND CLARIFICATION

The first misconception that must be clarified involves the professional backgrounds of Florida Supreme Court certified mediators and ADR Committee members who collaborated on the proposed amendments. There are currently approximately 6,200 Florida Supreme Court certified mediators. Each month, the

DRC receives approximately 50 new applications for mediator certification and 200 renewal applications. Attorneys represent only 50% or less of all Florida Supreme Court certified mediators. Individuals from a vast array of other professions or occupations, including mental health professionals, medical doctors, teachers, clergy, and certified public accountants, make up the other 50-51% of Florida Supreme Court certified mediators.

The following individuals participated in the initial drafting of the proposed amendments: an attorney who is a member of the MQB; a former assistant state attorney; and criminal defense attorneys who have participated in all stages of the mediation grievance process. The ADR Committee - a committee composed of Florida judges, attorneys, attorney/mediators (several of whom are members of the Bar ADR Section), non-attorney mediators, state court ADR administrators, and several MQB members - then vetted, revised, and edited the proposed draft amendments before voting to recommend them to this court.

Thus, the initial criticism of the proposed amendments for lack of any participation by the Bar ADR Section is unwarranted. Based upon the composition of the ADR Committee, it should be clear the proposed amendments are the result of an intense and collaborative effort of a vast array of **all** stakeholders to the mediator grievance process. A call for any further special collaboration between the ADR Committee and the Bar ADR Section, therefore, is both unwarranted and fundamentally unfair to the remaining mediators and other stakeholders who are not members of the Bar ADR Section.

The next misconception that needs clarification involves the nature of the mediation grievance proceeding itself. The disciplinary proceedings before the MQB are neither criminal nor civil in nature. Rather, they are quasi-judicial administrative proceedings. *See Vicbar, Inc. v. City of Miami,* 330 So. 2d 46, 47 (Fla. 3d DCA 1975). Although the constitutional guarantee of due process is certainly applicable to quasi-judicial administrative proceedings, the extent of the procedural due process afforded to a party in such proceedings is not as great as that afforded to a party in a full judicial hearing. *See Seminole Entertainment, Inc. v. City of Casselberry,* 811 So. 2d 693, 696 (Fla. 5th DCA 2001); *see also Hadley v. Dep't. of Administration*, 411 So. 2d 184, 187 (Fla. 1982). As a result, quasi-judicial administrative hearings are not controlled by strict rules of evidence and

procedure. *Seminole,* 811 So. 2d at 696; *see also*, *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 545 (1985), citing *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971), "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."

It has been held by the United States Supreme Court that there are essentially three distinct factors to be considered in an analysis of whether the due process afforded in any proceeding was constitutionally sufficient: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used; and (3) the probable value, if any, of additional or substitute procedural safeguards. *Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976). Further, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail should also be considered. Id. at 335.

Against this brief backdrop, the current Rules and proposed amendments thereto provide affected applicants or certified mediators with notice and the opportunity to be heard both prior to and during the grievance proceeding. Although the Rules, investigations, and grievance proceedings regulating mediators are generally patterned after those employed by The Florida Bar and the JQC in grievance proceedings against attorneys and judges, respectively, the Florida Supreme Court's certification of a mediator is not equivalent to the license or authority conferred upon other professionals such as judges, attorneys, physicians, and others.

Specifically, professionals such as attorneys, physicians, and others must undergo rigorous testing to establish their professional proficiency or competency to receive their licenses. Mediators, on the other hand, undergo no testing or evaluation process to establish their competency. Consequently, the DRC is forced to rely, in large part, upon relevant information regarding an applicant's or mediator's good moral character to establish or gauge that applicant's or mediator's fitness to receive and maintain certification. While the loss of a professional license in a disciplinary proceeding will necessarily end that professional's ability to practice, the loss of a mediator certification does not

effectively preclude a mediator from mediating. A mediator who has been decertified or whose certification has been suspended, or an applicant who is denied certification may still mediate by consent of the parties. The due process "private interest" at stake in mediator grievance proceedings (i.e., certification) clearly does not rise to the level of the due process "private interest" at stake in grievance proceedings involving professional licenses. Thus, all of the Eleventh Circuit's and the Bar ADR Section's comments which effectively seek to elevate the due process afforded to applicants and mediators in grievance proceedings above that due process which is afforded to licensed professionals in grievance proceedings must be rejected by this honorable court.

With this background clarification, the ADR Committee addresses those comments with which it substantially disagrees; those suggestions with which it agrees; and those comments which are factually inaccurate.

The proposed amendments to eleven of the Florida Rules for Certified and Court-Appointed Mediators which the ADR Committee agrees to revise in response to comments filed are attached in legislative and two-column chart format in Response Appendices A and B.

I. THE COMMENT THAT THE TERM "GOOD MORAL CHARACTER" IS UNDEFINED AND MAY RESULT IN A SUBJECTIVE APPLICATION OF THIS TERM IS UNFOUNDED

The initial comment that the term "good moral character" remains undefined in the proposed amendments and may lead to a subjective application of this term is unfounded. In 2000, when adopting the current rule 10.110, Good Moral Character, Florida Rules for Certified and Court-Appointed Mediators, this court expressly recognized the adequacy of the term "good moral character:"

> Current rule 10.010 (General Qualifications) which has been renumbered 10.100, contains, among other things, the requirement that an applicant for certification possess 'good moral character.' However, the rule contains no definition of or procedure for enforcing that requirement. New rule 10.110 (Good Moral Character) **defines the 'good moral character' standard.** It also establishes standards

> for determining good moral character. The criteria for determining whether an applicant meets the good moral character requirement is outlined in subdivision (c), which contains both objective and subjective criteria. 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 probation. Subdivision (c)(4) lists factors to be considered in relation to any conduct which may raise a question regarding good moral character. The criteria for determining whether an applicant meets the good moral character requirement is outlined in subdivision (c), which contains both objective and subjective criteria. This list of factors is based on rule 3-12 of the Rules of the Supreme Court Relating to Admissions to the Bar, which is used in determining fitness to practice law.

In re: Amendments to Fla. Rules for Certified & Court-Appointed Mediators, 762 So. 2d 441, 447 (Fla. 2000) (emphasis added).

The proposed amendments do NOT alter the existing "good moral character" standard approved by this court. The current criteria have proven adequate and sufficiently instructive for adjudicatory panels involved in mediation hearings to make their determinations without objections. For this reason, there is no need to enlarge or expound on the existing definition of "good moral character" in these proposed rules.

II. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.720 DEFINITIONS

Rule 10.720(g) Investigator

Proposed rule 10.720(g) defines "investigator" as follows: "A **certified mediator**, **lawyer**, or other **qualified individual retained** by the DRC at the direction of a RVCC or a QIC to conduct an investigation." (Emphasis added.) The Bar ADR Section asserts that there are no credentials set forth for being retained as an investigator and no explanation as to the method of compensation of an investigator. The DRC, at the instruction and request of a complaint committee or, at the adjudication stage, routinely retains investigators, prosecutors, and panel

advisers who are former or current assistant state attorneys, former or current criminal defense attorneys, and retired judges.

Additionally, both the Bar ADR Section and Eleventh Circuit incorrectly assert that this definition of "investigator" is silent as to the neutrality of the investigator. One of the commonly accepted definitions for the word "**retained**" is "to hire by the payment of a fee." *The American Heritage Dictionary of the English Language, Third Edition.* It necessarily follows that any certified mediator or other qualified individual who is "retained" by the DRC at the direction of either a Rule Violation Complaint Committee (RVCC) or a Qualifications Inquiry Committee (QIC) for a particular investigation must be an independent and neutral individual who is not otherwise on the staff and payroll of the DRC. Prior to being retained, each prospective investigator must conduct a conflict check to ensure that the investigator has no known conflicts or affiliations with the subject applicant or mediator under investigation. Similarly, the Rules pertaining to investigations of complaints against members of The Florida Bar (after which the mediator rules are patterned) do not specify that investigators in that process be neutral. See rules 3-7.3(b); 3-7.4(f); and 3-7.6(g), Rules Regulating The Florida Bar. And finally, the DRC, in its standard instructions to investigators, requests the investigative report include those facts which support the burden of proof and those which do not. All investigators are encouraged to advise the RVCC or QIC whether they believe the burden of proof could be met should probable cause be found. The neutrality of the investigator is encouraged and expected.

With regard to the comment on compensation, the Rules Regulating The Florida Bar do not specify whether or how The Florida Bar's independent investigators are compensated. The Florida Bar allows its staff counsel to conduct investigations and, of course, their salaries are public record. However, in the case of outside investigators, there is no detail of how they are compensated. The details of the specific tasks to be performed by the investigators and provisions for compensation are delineated in individualized contracts and do not need to be specified in the Rules.

Finally, the Bar ADR Section correctly observes that there is no prohibition against an investigator also being appointed to serve as the prosecutor in a grievance proceeding. The ADR Committee contends there should be NO such

prohibition. In criminal proceedings, the prosecutor who procures the criminal indictment before a grand jury is not disqualified as the prosecutor before the petit jury at the criminal trial. It is therefore inappropriate to suggest that in a quasi-judicial proceeding, the investigator whose investigative findings resulted in a probable cause finding before the QIC or RVCC is thereby disqualified from serving as the prosecutor before any panel of the Mediator Qualifications and Discipline Review Board ("MQDRB," the new name for the current MQB under the proposed Rules). To require the DRC to separately retain an investigator and prosecutor for each case would serve no purpose other than to strain the DRC's limited resources.

Rule 10.720(j) Panel Adviser

Proposed rule 10.720(j) provides that the DRC may retain the services of a "panel adviser" who is a member of The Florida Bar to assist the hearing panel in the performance of its functions at a hearing, including sitting in on deliberations in order to answer procedural questions and drafting the decision and opinion of the panel. The Bar ADR Section incorrectly asserts that the proposed amendments do not include experience requirements for the panel adviser. The language of the rule clearly prescribes that a panel adviser be a licensed Florida attorney. The DRC retains only panel advisers who have thorough knowledge of the Florida Rules for Certified and Court-Appointed Mediators. Panel advisers are necessary in grievance hearings for the following reasons: (1) panel members – a majority of whom may be non-attorneys – lack legal experience in such proceedings; (2) the DRC director is not neutral at the hearings and, accordingly, may not advise the panel members on procedural matters; and (3) the panel adviser must memorialize the panel's decision in a final order which is then approved by the panel. Additionally, if a panel appointed to a hearing is composed of individuals familiar with the process and includes members who can advise the other panel members, the DRC does not retain the services of a panel adviser.

The Bar ADR Section further asserts that there are no disclosure requirements for conflicts. While the rule does not expressly provide disclosure requirements for conflicts, the DRC requires complaint committee members, panel members, prospective investigators, prosecutors and Panel Advisers to conduct conflict checks prior to their appointment.

Finally, the Bar ADR Section notes that there is no process for the disqualification of the panel adviser by the applicant or mediator. Unless a panel adviser's conflict check uncovers a past or present conflict with an applicant or mediator, there is no need for any disqualification process. More importantly, the ADR Committee points out that panel advisers (like members of the adjudicatory panel) have absolutely no knowledge of or involvement with a particular grievance matter prior to the actual final hearing. Prior to the final hearing, the panel adviser and members of the panel receive only the formal charges from the DRC. During the hearing and the panel's subsequent deliberations, the panel adviser's sole role is to respond to panel members' questions about procedural matters. After the panel makes its decision, the panel adviser's role is to draft the panel's final decision in accordance with the panel's deliberations and instructions. The final decision is approved by the full panel before the chair signs. It is most important to note that the chair of any hearing panel must be a sitting judge.

The proposed amendment defining "panel adviser" simply reflects the DRC's long-standing practice with respect to (1) retaining qualified individuals to serve as panel advisers; and (2) defines the scope of their functions. The Bar ADR Section failed to demonstrate that the DRC's long-standing practice has been deficient.

Rule 10.720(k) Prosecutor

Proposed rule 10.720(k) defines "prosecutor" as a member of The Florida Bar in good standing retained by the DRC to prosecute a complaint before a hearing panel, perform additional investigation to prepare the case, negotiate a consent to charges and an agreement to the imposition of sanctions to be presented to the panel prior to the hearing, and prosecute any post-hearing proceedings. The Bar ADR Section challenges this proposed rule on the grounds that there is no experience required for the prosecutor, disclosure requirement regarding conflicts, or process for a mediator or applicant to disqualify a prosecutor. For the same reasons articulated in response to the challenges made to the proposed definition of "panel adviser," the ADR Committee asserts that this challenge is similarly unfounded. Moreover, the DRC conducts due diligence when it carefully scrutinizes the resumes of applicants for the positions of prosecutors, investigators, and panel advisers. The proposed amendment defining "prosecutor" simply reflects

the DRC's long-standing practice with respect to (1) retaining qualified individuals to serve as prosecutors; and (2) defines the scope of their functions. The Bar ADR Section failed to demonstrate that the DRC's long-standing practice has been deficient.

III. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.730 MEDIATOR QUALIFICATIONS AND DISCIPLINE REVIEW BOARD

Rule 10.730(b) Composition of Divisions

The ADR Committee points out that this proposed Rule expressly states that each division of the MQDRB shall be composed of "three circuit, county **or** appellate judges." (Emphasis added.) This proposed Rule specifies the judicial composition of each division.

Further, comments that the proposed Rule does not require the appointment of non-attorney certified circuit civil, county or appellate mediators are incorrect. All members of a RVCC or a hearing panel are appointed by rotation. Since each RVCC or hearing panel must be chaired by either a MQDRB judge or attorney-non-mediator member, the remaining members are all certified mediators who may or may not be attorneys. Due to rotation, all members of a committee or panel may be attorney mediators, all members may be non-attorney mediators, or there could be a mixture of the two. The criteria for designation to a complaint committee or panel is based on the **type** of certification held, not the professional background of the mediator who is the subject of the proceeding. Therefore, the appointment of non-attorney certified circuit civil, county or appellate mediators based on professional background would be inappropriate and inconsistent with the process that currently exists, and which was approved by this Court as long ago as 1992 in *Proposed Standards of Professional Conduct for Certified and Court-Appointed Mediators*, 604 So. 2d 764, 770-771 (Fla. 1992). No change has been made since then, although the provisions have been moved and renumbered in the Rules over time.

In response to the Bar ADR Section comment regarding retired and inactive attorneys being appointed to the MQDRB, the ADR Committee does not object to

the following modification to proposed 10.730(b)(7) (new language is indicated with a double underline and deleted language is indicated by double strikethrough):

> **(7) Attorneys:** three attorneys who are currently or were previously licensed to practice law in Florida for at least 3 years who have or had a substantial trial or appellate practice and are neither certified as mediators nor judicial officers during their terms of service on the ~~board~~MQDRB but who have a knowledge of and experience with mediation practice, statutes, and rules, at least 1 of whom shall have a substantial ~~dissolution of marriage~~family law practice.

This would allow retired or inactive members of The Florida Bar to serve on the MQDRB.

Finally, the Bar ADR Section proposes to mandate that MQDRB members possess knowledge of the Mediator Ethics Advisory Committee (MEAC) opinions as a prerequisite to service on a panel. This proposal is impractical. Short of having these individuals undergo written tests or evaluations, the DRC has no practical mechanism for ascertaining their proficiency or knowledge of MEAC opinions. All members of the MQB have access to MEAC opinions. Additionally, MQB members review MEAC opinions at their annual meeting. Lastly, the prosecution or defense may introduce as evidence and request that panel members consider any MEAC opinion relevant to a case.

Rule 10.730(d) Rule Violation Complaint Committee, and (e) Qualifications Inquiry Committee

The Eleventh Circuit and the Bar ADR Section propose that non-attorney mediators be permitted to serve as the chair or vice chair of a RVCC or QIC. This proposal is similarly impractical. Both current rule 10.820(d)(3) and proposed rule 10.820(i)(4) provide that the rules of evidence applicable to trials of civil actions (Florida Evidence Code) shall be applicable, but liberally construed in these proceedings. Non-attorney mediators generally lack knowledge of the rules of evidence and, therefore, would lack the ability to rule on evidentiary matters raised in these quasi-judicial proceedings. Further, proposed rule 10.860 vests the chair with the responsibility of issuing subpoenas for the production of documents or other evidence and for the appearance of any person before a RVCC or QIC panel.

Again, non-attorney mediators lack the legal acumen or authority to address legal disputes that often arise out of such matters.

IV. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.740 JURISDICTION AND POWERS

Rule 10.740(a) RVCC

The Bar ADR Section comments that no venue is stated for this section of the Rules. All RVCC meetings are conducted telephonically. Proposed rule 10.810(i) states that meetings with the complainant and the mediator may be "in person, by teleconference, or other communication method." Members of a RVCC may be selected from anywhere in the state, although they are primarily selected from the division in which the complaint originated or where the applicant, in the case of a good moral character issue, resides. (See proposed rule 10.730(f).) The division in which the complaint arose or the applicant resides establishes venue for any matters before a committee or panel.

The ADR Committee specifically objects, however, to the following proposals made by the Bar ADR Section: (1) the mediator be copied with all information provided to the RVCC or QIC during any step of the process, and be given the opportunity to provide additional information for consideration at every step of the process; and (2) the mediator and his or her counsel be permitted to attend every proceeding or meeting of the RVCC or QIC and be provided the opportunity to be heard and to have a court reporter present if requested by the mediator. The ADR Committee firmly believes that confidentiality at the investigatory (RVCC or QIC) level encourages and facilitates an atmosphere of trust, allows for the acquisition of honest and valuable information from complainants, mediators and other witnesses, and aids in determining whether to dismiss a case or find probable cause. The Bar ADR Section proposal would eliminate a critical element of this confidentiality at the investigatory level and would only serve to have a chilling effect on the process. At the hearing level, which is the adjudicatory stage, notice and the right to be heard is afforded all respondents, which includes mediators or new applicants. At a hearing, a court reporter is present, if requested by either the DRC, mediator, or applicant, and the mediator is afforded the opportunity to be present and heard, receive and challenge

all evidence introduced by the prosecution for consideration by the panel members, and provide or introduce any additional evidence for consideration by the panel members. Thus, in these quasi-judicial proceedings and under the proposed rules, the mediator or applicant receives more than ample due process.

When this court considers, for example, that criminal defendants have no due process right to be present or participate in deliberations by either a grand or petit jury, it becomes clear that an applicant or mediator can similarly have no such due process right in the mediator certification or disciplinary process. Thus, the Bar ADR Section's and Eleventh Circuit's proposals have no place in these quasi-judicial proceedings and the language as proposed in the petition should be adopted.

Rule 10.740(a) RVCC, (b) QIC, and (c) Panel

In proposed subdivisions 10.740(a) – (c), the RVCC and QIC are vested with the necessary jurisdiction and powers to conduct the proper and speedy investigation and disposition of any complaint. Similarly, the panel is vested with the necessary jurisdiction and powers to conduct the proper and speedy adjudication and disposition of any proceeding. The Eleventh Circuit and the Bar ADR Section specifically note the absence of specific time frames for the RVCC, QIC, and panel to discharge their respective powers.

In response, the ADR Committee points out that the Rules are modeled after The Florida Bar grievance rules which also do not indicate specific time frames. The requirement in proposed subdivisions 10.740(a) – (c) that the RVCC, QIC, and panel discharge their respective powers in a "proper and speedy" manner serves to ensure that any investigation and/or adjudication proceeding will not be unduly prolonged and that due process will be afforded to the mediator or applicant in these quasi-judicial proceedings. Further, once a panel is assigned, the hearing dates have specific time frames. For example, in the current Rules, no hearing may be set prior to 30 days from the notice of assignment of the panel, nor more than 90 days.

Moreover, as a practical matter, the DRC consists of a relatively small office staff which must oversee not just discipline, but all aspects of mediator training,

certification, ethics, rules and policy. The DRC must coordinate investigations and hearings with numerous judges, lawyers, and other members of the MQB who voluntarily attend and participate in each stage of the proceedings. Contrary to the Bar ADR Section's comments that any disciplinary proceeding has an immediate negative effect on a mediator's livelihood, a certified mediator retains his or her certification and ability to mediate until a final decision is made or a consensual agreement is reached in the confidential proceedings. In other words, nothing changes for a mediator during the proceedings unless some other disqualifying event causes the mediator to lapse in their certification. The current and proposed amendments to the Rules honor the "innocent unless proven guilty" precept of justice.

Thus, the ADR Committee respectfully requests that this court adopt proposed rule 10.740(a) – (c) as filed.

Rule 10.740(d) Panel Chair (5), (6), & (7)

The provisions of proposed rule 10.740(d)(5), (6), and (7) confer the panel chair with the authority to implement procedures during the hearing, determine admissibility of evidence, and decide motions before or during the hearing. In response to this proposed rule, the Eleventh Circuit and the Bar ADR Section comment as follows: (1) the procedures to be implemented by the chair are not expressly delineated; (2) there is no clarification as to whether the evidence to be considered is to be consistent with the civil rules of evidence; and (3) the determination as to the admissibility of the evidence at a hearing should be made by the entire panel rather than the chair. The ADR Committee points out that most applicants and mediators (both attorneys and non-attorneys), appear *pro se* in these quasi-judicial proceedings. The Eleventh Circuit and Bar ADR Section's recommendations would unnecessarily complicate and prolong these quasi-judicial proceedings.

It is expressly stated in proposed rule 10.820(i)(2) and (4) that hearings are to be conducted informally but with decorum and the Florida Evidence Code applicable to trials of civil actions are to apply, but to be liberally construed. These are the same standards that currently exist in the Rules and which have caused no concern. The DRC's long-standing practice of adhering to and applying the

hearing procedures set forth in the current Rules have in no way been deficient. Thus, the purported concerns of the Eleventh Circuit and Bar ADR Section are not well taken.

Lastly, as stated earlier, only judges and attorneys, who have knowledge of the Florida Evidence Code and the Florida Rules of Civil Procedure, are eligible to serve as the chair of a complaint committee and only judges are eligible to serve as the chair of a panel. This broadly worded proposed rule is necessary to give the judges and attorneys the discretion needed to effectively preside over these informal proceedings and to determine the relevancy and admissibility of certain evidence as well as to adopt any needed procedures in a given case to bring it to a prompt and just conclusion. The concerns espoused by the Eleventh Circuit and Bar ADR Section only underscore why this court must reject their earlier proposal that non-attorney mediators be permitted to serve as the panel chair of these proceedings.

Rule 10.740(e) Contempt/Disqualification Judge

Proposed rule 10.740(e) creates one contempt/disqualification judge for each MQDRB division who will serve for a period of one year. The rule provides that the contempt/disqualification judge will hear all motions for contempt brought by a RVCC or a QIC, and hear motions for disqualification of any member of a RVCC, QIC, or panel. The Bar ADR Section challenges this proposed rule on the grounds that: (1) it fails to allow a mediator or applicant to file a motion for contempt against a person or witness who fails to respond to subpoenas issued on behalf of the mediator or applicant for appearance or production of discovery; (2) the grounds for granting disqualification by the contempt/disqualification judge are not spelled out in this proposed rule; and (3) the rule provides no basis for motions to disqualify investigators, prosecutors, panel advisers or other legal counsel retained to assist the RVCC, QIC, panel, or DRC in the disciplinary process.

In response to the first comment, the ADR Committee suggests the following revision to proposed rule 10.740(e) (new language is indicated with a double underline and deleted language is indicated by double strikethrough):

> **(e) Contempt/Disqualification Judge.** One MQDRB judge member from each division shall be designated by the DRC, to serve

for a term of 1 year, to hear all motions for contempt at the complaint committee~~brought by the RVCC and the QIC,~~ level (RVCC or QIC) and hear motions for disqualification of any member of a RVCC, QIC or panel.

As to the specification of grounds for granting disqualification, the grounds for finding legal sufficiency for disqualification should be determined on a case by case basis by the contempt/disqualification judge rather than attempting to delineate all possible grounds in the proposed Rule. The contempt/disqualification judge is a sitting judge well versed in the law as to the legally sufficient grounds for contempt and disqualification.

Finally, the ADR Committee specifically objects to any provision for mediators and applicants to file motions for the disqualification of investigators, prosecutors, panel advisers or other legal counsel retained to assist the RVCC, QIC, panel, or DRC in the disciplinary process. The argument regarding panel advisers was made and responded to above in the section on rule 10.720(j) concerning the Bar ADR Section's comments on the disqualification of a panel adviser. No such provision exists in the Rules Regulating The Florida Bar and the Florida Rules for Certified and Court-Appointed Mediators are patterned after The Bar's rules. Further, the DRC exercises due diligence to conduct the necessary conflict checks prior to retaining such individuals. Thus, there is no legally sufficient basis for a mediator or applicant to file any motion for disqualification of an investigator or prosecutor.

V. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.750 CONTEMPT PROCESS

Proposed rule 10.750 allows for contempt in the event a witness fails to respond to a subpoena, fails or refuses to answer all inquiries, fails to turn over evidence as subpoenaed by a RVCC, QIC, or a panel, and allows for contempt based on a person's disorderly or contemptuous conduct before a proceeding of an RVCC, QIC, or panel. The Bar ADR Section recommends that the contempt power also be available to the mediator or applicant.

The ADR Committee is in agreement that motions for contempt should be available to both the prosecution and the mediator or applicant. The ADR

Committee withdraws the proposed rule previously filed and the following revised proposed rule 10.750 is submitted for the consideration of the court (new language is indicated with a double underline and deleted language is indicated by double strikethrough):

10.750 Contempt Process

(a) General. Should any person fail, without justification, to respond to the lawful subpoena of a RVCC, QIC, or panel, or, having responded, fail or refuse to answer all inquiries or to turn over evidence that has been lawfully subpoenaed, or should any person be guilty of disorderly conduct, that person may be found to be in contempt.

(b) RVCC or QIC Contempt. A motion for contempt based on the grounds delineated in subdivision (a) above along with a proposed order to show cause may be filed before the contempt/disqualification judge in the division in which the matter is pending. The motion shall allege the specific failure on the part of the person or the specific disorderly or contemptuous act of the person which forms the basis of the alleged contempt.

(c) Panel Contempt. The chair of a panel may hear any motions filed either before or during a hearing or hold any person in contempt for conduct occurring during the hearing.

VI. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.760 DUTY TO INFORM

Proposed rule 10.760 requires a certified mediator to inform the DRC in writing within 30 days of having been admonished, reprimanded, sanctioned, or otherwise disciplined by any court, administrative agency, bar association, or other professional group. The Eleventh Circuit and the Bar ADR Section both complain that the failure to define "admonished" and "reprimanded" renders this proposed rule overbroad and unclear as to those matters about which a mediator has a duty to inform. The ADR Committee respectfully disagrees and asserts that the Eleventh Circuit and the Bar ADR Section's objections are the result of their unduly narrow reading of the proposed Rule.

When the remaining qualifying phrase of the proposed Rule "or otherwise disciplined by any court, administrative agency, bar association, or other professional group" is considered, it should be clear to a reasonable person that a mediator or applicant is only required to report admonishments or reprimands that are considered by the admonishing entity (e.g. court, administrative agency, bar association, or other professional group) to be disciplinary measures.

VII. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.800 GOOD MORAL CHARACTER INQUIRY PROCESS

Rule 10.800(a) Good Moral Character

Proposed rule 10.800(a) provides, among other things, that during the term of a mediator's certification, any information received by the DRC that could constitute credible evidence of a lack of moral character by the mediator, must be referred to a RVCC as a rule violation complaint. The proposed Rule additionally provides that the QIC or a RVCC shall be informed of the applicant's or mediator's prior disciplinary history. The Bar ADR Section suggests the following in response to this proposed Rule: (1) all information provided by the DRC or investigators to the QIC or the RVCC be given to the mediator at every stage of the process; (2) all "credible evidence" of lack of good moral character which the DRC believes merits a good moral character inquiry must be provided to the mediator; and (3) all information regarding the mediator's prior disciplinary history given to the QIC, RVCC, or a panel be provided simultaneously to the mediator and should not include investigations, inquiries, or disciplinary actions which did not result in suspension, probation, disbarment, or public reprimands by a professional licensing authority, and should not include any admonishments or sanctions by a court.

The ADR Committee objects to the disclosure of any and all investigative findings made and presented to the QIC or RVCC for an initial probable cause determination. The mediator is not entitled to any such information as it is the confidential "work-product" of the DRC's investigators. The mediator, however, is entitled to and does receive all evidence actually presented to the QIC and RVCC members for their determination of whether the mediator or applicant has violated any of the Rules.

Additionally, a mediator or applicant receives all "credible evidence" of lack of good moral character which the DRC believes warrants a good moral character inquiry. In fact, most good moral character inquiries are based upon information supplied or self-reported to the DRC by the applicants or mediators. If a matter is discovered by the DRC through means other than self-report, the DRC sends the information to the mediator and asks the mediator to provide a sworn statement explaining the details of the events.

Finally, the QIC and RVCC members do not consider investigations, inquiries, or disciplinary actions which did not result in suspension, probation, disbarment, public reprimands, admonishments, or sanctions by a professional licensing authority or a court. The ADR Committee, however, specifically objects to the Bar ADR Section's suggestion that the QIC or RVCC not have access to any admonishments or sanctions imposed against an applicant or mediator by a court. Florida Supreme Court certified mediators operate under the auspices of this honorable court and any admonishments or sanctions imposed against them by a previous QIC or RVCC or any court of law directly reflects adversely upon their good moral character or fitness to obtain or maintain their certification.

Rule 10.800(b) Meetings

Proposed rule 10.800(b) states that the QIC shall convene as necessary by conference call or other electronic means to consider all cases currently pending before it. The Bar ADR Section, however, suggests that rule 10.740(b) appears to suggest that proceedings are to include in-person hearings and that the mediators should be present and given an opportunity to be heard at any stage of the disciplinary process with a court reporter. Due to budgetary constraints, the DRC no longer conducts QIC or RVCC deliberations in person. All QIC and RVCC meetings are held telephonically. If, however, a meeting were to be held in person, the mediator or applicant would be given the same opportunity to be heard as they are given currently. Every complaint, whether to an RVCC or the QIC, is sent to the mediator or applicant who is then given the opportunity to respond. All complaints and responses must be in writing and under oath.

The proposed amendments to the Rules must be read in their entirety to fully appreciate the level of due process afforded each mediator or applicant. The

MQB's goal is not punishment, but education and rehabilitation whenever possible. Only the most egregious cases reach the panel level.

Rule 10.800(c) Initial Review

Proposed rule 10.800(b) provides, in relevant part, that if the DRC's review of an application or application for renewal of certification raises any questions as to good moral character, the DRC shall request the applicant or mediator to supply any additional necessary information. This Rule further provides that if the information continues to raise questions regarding the applicant's or mediator's good moral character, the DRC shall forward the application and supporting material as an inquiry to the QIC.

The Bar ADR Section challenges this proposed Rule on the following grounds: (1) there are no time limits imposed for the review process; (2) there is no provision for how the mediator will be requested by the DRC to provide the additional information; and (3) the Rule should include an application for certification in an additional area of certification.

This is not a new rule but rather is one that was incorporated into the new revisions from the existing Rules. Additionally, the purpose of the DRC requesting information prior to submitting an application to the QIC is to avoid any unnecessary inquiries for the mediator. If satisfactory explanation is given and the DRC determines there are no remaining questions of concern, the matter is dropped. Time limitations are not necessary in this proposed rule because certified mediators have the ability to continue their practices during the pendency of this confidential investigatory proceeding. Mediators, therefore, are not prejudiced due to the lack of time limitations in this proposed rule. Applicants who have never been certified may experience a delay in the processing of their application; however, all times are tolled during the pendency of a matter so that, if cleared, the application can then be processed as usual. Further, as has been previously explained, the Bar ADR Section is asking for time elements where none exist within the comparable Bar rules. Further, it is expressly provided in proposed rule 10.800(e) that notice to the applicant by the DRC shall be made either electronically or by certified mail addressed to the applicant's physical or e-mail address on file with the DRC. Finally, contrary to the Bar ADR Section's

implication that an additional certification application is not included, the definition portion of the Rules reveal that an application for an additional certification makes the applier an "applicant" which is clearly defined in proposed rule 10.720(a).

Rule 10.800(d) Process

Proposed rule 10.800(d) delineates the process to be followed by the QIC in the review of all documentation relating to the good moral character of any applicant. The Bar ADR Section first asserts that this proposed Rule does not provide the mediator or applicant with an opportunity to respond to and supplement documentation provided to the QIC by the DRC for consideration. The Bar ADR Section's comments reflect a basic misreading or misunderstanding of proposed rule 10.800(c). Pursuant to this Rule, the applicant or mediator is provided all information which raises any questions regarding that applicant's or mediator's good moral character and the mediator or applicant is afforded the opportunity to supply additional information as necessary. Moreover, proposed rule 10.800(d) expands the power of the QIC to allow for a resolution with the applicant or mediator prior to any probable cause finding, something the current rules do not allow.

The Bar ADR Section next suggests that proposed rule 10.800(d) should be changed to require the DRC to send all of its notices and requests for information to mediators and applicants to all e-mail, physical, and post office box addresses provided by a mediator or applicant to the DRC. This suggestion would not only create an onerous and unreasonable burden on the DRC's limited staff and resources, but it is wholly unnecessary and impractical. The DRC requests that all applicants or mediators provide their physical address and an e-mail address for notification from the DRC. The DRC discourages the use of any post office box addresses because certified mail, return receipt requested cannot be effectuated with such addresses. The burden of ensuring that applicants or mediators receive all notifications from the DRC should rest squarely on the shoulders of the applicants or mediators with their providing the DRC with current primary, functional physical and e-mail addresses at all times.

The Bar ADR Section further suggests that this proposed Rule should permit the mediator or applicant to respond and provide information to the DRC director or staff designee by e-mail, fax, or by any other service (including U.S. postal or other delivery service) and service shall be effectuated on the date sent by U.S. mail or other delivery service, faxed or e-mailed. The ADR Committee believes the Bar ADR Section's comments fail to reflect a careful reading of the Rules as a whole. The mediator or applicant may reply by any method they choose unless the Rules provide a notarization and oath are required, in which case, the mediator or applicant should respond by mail. Although any method of reply is accepted, a mediator or applicant should choose a manner of responding that best assures the proper delivery of the response.

Finally, the Bar ADR Section notes that proposed rule 10.800(d)(1)(C) provides that an applicant shall respond to a complaint within 20 days of receipt of the complaint unless the time is otherwise extended by the DRC in writing. The Bar ADR Section proposes a proviso in this Rule for the use of motions for extension of time directed to the QIC chair, which would toll the time for response until granted or denied. The ADR Committee specifically objects to this proposal for the following reasons: (1) these are informal, quasi-judicial proceedings and many of the applicants and mediators are non-attorneys who appear *pro se,* therefore, the use of motions would place them at a distinct disadvantage; (2) some attorney applicants or mediators would attempt to utilize such motions solely for the purpose of delay of these proceedings; and (3) as a matter of course, informal requests for extensions of time are generally granted by the DRC for good cause shown and the time for response is tolled.

Rule 10.800(e) Notification

Proposed rule 10.800(e) requires the DRC to notify an applicant of the existence of a good moral character inquiry within ten days of the matter being referred to the QIC. The proposed Rule further mandates that such notification be made either electronically or by certified mail addressed to the applicant's physical or e-mail address on file with the DRC.

The Eleventh Circuit seeks to require the DRC to send notification to the applicant of the existence of a good moral character inquiry and upon the finding

of facial sufficiency of a complaint by certified mail until such time as the mediator expressly agrees in writing to accept service electronically. The ADR Committee does not object to changing the proposed Rule so that notice is provided only by certified mail until such time as the mediator or applicant accepts notification electronically. Currently, the DRC provides notice by certified mail even though the current Rules do not require more than a simple mailing to the last address provided by the mediator or applicant.

The revised proposed rule 10.800(e) is submitted for the consideration of the court (new language is indicated with a double underline and deleted language is indicated by double strikethrough)

> **(e) Notification.** Within 10 days of a matter being referred to the QIC, the DRC shall send notification to the applicant of the existence of a good moral character inquiry. Notification to the applicant shall be made ~~either electronically or~~ by certified mail addressed to the applicant's physical ~~or e-mail~~ address on file with the DRC until such time as the mediator expressly agrees in writing to accept service electronically and then notification shall be made to the applicant's e-mail address on file with the DRC.

Rule 10.800(k) Probable Cause and Formal Charges

Proposed rule 10.800(k) sets forth the procedures to be followed regarding the drafting of formal charges once a probable cause finding has been made by the QIC. The Bar ADR Section suggests that applicants should receive a copy of all inquiries sent to the DRC regarding their good moral character and be entitled to provide additional information to the QIC for consideration. These comments lack merit. As discussed earlier herein, the DRC provides applicants with a copy of all inquiries sent to the DRC regarding their good moral character and the mediator or applicant is afforded an opportunity to respond and provide additional information thereto.

Rule 10.800(l) Withdrawal Application

Proposed rule 10.800(l) provides that the withdrawal of an application does not result in the loss of jurisdiction by the QIC. Both the Eleventh Circuit and the Bar ADR Section take exception with this proposed rule and assert that the

withdrawal of an application should result in the loss of jurisdiction by the QIC. The ADR Committee strenuously disagrees with and objects to this proposal.

When an applicant applies for mediator certification or certification renewal, that individual submits himself or herself to the jurisdiction of the MQB for a determination of, among other things, whether that individual possesses good moral character to mediate in the State of Florida. If, during the application or certification renewal process, the DRC becomes aware of information that reflects that the applicant or mediator lacks good moral character to mediate cases, the DRC and the MQB need to have the continuing ability or jurisdiction to pursue such matters to conclusion for the awareness and protection of the public. It is only at the conclusion of the proceeding that the DRC may publish the findings of the panel. Without publication, the public is not protected.

The lack or loss of mediator certification, unlike the loss of a professional license, does not preclude a mediator from mediating cases. Without this proposed Rule conferring continuing jurisdiction to the QIC to pursue applicants or mediators who lack good moral character or fitness, unsuspecting members of the public would have no way of making informed decisions about their selection of such applicants or mediators. As has been attempted many times in the past, as soon as a mediator or applicant senses the disciplinary process is leading toward a finding of probable cause, the mediator or applicant would simply withdraw or resign. A mediator may still mediate even if not certified. Resignation by a lawyer or withdrawal of an application to The Florida Bar results in the individual not obtaining the credentials necessary to practice. In order to protect the public, it is of utmost importance that the MQB maintain jurisdiction once a disciplinary matter is initiated.

VIII. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.810 RULE VIOLATION COMPLAINT PROCESS

Rule 10.810(a) Initiation of Complaint

Proposed rule 10.810(a) requires, in part, that complaints filed against mediators by individuals be written, sworn to under oath, and notarized using a form supplied by the DRC. Complaints initiated by the DRC, however, need not

be sworn nor notarized, but shall be signed by the director or the DRC staff attorney, if any. Both the Eleventh Circuit and the Bar ADR Section proposals would require that complaints initiated by the DRC also be sworn and notarized. The ADR Committee points out that rule 3-7.3(c), Rules Regulating The Florida Bar, similarly exempts all complaints initiated against attorneys by The Florida Bar from being sworn to and under oath. Both the DRC and The Florida Bar operate and perform vital functions under the auspices of this honorable court. The suggestion that sworn complaints from these state court regulatory agencies are necessary to ensure that they do not file frivolous complaints against mediators and attorneys impugns the integrity of the DRC. The ADR Committee requests no change in the proposed language.

Rule 10.810(d)(1) Facial Sufficiency Determination

According to proposed rule 10.810(d)(1), if the RVCC finds a complaint against a mediator to be facially insufficient, the complaint shall be dismissed without prejudice and the complainant shall be notified and given an opportunity to re-file within a 20-day time period. The complainant is further limited to two additional re-filings of a complaint to establish facial sufficiency. In response, the Eleventh Circuit and Bar ADR Section propose that: (1) upon the dismissal of a complaint for facial insufficiency, the complainant be limited to only one additional complaint and only then upon the showing of good cause; (2) any complaints found to be facially insufficient by the RVCC should be provided to the mediator, but not be included in a mediator's disciplinary history; and (3) the standard for the RVCC's review of a complaint should be clear and convincing evidence rather than facial sufficiency.

The ADR Committee is of the opinion that limiting the re-filing to one time may adversely affect the lay person complainant but is willing to accept this limitation if the court so chooses; however, the ADR Committee objects to conditioning any re-filing upon the showing of good cause by the complainant. It is worth reemphasizing that many complainants, if not most, are non-attorneys who may lack familiarity with the Florida Rules for Certified and Court-Appointed Mediators. Such complainants may only feel that they have been wronged in some manner by a particular mediator (e.g. improper mediator comments during the mediation; over-billing; etc.) or may possess information evidencing the lack of

good moral character of a mediator. These rules should not be drafted or construed in such a manner as to deter or unduly preclude non-attorney members of the public from exposing potentially legitimate allegations of wrong-doings of certified mediators. Rules which deter or preclude the public from filing complaints would only lead to a lack of confidence in the disciplinary role of the DRC by the public at large.

The DRC has never included complaints lacking facial sufficiency in the mediator's disciplinary history. Accordingly, there is no need to delineate such a requirement in this proposed Rule. Mediators are never notified of complaints dismissed for lack of facial sufficiency just as attorneys and judges are never apprised of facially insufficient complaints filed against them in Bar and JQC proceedings. To send facially insufficient complaints to mediators would serve only to cause unnecessary anxiety to a mediator and create a potentially uncomfortable issue with the complainant.

Finally, the ADR Committee strenuously disagrees with the proposal that the "clear and convincing evidence" standard is the appropriate standard for the initial review of a complaint by the RVCC. The "clear and convincing evidence" standard is only applicable to the adjudicatory proceeding on the merits of formal charges which have been filed against a mediator. When a complaint is received and initially reviewed, the RVCC's tasks at that juncture are to determine whether the complaint is facially sufficient to establish the violation of any disciplinary Rule(s) and identify any Rule(s) which may have been violated. The RVCC has no adjudicatory function to decide the merits of the complaint. Indeed, the RVCC thereafter may decide to have the DRC retain an investigator to investigate further whether there are credible facts to establish a probable cause finding of the violation of the Rule(s).

<u>Rule 10.810(f) Response</u>

Proposed rule 10.810(f) provides that within 20 days of receipt of the list of alleged rule violations and the complaint, the mediator shall submit a written, sworn and notarized response to the DRC by registered or certified mail. The mediator's failure to either procure an extension of the response time from the DRC or to timely respond to the complaint and rule violations, shall be deemed an

admission of the same. The Eleventh Circuit and Bar ADR Section make the following proposals: (1) there should be mechanisms for the mediator to file defensive motions prior to the filing of a response; and (2) there should be no time limitation for the mediator's response as this rule unreasonably punishes a mediator's failure to timely respond to a complaint. The ADR Committee requests that both proposals be rejected by this court.

The use of defensive motions would necessarily convert these quasi-judicial proceedings into formalistic judicial proceedings to the prejudice of most non-attorney mediators. The use of defensive motions would also unnecessarily cause these proceedings to become protracted, expensive, and tax the limited resources available for these quasi-judicial proceedings. For many of the same reasons, the proposal that there be no time limitations for the mediator's response should be similarly rejected. First, as has been previously stated, a mediator may continue to mediate during the pendency of a grievance. To have no time limitations would allow a mediator to delay these proceedings indefinitely, while potentially committing the same or worse violations. Second, the imposition of a deadline for the mediator's response and resultant adverse consequence for the mediator's failure to adhere to that deadline ensures that the grievance proceeding will not be unduly long, protracted, and expensive for all participants.

Rule 10.810(g) Resignation of Certification

Proposed rule 10.810(g) provides that a resignation of certification by a mediator after the filing of a complaint does not result in the loss of jurisdiction by the MQDRB. The ADR Committee incorporates its' earlier response to proposed rule 10.800(l) herein by reference.

Rule 10.810(l) No Probable Cause

Proposed rule 10.810(l) provides that if the RVCC finds no probable cause, it shall dismiss the complaint with prejudice and so advise the complainant and the mediator in writing. The proposed rule further specifies that such decision shall be final. The Eleventh Circuit and Bar ADR Section further propose that if the RVCC finds the complaint to be frivolous, the mediator should also be permitted to

recover reasonable costs incurred to defend the complaint. The ADR Committee submits this proposal is not feasible as well as unwarranted.

Initially, at the time of a no probable cause finding by the RVCC, the only time expended by the mediator will be the preparation of his or her sworn response to the complaint. As stated earlier, in most instances, the mediator appears *pro se* in all of these grievance proceedings. As such, there is no reasonable basis for the taxation of costs. Next, there is no specification in this proposal as to whether the recovery of any requested costs would be borne by the complainant, the DRC, or both. The MQDRB has no jurisdiction in the Rules to assess costs against complainants who file complaints deemed frivolous, nor does any complaint committee determine whether a complaint is frivolous, only whether it is facially sufficient. Any frivolous complaint would be identified as such in the response of the mediator. Further, the DRC lacks funding for the payment of costs.

Rule 10.810(o) Dismissal

The provisions of proposed rule 10.810(o) state that upon the filing of a stipulation of dismissal signed by the complainant and the mediator, and with the concurrence of the RVCC, the complaint shall be dismissed. The Bar ADR Section proposes that this Rule include the proviso that stipulations of dismissal of a complaint under this Rule be with prejudice. The ADR Committee has no objection to this proposal provided it is understood that the RVCC may withhold its concurrence.

The following language revision is suggested to proposed rule 10.810(o) (new language is indicated with a double underline and deleted language is indicated by double strikethrough):

> **(~~*o*~~o) Dismissal.** Upon the filing of a stipulation of dismissal signed by the complainant and the mediator, and with the concurrence of the ~~complaint committee~~RVCC, which may withhold concurrence, the ~~action~~complaint shall be dismissed with prejudice. ~~If an application is withdrawn by the applicant, the complaint shall be dismissed with or without prejudice depending on the circumstances.~~

VIV. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.820 HEARING PANEL PROCEDURES

Rule 10.820(f) Time of the Hearing

Proposed rule 10.820(f) states that, absent stipulation of the parties or good cause, the DRC shall set the hearing for a date not more than 120 days nor less than 30 days from the date of the notice of assignment of the case to a panel. The Bar ADR Section proposes that this Rule include a method of notice of hearing. The ADR Committee has no objection to this proposal. In practice, the DRC already prepares a notice of hearing and copies all panel members, the prosecutor, the mediator or applicant and his or her attorney, if any.

The following language revision is suggested to proposed rule 10.820(f) (new language is indicated with a double underline and deleted language is indicated by double strikethrough):

> **(f)** ~~**Mediator or Applicant Discovery.** The center shall, upon written demand of a mediator, applicant, or counsel of record, promptly furnish the following: the names and addresses of all witnesses whose testimony is expected to be offered at the hearing, together with copies of all written statements and transcripts of the testimony of such witnesses in the possession of the counsel or the center which are relevant to the subject matter of the hearing and which have not previously been furnished.~~ **Time of the Hearing.** Absent stipulation of the parties or good cause, the DRC shall set the hearing for a date not more than 120 days nor less than 30 days from the date of the notice of assignment of the case to the panel. Within 10 days of the scheduling of the hearing, a notice of hearing shall be sent by certified mail to the mediator or applicant and his or her attorney, if any.

Rule 10.820(h) Dismissal by Stipulation

Proposed rule 10.820(h) provides that upon the filing of a stipulation of dismissal signed by the complainant, if any, the mediator or applicant, and the prosecutor and with the review and concurrence of the panel, the case may be dismissed. Upon dismissal, the Rule further provides that the panel shall promptly forward a copy of the dismissal order to the DRC. The Bar ADR Section proposes

that the stipulated dismissal in this proposed Rule be with prejudice. The ADR Committee has no objection to this proposal provided it is understood the panel may withhold its concurrence.

The following language revision to proposed rule 10.820(h) is suggested (new language is indicated with a double underline and deleted language is indicated by double strikethrough):

> **(h) ~~Failure to Appear.~~** ~~Absent a showing of good cause, if the complainant fails to appear at the hearing, the panel may dismiss a complaint for want of prosecution.~~**Dismissal by Stipulation.** Upon the filing of a stipulation of dismissal signed by the complainant, if any, the mediator or applicant, and the prosecutor and with the review and concurrence of the panel, which concurrence may be withheld, the case ~~may~~shall be dismissed with prejudice. Upon dismissal, the panel shall promptly forward a copy of the dismissal order to the DRC.

Rule 10.820(i)(4) Florida Evidence Code

Proposed rule 10.820(i)(4) states that the rules of evidence applicable to trials of civil actions shall apply but are to be liberally construed. Both the Eleventh Circuit and the Bar ADR Section incorrectly suggest the liberal construction of the rules of evidence renders this a subjective standard. Contrary to their assertions, this standard has been utilized without objection since 1992 when the first set of the Florida Rules for Certified and Court-Appointed Mediators was adopted by this court. The MQDRB's exclusive use of sitting judges to make evidentiary rulings in these proceedings ensures the fundamental fairness of the same to all parties. Further, the Eleventh Circuit's and the Bar ADR Section's suggestions are inconsistent with the standards for admission of evidence in other proceedings. By way of comparison, the Administrative Procedures Act states as follows: "irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." § 120.569(2)(g).

Rule 10.820(i)(5) Testimony

Proposed rule 10.820(i)(5) permits the panel chair to accept testimony at the hearing by telephonic or other communication equipment upon a good cause showing within a reasonable time prior to the hearing. Both the Eleventh Circuit and the Bar ADR Section assert that the mediator should be provided the right to object to and be heard on the use of testimony by telephonic or other communication equipment prior to a ruling by the panel chair. The Eleventh Circuit and the Bar ADR Section apparently misunderstood the language of the Rule. In the absence of a stipulation, either party may move for an appearance other than "in person." Any such motion would be set for hearing and the opposing party would be afforded the opportunity to object and be heard. For these reasons, the ADR Committee suggests no change is necessary.

Rule 10.820(i)(7) Mediator or Applicant Discovery

Proposed rule 10.820(i)(7) specifies the reciprocal discovery available to both the mediator or applicant and prosecutor upon request as follows: names and addresses of all witnesses whose testimony is expected to be offered at the hearing; copies of all written statements and transcripts of the testimony of such witnesses in the possession of the prosecutor or the DRC, or mediator or applicant or their counsel of record which are relevant to the subject matter of the hearing and have not been previously furnished; and copies of any exhibits which are expected to be offered at the hearing. In response, the Bar ADR Section seeks to expand the scope of this allowable discovery to include all investigatory information produced by any investigator retained by the DRC at any time, or any other information provided by the DRC to the RVCC, QIC, or any panel.

The ADR Committee objects and states that the proposed discovery fully comports with the due process required in these quasi-judicial proceedings. The investigator's report constitutes confidential work-product. Further, the investigator's report is provided only to the RVCC or QIC to be used solely for a consideration of whether the evidence supports a probable cause determination against the mediator or applicant. The investigative report is never introduced into evidence or otherwise provided to the panel members in their adjudicatory

function. Evidence is put on by both parties as they see fit. The panel makes its decision based only on the evidence presented at the hearing.

The Bar ADR Section's proposed expansion of this discovery Rule would also impermissibly allow the mediator to "discover" information about or invade the confidential deliberative proceedings of the panel members as well as the drafting of their final decision. As stated earlier herein, this is unheard of even in criminal proceedings where there is heightened due process afforded to the criminal defendant. The ADR Committee requests that this court reject this proposal.

Rule 10.820(i)(9) Complainant's Failure to Appear

Proposed rule 10.820(i)(9) provides that absent good cause shown, if the complainant fails to appear at the hearing, the panel may dismiss the case. The Eleventh Circuit and the Bar ADR Section propose that this Rule should provide that the failure of the complainant's appearance at the hearing, absent good cause, should automatically result in the dismissal of the case either with or without prejudice. The ADR Committee disagrees with this proposal for several reasons.

First, the complainant's testimony is not always necessary to establish the mediator's violation of the Rules. If, for example, the complainant provides information to the DRC that a mediator or applicant is a convicted felon, the prosecutor may establish this independently and without the testimony of the complainant. Next, an investigation of a mediator or applicant sometimes uncovers additional Rule violations which a complainant failed to articulate. The DRC has both the right and responsibility to present the evidence of such additional Rule violations, independent of the complainant's presence at the hearing. Finally, a complainant may be only one of the people at the mediation who observed the actions which led to the complaint; in a mediation, other parties and their attorneys are in attendance. The prosecutor may not need the testimony of the complainant to prove his or her case to the panel. Additionally, there may be times when, for safety reasons (for example, cases in which domestic abuse became evident during the mediation), it is best to allow the complainant not to appear at the hearing.

Rule 10.820(i)(10) Mediator's or Applicant's Failure to Appear

Proposed rule 10.820(i)(10) permits the panel to proceed with the hearing if the mediator or applicant fails to appear. In the event that the hearing proceeds in the absence of a mediator or applicant who has failed to respond to the complaint and the allegations have thereby been deemed admitted, no further notice to the mediator or applicant is necessary and the decision of the panel shall be final. If the hearing is conducted in the absence of a mediator or applicant who submitted a response to the complaint, the DRC shall notify the mediator or applicant that the hearing occurred and whether the matter was dismissed or sanctions were imposed. The Rule also gives the mediator or applicant an opportunity to file a petition for rehearing for good cause shown, which is to be decided solely by the panel chair.

Both the Eleventh Circuit and the Bar ADR Section suggest that petitions for rehearing should be considered and determined by the entire panel, rather than by the panel chair. They further propose that all panel hearings granted be conducted with the same procedural protections and rights as afforded for the initial hearing.

The ADR Committee disagrees in part and provides explanation in part. Motions for re-hearing should not be heard by the entire panel. The panel chair is always a sitting judge and is more than qualified to make a good cause determination. Some panel members may not be attorneys and may not be able to adequately address this issue. Moreover, having the panel chair make this decision ensures that a determination will be made expeditiously. With regard to the next comment regarding the nature of any re-hearing, all re-hearings granted will comport with the same procedures, protections and rights afforded in the initial hearings. There is nothing in the Rules which would indicate otherwise.

Rule 10.820(l) Publication

Proposed rule 10.820(l) provides, in relevant part, that upon the imposition of sanctions, the DRC shall publish the name of the mediator or applicant, a summary of the case, a list of the Rule or Rules violated, the circumstances surrounding the violation(s), and a copy of the panel's decision. It is further provided in this proposed Rule that the publication shall be on the DRC page of the Florida courts' website and in any outside publication at the discretion of the DRC

Director. The Eleventh Circuit has suggested that the publication of sanctions should be limited to professional publications related to law or mediation and that the decision to publish should be that of the Panel, not the DRC.

The ADR Committee disagrees with both suggestions. As stated earlier herein, approximately 50% of all certified mediators come from professions or occupations other than the law. If these mediators have been found to have violated the mediator ethical Rules, other professional agencies which may regulate such mediators as well as the public, deserve to know of such ethical lapses. As the entity charged with the regulation of the mediators it certifies, the decision regarding publication other than on the DRC website should remain with the DRC.

X. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.830 BURDEN OF PROOF

Proposed Rule 10.830(a) Rule Violation provides that the burden of proof for Rule violations other than good moral character is clear and convincing evidence. Proposed rule 10.830(b) Good Moral Character provides that the burden of proof for any good moral character issue is the preponderance of the evidence. Both the Eleventh Circuit and the Bar ADR Section assert that the burden of proof for a good moral character violation should be that of clear and convincing evidence because the mere filing of a complaint has a grave impact on the mediator's professional reputation and livelihood. The ADR Committee disagrees with this proposal and the underlying erroneous assumption upon which it is based.

Contrary to the assumption made by the Eleventh Circuit and Bar ADR Section, the filing of a complaint has absolutely no impact on a mediator's professional reputation or livelihood. Until a finding of probable cause is made, all communications and proceedings remain confidential pursuant to proposed rule 10.870(a). It is only upon the filing of formal charges that such charges and all documents created thereafter become public, except matters that are otherwise confidential under law or rule of the Florida Supreme Court, regardless of the outcome of any appeal.

The ADR Committee submits that the burden of proof for establishing the lack of good moral character of a mediator or applicant should always be lower than the burden for other Rule violations. "The primary purpose of the requirement of good moral character is to ensure protection of the participants in mediation and the public, as well as to safeguard the justice system." Rule 10.110, Florida Rules for Certified and Court-Appointed Mediators. The possession of good moral character is the fundamental prerequisite for both initial and continuing certification as a mediator. Mediations are conducted by mediators in private, confidential settings. It is imperative that a certified mediator selected by the public to conduct such confidential mediation proceedings be of the highest ethical caliber. Therefore, the burden to establish the lack of good moral character should not be as stringent as the burden required to establish the mediator's violation of the other Rules.

XI. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.840 SANCTIONS

Rule 10.840(b)(9) Costs

Proposed Rule 10.840(b)(9) provides that a mediator may be sanctioned by the panel with the imposition of certain taxable costs associated with the proceeding. The Eleventh Circuit and the Bar ADR Committee both assert that: (1) this proposed amended Rule should provide the mediator with a reciprocal right to seek sanctions against the complainant if the panel determines that a complaint was frivolous; and (2) the listed taxable costs go well beyond that which are "normally taxable costs" and should be subject to a cap. The ADR Committee submits that both such proposals lack merit and should be rejected by this court.

First, a probable cause finding by either a RVCC or QIC negates any notion that the complaint was frivolous at its inception. The fact that the evidence at a hearing fails to establish all or some of the formal charges under the applicable burden of proof, still does not render the complaint frivolous at its inception. Thus, upon a probable cause finding, there will never be an opportunity for an applicant or mediator to assert or argue that a complaint was frivolous at its inception.

This court should reject any provision in these Rules which might have a "chilling effect" on any members of the public stepping forward to report Rule violations by certified mediators. The taxation of costs against members of the public who file unsuccessful complaints against mediators would have precisely this "chilling effect." As was demonstrated earlier herein, prior to a probable cause finding, an applicant's or mediator's purported "costs" are *de minimis* and consist of the filing of a sworn and notarized response to the complaint. "Filing" consists only of mailing the response to the DRC. Additionally, for the purpose of the imposition of any costs, the MQB has no jurisdiction over members of the public who file complaints.

Finally, the listed taxable costs to be assessed against a mediator were taken directly from rule 3-7.6(q), Rules Regulating The Florida Bar, regarding disciplinary proceedings before a referee. As the Florida Rules for Certified and Court-Appointed Mediators are patterned after the Rules Regulating The Florida Bar, which have been approved by this court, the proposals made by the Bar ADR Section and Eleventh Circuit regarding the same should be rejected. The ADR Committee requests this court to approve the language as proposed.

Rule 10.840(c)(1) Failure to Comply With Sanctions

Proposed rule 10.840(c)(1) provides that if there is a reasonable belief that a mediator or applicant has failed to comply with any sanction, unless otherwise provided for in a stipulated agreement or decision of a panel, the DRC may file a motion for contempt with the contempt/disqualification judge of the division in which the sanctions were agreed or imposed and serve the mediator or applicant with a copy of the same. The Eleventh Circuit and Bar ADR Section propose that: (1) there be a time limit for the DRC to file a motion for contempt; (2) the method of service of the motion on the mediator should be specified; (3) the mediator's failure to respond should not be deemed an admission; (4) there should be provisions for motion practice directed to matters such as requests for extension of time to file response, production of discovery, notice of exhibits and witness lists; (5) the burden of proof in this contempt proceeding should be clear and convincing evidence; and (6) the time limits for setting the hearing should be similar to those set forth for panel hearings.

In response, the ADR Committee directs the court to the important use of the words "may file." As was outlined in the beginning of this response, the goal of the DRC and the MQB at all times is the education and rehabilitation of mediators or applicants, not punishment. Prior to any motion for contempt being filed, the DRC will pursue all avenues to resolve the matter amicably and informally. Because of this, the DRC should not be held to a specific timeframe. To hold the DRC to a timeframe may very well work against the mediator or applicant since he or she may be compelled to file a motion, particularly if negotiations or correspondence with the offending party are protracted. Any timeframe set at this stage could cause undue and unnecessary judicial interference into amicable negotiations.

Rule 10.840(c)(4) Failure to Comply With Sanctions

Proposed rule 10.840(c)(4) permits, in relevant part, the DRC to schedule a hearing with the contempt/disqualification judge and include any additional alleged failures of the mediator to comply with sanctions of which the DRC becomes aware prior to the date of the hearing. The Bar ADR Section incorrectly asserts that this proposed Rule fails to provide the mediator with notice of the additional issues to be heard at the contempt hearing.

Any hearing for contempt would follow the procedures outlined for contempt. The motion for contempt would necessarily include any additional alleged failures. Thereafter, the hearing would be noticed as any motion is noticed.

Rule 10.840(c)(6) Failure to Comply With Sanctions

According to proposed rule 10.840(c)(6), a finding of a mediator's willful failure to substantially comply with any imposed or agreed-to sanction shall result in the automatic decertification of the mediator for no less than two years after which the mediator shall be required to apply as a new applicant. In essence, the Eleventh Circuit and Bar ADR Section respond as follows: (1) the phrase "willful failure to substantially comply" is not defined and the DRC should not initiate any contempt proceeding unless it has a reasonable belief that the mediator has willfully failed to substantially comply; (2) there should not be a mandatory two-year decertification by the contempt/disqualification judge; and (3) the language

regarding a "finding pursuant to the procedure established in the sanction agreement or decision of the panel" in addition to a finding by the contempt/disqualification judge lacks clarity as who is making the finding.

There is no need for a definition for the phrase "willful failure to substantially comply" in these Rules. The contempt/disqualification judge is always a sitting member of the judiciary who is well versed on the legal application of this standard. Further, the ADR Committee submits that a minimum two-year decertification imposed against a mediator who has been found to have willfully failed to substantially comply with any imposed or agreed-to sanction is a just and fit punishment. Certified mediators, as stated earlier, operate under the auspices of this court and are expected to adhere to all imposed or agreed-to sanctions.

Finally, as to the remaining comment, the ADR Committee would suggest the following to make proposed rule 10.840(c)(6) clearer (new language is indicated with a double underline and deleted language is indicated by double strikethrough):

> **(6)** A finding by the Contempt/Disqualification Judge ~~or a finding pursuant to the procedure established in the sanction agreement or decision of the panel~~ that there was a willful failure to substantially comply with any imposed or agreed-to sanction shall result in the automatic decertification of the mediator for no less than 2 years after which the mediator shall be required to apply as a new applicant.

XII. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.850 SUSPENSION, DECERTIFICATION, DENIAL OF APPLICATION, AND REMOVAL

Rule 10.850(b) Reinstatement After Suspension

Proposed rule 10.850(b) states that "Except if inconsistent with rule 10.110 [current Good Moral Character Rule], a mediator who has been suspended shall be reinstated as a certified mediator, unless otherwise ineligible, upon the expiration of the suspension period and satisfaction of any additional obligations contained in the sanction document." The Bar ADR Section proposes that any good moral character inquiry regarding either reinstatement after suspension or decertification should follow the same processes and procedures for QIC review of new applicants. The phrase "unless otherwise ineligible" would cover any good moral

character matters that may have surfaced during the mediator's sanction period and the mediator would then be afforded all due process protections of the Rules if these new ineligibility matters were alleged.

The ADR Committee agrees and suggests the elimination of the phrase "Except if inconsistent with rule 10.110," so that the revised proposed Rule reads as follows (new language is indicated with a double underline and deleted language is indicated by double strikethrough):

> **(b) Reinstatement After Suspension.** ~~Except if inconsistent with rule 10.110, a~~A mediator who has been suspended shall be reinstated as a certified mediator, unless otherwise ineligible, upon the expiration of the suspension period and satisfaction of any additional obligations contained in the sanction document.

Rule 10.850(c)(4) Revocation of Professional License of Applicant

Proposed rule 10.850(c)(4) essentially provides that if an applicant for certification has been disbarred from any state or federal bar or has had any professional license revoked, the applicant shall be automatically denied approval and cannot reapply for certification for a period of two years. The Eleventh Circuit asserts that the DRC should not have the authority to automatically deny approval of an applicant if the revoked license is unrelated to law or mediation. The Bar ADR Section asserts that the revocation of a professional license should not result in automatic disqualification because the revocation may not have been based upon issues related to good moral character. The ADR Committee disagrees with both assertions and requests the court to accept the ADR Committee's proposed Rule.

The Eleventh Circuit's proposal would penalize attorneys whose licenses have been revoked by The Florida Bar, but grant a "free pass" to the remaining 50% of non-attorney applicants whose licenses in various other professions may have been similarly revoked. In terms of good moral character, the revocation of a legal license is no more or less onerous than the revocation of any other professional license.

The ADR Committee submits that the revocation of any professional license by a licensing authority is the result of a determination that a particular professional, for whatever reason, is unfit to continue to possess his or her license.

If an applicant or mediator has been deemed unfit to maintain another professional license, that certainly reflects adversely on that applicant's or mediator's fitness for certification as a Florida Supreme Court certified mediator. In Florida, as has been stated numerous times throughout this response, an individual can mediate without being certified. The Florida Rules for Certified and Court-Appointed Mediator's good moral character requirement, in addition to demonstrating an individual's basic fiber of honesty and integrity, also acts as a "fitness to practice" standard because there is no evaluation or testing of a mediator and mediation is done in confidence behind closed doors.

Rule 10.850(f)(3)(D) Reinstatement After Decertification

Proposed rule 10.850(f)(3)(D) provides, in relevant part, that the QIC shall review the petition for reinstatement and, if the petitioner is found to be unfit to mediate, the petition shall be denied. Both the Eleventh Circuit and the Bar ADR Section assert that there should be some specified criteria to guide the QIC in its determination of whether a petitioner is unfit to mediate.

In response, the ADR Committee suggests the following revision to the proposed Rule (new language is indicated with a double underline and deleted language is indicated by double strikethrough):

> **(D)** The QIC shall review the petition for reinstatement~~and, if the petitioner is found to be unfit to mediate, the petition shall be denied~~. If there are no matters which make the mediator otherwise ineligible and if the petitioner is found to have met the requirements for certification, the QIC shall notify the DRC and the DRC shall reinstate the petitioner as a certified mediator. However, if the decertification was for 2 or more years, reinstatement shall be contingent on the petitioner's completion of a certified mediation training program of the type for which the petitioner seeks to be reinstated.

XII. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.870 CONFIDENTIALITY

Rule 10.870(a) Generally

According to proposed rule 10.870(a), until a finding of probable cause, all communications and proceedings shall remain confidential. Upon the filing of formal charges, the formal charges and all documents created subsequent to the filing of formal charges shall be public with the exception of those matters which are otherwise confidential under law or rule of the Florida Supreme Court, regardless of the outcome of any appeal. Both the Eleventh Circuit and Bar ADR Section contend that this proposed Rule violates the non-complaining party's right to mediation confidentiality. Their comments overlook section 44.405(4)(a)(6), Florida Statutes, which expressly provides that there is no confidentiality or privilege for any mediation communication "offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct."

The ADR Committee asserts that mediation confidentiality does not (and should not) shield or protect a mediator's misconduct or violation of disciplinary Rules during the course of mediation. As a practical matter, during the course of an investigation, all participants of that mediation may be contacted and interviewed at the discretion of the complaint committee or investigator. Thus, non-complaining mediation parties are generally made aware of the grievance against the mediator and often serve as a valuable asset in determining probable cause.

XII. RESPONSES DIRECTED TO COMMENTS FOR PROPOSED RULE 10.890 LIMITATION ON TIME TO INITIATE A COMPLAINT

Rule 10.890(a) Rule Violations, and (c) Good Moral Character

Proposed rule 10.890(a) specifies that complaints alleging violations of the Florida Rules for Certified and Court-Appointed Mediators shall not be filed later than two years after the date on which the party had a reasonable opportunity to discover the violation, but in no case more than four years after the date of the violation. The Eleventh Circuit and the Bar ADR Section assert that the statute of

limitations in this Rule should be limited to a total of two years. The ADR Committee responds that the time periods listed in this proposed Rule are neither unfair nor unreasonable. Indeed, rule 3-7.16 of the Rules Regulating The Florida Bar permits complaints to be filed within six years from the time the matter giving rise to the complaint or inquiry is discovered or, with due diligence, should have been discovered.

Proposed rule 10.890(c) provides that there shall be no time limitation to file a complaint alleging lack of good moral character in connection with an application under these Rules. Both the Eleventh Circuit and Bar ADR Section contend that this proposed Rule should similarly have a two year statute of limitations from the date of submission of application.

The ADR Committee suggests the following revision to proposed rule 10.890(c), (new language is indicated with a double underline and deleted language is indicated by double strikethrough):

> **(c) Good Moral Character.** ~~There shall be no limit on the time in which to file a~~A complaint alleging lack of good moral character in connection with an application under these rules shall not be filed later than 4 years after the date of the discovery by the DRC of the matter(s) evidencing a lack of good moral character.

CONCLUSION

The proposed amendments to eleven of the Florida Rules for Certified and Court-Appointed Mediators which the ADR Committee agrees to revise in response to comments filed and asks the court to adopt are attached in legislative and two-column chart format in Response Appendices A and B. The ADR Committee respectfully requests this court consider and adopt the other proposed Rules not refiled with this response as previously filed with the petition in Appendix A.

Respectfully submitted this 11th day of December, 2015.

/s/ Rodney Smith, Circuit Judge
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Comments by the Committee on Alternative Dispute Resolution Rules and Policy was furnished by e-mail through the Florida Courts E-Filing Portal this 11th day of December, 2015, to D. Robert Hoyle, Chair of the ADR Section of The Florida Bar, 1001 Third Avenue W., Suite 260, Bradenton, FL 34205, bhoyle@hoylefirm.com ; Meah Rothman Tell, Vice-Chair of the ADR Section of The Florida Bar, P.O. Box 25490, Tamarac, Florida 33320, meahtell@gmail.com ; and Linda Kelly Kearson, General Counsel 11th Judicial Circuit, Lawson E. Thomas Courthouse, 175 N.W. 1st Street, Suite 3033, Miami, Florida 33128, lkearson@jud11.flcourts.org

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CERTIFICATE OF TYPEFACE COMPLIANCE

I 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(*l*).

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