Alternative ADR
Dispute Resolution Section
of The Florida Bar

THE COMMON GROUND

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ANA CRISTINA MALDONADO & MICHELLE BURKE, CO-EDITORS

MESSAGE FROM THE 2024-2025 CHAIR

Ana Cristina Maldonado, Esq.

Members of the ADR Section,

Our hearts are with our colleagues and neighbors still being impacted by Helene and Milton. The most overwhelming situations must still be tackled one piece at a time. To those who can help—offer your listening ear, generous spirit and capable mind. In times of need, peacemakers are called on to serve.

The Florida Supreme Court proclaimed October 13–19 as Dispute Resolution Week. Section members hosted Alternative Dispute Resolution Mixers at various locations around the state to encourage camaraderie and networking.

Our Section is glad to celebrate the essential contributions of arbitrators, mediators, eldercare

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coordinators, parenting coordinators and professional neutrals to the administration of justice in Florida.

In this spirit, we recognize the accomplishments of some very special section members: Prof. Fran Tetunic, recipient of the 2024 Sharon Press Excellence in ADR Award, our immediate past Chair, Christy Foley, recipient of the DRC's Award of Appreciation, and Hadas Stagman, who was elected Chair of the MEAC. We are also proud that the Litigator Mediator initiative, under the leadership of Harold Oehler, held its first ever Forum at UF Levin College of Law

This edition of The Common Ground tells the story of our first out-of-state retreat, visiting civil rights sites in Alabama. Transformative travel, like transformative conflict resolution, is all about connecting to deeper truths and finding inspiration—first to imagine a better future and then to move towards it.

This issue also explores Collaborative Family Law with Hispanic clients, the use of court-appointed Special Magistrates, and a case law update on requests for trial de novo in mandatory non-binding arbitration.

Registration is open for the Section's third Mediation Mentoring Academy, which will take place IN PERSON at Nova Southeastern University's Shepard Broad College of Law in Davie, Florida on February 28–March 1, 2025.

Lastly, we welcome Michelle Burke as the new Co-Editor of The Common Ground, while acknowledging Natalie Paskiewicz for her years in the role. Thank you both for your service to the Section!

Hope you enjoy this issue, and I look forward to seeing you—online or in person—at our CLEs, forums, meetings and events.

Ana Cristina Maldonado
2024-2025 ADR Section Chair

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Utilizing Court-Appointed Special Magistrates Under Florida Rules of Court Procedure

by Jeffrey M. Fleming, Orlando,
and Howard R. Marsee, Oviedo
Upchurch, Watson, White and Max

Authors' note—*This article is an update of a more comprehensive article appearing in the October 2007 issue of The Florida Bar Journal. For reasons of brevity, we limit ourselves here to appointments under the Florida Rules of Procedure and have omitted a discussion of Rule 53 of The Federal Rules of Civil Procedure.*

"Magistrates" are adjuncts of the court, exercising limited judicial authority and appointed by the court to perform specific tasks. "Special Magistrates" typically are appointed by the presiding judge to serve in specific cases. "General Magistrates" serve more broadly and typically are appointed to serve over a variety or class of cases, often on a venue-wide basis.

A note on nomenclature is unavoidable. The term "magistrates" has replaced "masters" in Florida. Effective October 1, 2004, the Supreme Court of Florida amended Rule 1.490 of the Florida Rules of Civil Procedure, Rule 12.492 of the Florida Family Law Rules of Procedure, and Rule 5.697 of the Florida Probate Rules so that all references to "master" thereafter became "magistrate." The change was essentially administrative and cosmetic. For the sake of currency and consistency, "special magistrate" is used throughout this article, even when discussing matters which predate the name change.

The special magistrate's authority derives from his or her appointment by the court. Historically, courts relied upon the common law and upon the court's inherent authority to appoint magistrates and to define the magistrate's duties and responsibilities. The practice of utilizing magistrates to assist trial judges in the disposition of cases predates the American legal system and has its origin in common law English chancery courts during the reign of King Henry VIII. Congestion in the federal court system spawned the use of magistrates in the United States as early as the colonial period.

Over time, the use and appointment of magistrates came to be governed by state and federal rules of civil procedure. At the state court level in Florida, the appointment of special magistrates in civil cases is now governed by Rule 1.490, Rule 12.492, and Rule 5.697. The role of special magistrates has evolved from a strict and limited role of trial assistance to a more expanded view—with the duties and responsibilities of special magistrates now extending to every phase of litigation.

Special magistrates perform a wide variety of tasks. They serve various roles in pretrial discovery and proceedings, facilitate the mediated settlement of cases by overseeing the selection and use of mediators, conduct *in camera* review of evidence, make recommendations and submit reports to judges, assist with complex issues, chair advisory committees composed of lawyers of record, help administer class actions and settlements, propose orders jointly recommended by the parties, make decisions based on judicial reference or the parties' consent, and become engaged in post-trial proceedings. Rule 1.200, Florida Rules of Civil Procedure, provides that at a case management conference the court may "consider referring issues to a magistrate for findings of fact."

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Consent to Appointment: The issue of consent under Rule 1.490(c) and Rule 12.492(b) is straight forward. No referral may be made to a special magistrate without the consent of the parties. Rule 12.492(b) does provide an exception for the court, without the consent of the parties, to appoint an attorney as a special magistrate to preside over depositions and rule upon objections upon good cause being shown.

Several Florida appellate decisions have held lack of consent fatal to the appointment of a special magistrate.

Mandamus is appropriate to correct a trial court's referral without consent. Probate Rule 5.697 is a relatively new rule, having been adopted in 1992 and "patterned after" Rule 1.490. On its face, there is no requirement for consent by the parties to the appointment of a special magistrate, maybe because the delegation of duties under this rule appears to be restricted to review of guardianship accountings and plans.

The Magistrate's qualifications: Rules 1.490(b), Rule 12.492(a), and Rule 5.697, provide that the court "may" appoint "members of The Florida Bar as special magistrates." Rules 1.490(b) and 12.492(a) go on, however, to provide that upon a showing that the appointment is advisable, a person other than a member of The Florida Bar may be appointed. Rule 5.697(b) requires "good cause shown" for the appointment of some person other than a member of The Florida Bar. In probate, the tasks to be performed may require certain types of expertise, (*e.g.*, accounting, corporate share evaluation, patent issues, scientific questions), where the need for a non-lawyer may be the raison d'être for appointment of the magistrate. Rule 12.492 prohibits the appointment of a special magistrate in matters "involving injunctions for protection against domestic, repeat, dating, and sexual violence, and stalking." Rule 1.490, Rule 12.492, and Rule 5.697 provide that all grounds for disqualification of a judge shall apply to special magistrates.

Oath and Bond requirements: Rule 1.490(a) of the Florida Rules of Civil Procedure requires persons appointed as *general* magistrates to "take the oath required of officers by the Constitution and the oath shall be recorded before the magistrate discharges any duties of that office." However, in the case of *special* magistrates, Rule 1.490(b), Rule 12.492(a), and Rule 5.697(b) provide that the administration of an oath is discretionary with the court.

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Subsections (b) and (e) of Rule 1.490, and subsections (a) and (d) of Rule 12.492 address the question of whether a bond may be required of the special magistrate. The gist of the subsections is that the requirement of a bond is discretionary with the court. However, Rule 1.490(e) and Rule 12.492(d) specifically provide that the court may require bond of magistrates who are appointed to dispose of real or personal property and may establish the language that such bonds should contain. Rule 5.697 does not address the subject of a bond.

The Order of Referral: Great care must be taken in drafting the order of referral. When appointing a special magistrate under Rule 1.490, Rule 12.492, or Rule 5.697, it is advisable to specifically include in the order of referral: a recital that the referral is consensual; whether an affidavit of disqualification, if required, has been filed; the reasons for any non-attorney referral; whether a bond is required and how it will be funded; how the special magistrate will be compensated; whether the special magistrate may issue orders; what types of orders are permissible and under what circumstances; and what type of sanctions other than contempt are authorized. The order of referral should specifically delineate the magistrate's duties and any limits on his or her authority, whether hearings may be conducted outside the county of appointment, whether *ex parte* communications are permitted and under what circumstances, and whether a court reporter is required and, if so, how funded.

The Magistrate's powers and duties: In broad terms, the special magistrate's authority is established by the terms contained in the order of referral, and it is important that the referral order delineate the duties and authority conferred. Rule 1.490, Rule 12.492, and Rule 5.697 offer some specific guidelines regarding the exercise of the magistrate's powers, duties, and authority. For example, Rule 1.490(d) and Rule 12.492(c) provide that the magistrate *shall* hold hearings in the county where the action is pending, but hearings may be held elsewhere by order of court to meet the convenience of the parties or witnesses. Rule 5.697(d) provides that the hearing *may* be held in the county of record or elsewhere for convenience as ordered by the court.

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Alternative ADR Dispute Resolution Section of The Florida Bar

ADR Section members now have a new FREE benefit: a listserv to communicate with other ADR professionals! You can subscribe and manage your listserv preferences at groups.io/g/FlaBarADR. Your subscription will be approved when your ADR Section membership is confirmed. Please adhere to the rules—they're for the good of the group.

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Rule 1.490(f), Rule 12.492(e), and Rule 5.697(d) also address the conduct of hearings. Generally, they place on the magistrate the duty to set and notice hearings and provide the authority to proceed *ex parte* if any party fails to appear. The magistrate may examine parties and witnesses on oath and may require the production of books, papers, writings, vouchers, and other documents. Under Rule 5.697(d), evidence at hearings is to be taken "in writing or by electronic recording" and shall "be filed with the magistrate's report." Rule 12.492(e) differs slightly and provides: "Unless otherwise ordered by the court, or agreed to by all parties, all parties shall equally share the cost of a court reporter at a special magistrate's proceedings." In most instances it seems that a court reporter is advisable.

The Magistrate's Report: Each rule specifically addresses the special magistrate's report. Rule 12.492(f) deals with the content: *"In the report made by the special magistrate no part of any statement of facts, account, charge, deposition, examination, or answer used before the special magistrate need be recited. The matters shall be identified to inform the court what items were used."* The language of Rule 5.697(e) is different in that it provides: *"No part of any statement of facts, account, charge, deposition, examination, or answer used before the magistrate shall be recited."* The creation of a record is one of the magistrate's most important duties. Failure to provide an adequate record can have serious consequences, and the special magistrate must carefully review the specific rule under which they have been appointed for the specific report requirements. In fact, Rule 1.490(h) specifically requires the report to include the name and address of any court reporter who transcribed the proceedings, and Rule 12.492(f) requires the name and address of any court reporter present.

Omitted from Rule 1.490, Rule 5.697, and Rule 12.492 is whether the magistrate has the authority to impose sanctions on any party for non-compliance with any of the magistrate's directives. Absent an explicit delegation of contempt authority either by statute or by rule, it is doubtful whether a special magistrate may do more than recommend a contempt sanction to the presiding judge. It is also unclear whether a special magistrate under Rule 1.490, Rule 5.697, or Rule 12.492 may impose non-contempt sanctions (*e.g.*, award attorney's fees or costs, strike pleadings or defenses, or order matters taken as admitted) or whether he or she is confined to recommending such sanctions to the presiding judge.

At no place in Rule 1.490, Rule 12.492, or Rule 5.697 is there reference to the special magistrate issuing or filing substantive *"orders."* However, Rule 1.490(f) does refer to an "order setting a matter for hearing." One can fairly ask whether a magistrate, under the rules, has authority, other than setting hearings, to *issue* orders—as opposed to *recommending* orders to the appointing judge. At least one appellate decision has held that a special magistrate's role is advisory only, and that any ultimate disposition and determination must be adjudicated by the court. When submitting a "Report and Recommendation" for the trial judge's consideration, special magistrates will typically also provide a proposed order that includes findings of fact and conclusions of law.

Exceptions and Standard of Review: Any party may raise exceptions to the findings and recommendations found in the magistrate's report. If no exceptions are raised, then the court, after expiration of the time for raising the exceptions, may act on the report. Rules 1.490 and 12.492 also implicitly provide that parties may raise cross-exceptions. Ten days is allowed for exceptions and five days for cross-exceptions. However, each rule must be consulted as they vary in their use of "file/filed/filing" and "serve/served/service" in terms of establishing the applicable time limits.

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Even in the absence of exceptions, the trial court, prior to entry of a final judgment in accordance with the magistrate's report, has a duty to examine and consider the evidence for itself and to determine whether under the law and facts the findings and recommendations of the magistrate are justified. Rule 1.490, Rule 12.492, and Rule 5.697 provide no explicit standards for a judge reviewing the report and recommendations of a special magistrate. Instead, we need look to published appellate decisions in Florida.

In examining the various appellate decisions addressing the question of review standards, we see that over time two disparate sets of standards have emerged. One line of cases has adopted a "competent substantial evidence" standard for findings of fact and a "clearly erroneous" standard for issues of law. A second line of decisions applies a "clearly erroneous" standard for findings of fact and a "misconception of the law" standard for conclusions of law. There appears to be no Florida appellate decision considering what the standard of review should be for *procedural* conclusions by the magistrate under Rule 1.490, Rule 12.492, or Rule 5.697.

A Final Note: Today, electronic discovery looms large in litigation. The labyrinthine, technical aspects of electronic discovery, and the increasing complexity of litigation generally, create fertile ground for the utilization of special magistrates. Additional expansion of the role of magistrates seems inevitable. Carefully drafted orders of referral can anticipate issues and problems.

SOURCE: Utilizing "Special Masters" in Florida: Unanswered Questions, Practical Considerations and the Order of Appointment, Howard R. Marsee, (October 2007 Issue of The Florida Bar Journal).

Jeffrey Fleming and Howard Marsee are with the ADR firm of Upchurch, Watson, White and Max. Both serve as mediators, arbitrators, and special magistrates.

Alternative Dispute Resolution Mixers

ADR Section members hosted Dispute Resolution Mixers this fall at various locations around the state. The events were open to anyone interested in learning more about mediation, arbitration, and ADR Section membership—and were intended to encourage networking and camaraderie among fellow neutrals.

Thank you to our event hosts!

- **Miami:** Megan Mochell and Patrick Russell
- **Orlando:** Rebekah Taylor and Alicia Perez
- **Fort Lauderdale:** Ana Cristina Maldonado, Moritt Hock & Hamroff, NSU Law's Dispute Resolution Clinic, NSU Law's Health Law Society, NSU Law's Hispanic Student Bar Association, and NSU Law's Public Interest Law Society
- **Tallahassee:** Kelly Overstreet Johnson and Rick Miller

ADR Section of The Florida Bar Annual Retreat

by Ana Cristina Maldonado
Nova Southeastern University Shepard Broad College of Law, Davie

"History, despite its wrenching pain, cannot be unlived, but if faced with courage, need not be lived again" ~ Dr. Maya Angelou

This year, the ADR Section of The Florida Bar held its first out-of-state annual retreat and visited civil rights sites in Alabama.

The trip began with a tour of Dexter King Memorial Church in Montgomery, where Rev. Dr. Martin Luther King, Jr. served as pastor from 1954 to 1960, starting when he was only 25 years old. Our extraordinary guide was the Hon. Vanzetta Penn McPherson, a federal appellate judge retired from the U.S. District Court for the Middle District of Alabama and a member of the congregation for decades. Judge McPherson wove her own story as a child growing up in Montgomery with deep love of her church and her knowledge and passion for the law into an unforgettable experience. At the end, Judge McPherson showed us the actual pulpit from which Dr. King gave his 1965 "How Long? Not Long!" speech at the end of the Selma to Montgomery march. The visit was electric.

The second day of the trip, the group travelled to Birmingham. In addition to walking through Kelly Ingram Park, where in 1963, marchers, including the young marchers of the Children's Crusade, were attacked by police with tear gas, dogs and water cannons, the group visited the AG Gaston Hotel, where the leaders of the civil rights movement met to strategize. During a guided tour of the Birmingham Civil Rights Institute (BCRI), one of the on-staff historians, Charles Woods, III walked us through the history of the movement while connecting it to the present. We learned about the pathbreaking role of Birmingham's Rev. Fred Shuttlesworth and his partnership with Dr. King, whose arrest during these events led to his famous "Letter from a Birmingham Jail." Over a delicious BBQ lunch, Mr. Woods spoke during a hybrid CLE, "Constructive Conflict & Civil Rights," which was attended virtually by several Section members who were not able to travel with the group and included a thought-provoking discussion about the difference between being "non-racist" and "anti-racist." Our day in Birmingham concluded with a tour of the 16th Street Baptist Church, whose bombing in 1963 killed four little girls. The horrified

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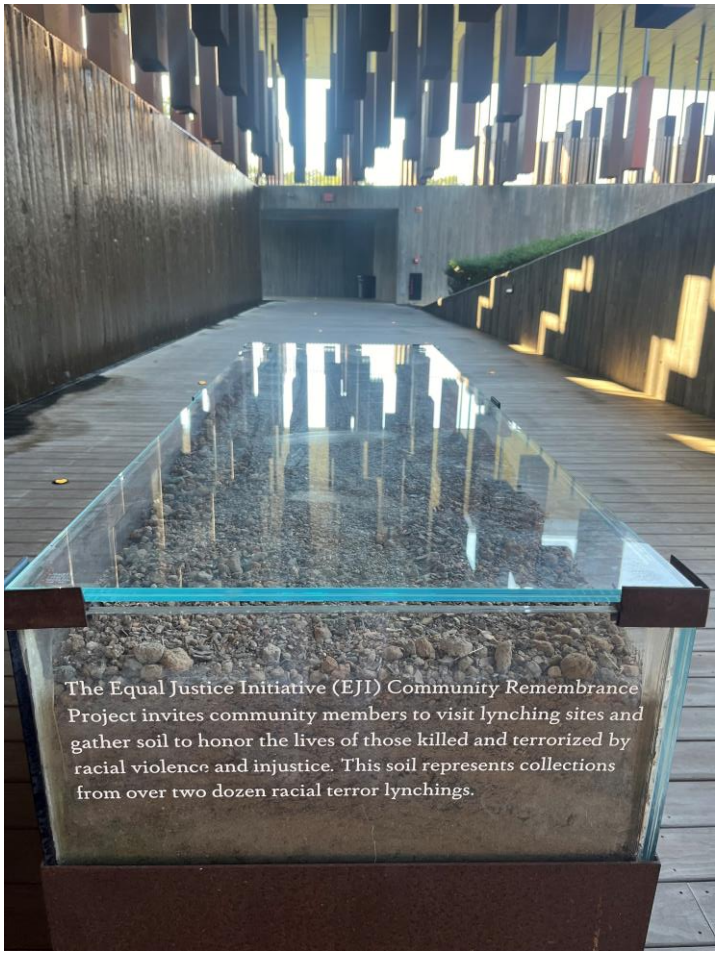
response to this event helped push the passage of the Civil Rights Act in 1964. Three members of the Ku Klux Klan were ultimately convicted, but justice took years; one man was found guilty of the bombing in 1977 and two more were convicted in 2001.

On our third day, the group drove to Selma, where we had the opportunity to walk across the Edmund Pettus Bridge, the beginning of the Selma to Montgomery march and site of Bloody Sunday, March 7, 1965, where marchers were attacked with water cannons and dogs, and where Congressman John Lewis (then the head of the Student Non-violent Coordinating Committee) had his nose broken. The march for voting rights from Selma to Montgomery took five long days in 1965 and our bus covered it in one hour. Next year will be the 60th anniversary of this pivotal event.

That third afternoon, we visited the Equal Justice Initiative's (EJI) "Legacy Sites," an incredible, internationally recognized museum complex consisting of the Legacy Museum, the National Memorial for Peace and Justice, and the Freedom Monument Sculpture Park. It is the brainchild of EJI's visionary director, death penalty and civil rights attorney Bryan Stevenson (author of Just Mercy).

The Legacy sites connect the terror and injustice of slavery, lynching, segregation and mass incarceration, with a powerful belief that reconciliation and healing require truth and justice.



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On our final morning, we had the privilege of viewing the city of Montgomery through the eyes of Wanda Battle. Ms. Battle grew up in West Montgomery and was a child during the civil rights era. Among her neighbors were Rosa Parks, the local NAACP's Secretary and seamstress whose famous bus stop arrest inspired Jo Ann Robinson, a college English professor at the historically black Alabama State University, to call for a boycott of the Montgomery buses. The organization of the Montgomery Bus Boycott catapulted Dr. King into leadership, lasted 381 days and involved around 40,000 members of the West Montgomery community. Ms. Battle also shared her personal history of "the aftermath" when her family was displaced in the 1970s by urban renewal, their home purchased for $3,500 and destroyed by the construction of a highway routed right through West Montgomery. While acknowledging the real emotional harm she experienced from all these events, Ms. Battle's message is one of hope, positivity and love. With a deep generosity of spirit, she guided us through a conversation about how we each experience segregation in our own lives, and when we connected with people beyond our own community.

This trip has been over two years in the making. As the ADR Section Chair, it was incredibly special to make it a reality. My thanks to George Knox, Jason Broadnax of Moor Global, Benjamin Morris, Krista Doland and Ashlee Pouncy for their help in making it happen. I'm also thankful to the Section members and family who joined us on the trip: Shari Elessar, Lester Langer, Sharon Langer, Benjamin Morris, Charlie Peppler and his wife Ellen, Alicia Perez, Ashlee Pouncy and her mother Theresa, Hadas Stagman, Rebekah Taylor, Kim Torres and my goddaughter and aspiring law student Mailah Bilal. Now that the template is ready, my hope is to organize the trip again in the future, and to inspire other organizations of lawyers to take the same journey.

Travel, like conflict and like conversation, can be transformative. It plants seeds in us that grow for the rest of our lives. The experience of this trip will forever serve as a source of strength, pride and knowledge. It shines a light, for us, as lawyers, on the powerful link between this era of history and our work today.

Cristina Maldonado is the 2024-2025 Chair of the ADR Section of The Florida Bar. A full time neutral for 13 years, she is currently Associate Professor at Nova Southeastern University's Shepard Broad College of Law.

Requests For Trial De Novo in Mandatory Non-Binding Arbitration in Florida

By Meah Tell, Meah Rothman Tell, P.A., Tamarac

This article discusses two important updates regarding requests for trial de novo in mandatory non-binding arbitrations in Florida.[1]

BACKGROUND

By way of background, mandatory non-binding arbitration statutes must permit a party to reject an arbitrator's decision and request a trial in a judicial tribunal in order to be constitutional. Kimberly J. Mann reviewed challenges to court-ordered arbitration and concluded:

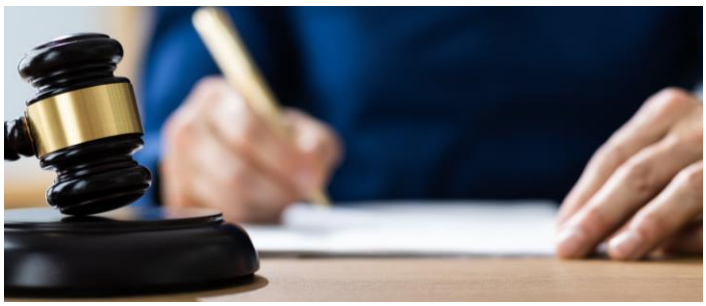
> "Court-ordered arbitration is emerging in various forms throughout the country as a quick, inexpensive, and effective alternative to litigation. Notwithstanding these benefits, arbitration programs must be carefully designed to protect constitutional rights. Arbitrators' decisions must not be final in order to protect the right to a jury trial. Arbitration statutes must comport with due process requirements and provide access to courts, both by design and in operation. In addition, arbitration statutes must allow parties to appeal arbitration decisions to judicial tribunals. Finally, arbitration statutes must be rationally related to legitimate state interests. The constitutional challenges to arbitration that have been raised thus far suggest that legislatures may constitutionally mandate nonbinding arbitration as long as they do not use it to deprive parties of their day in court."

Comment, "Constitutional Challenges to Court-Ordered Arbitration," 24 Fla. St.

[1] Both circuit and county courts can order all or any part of a contested civil matter to mandatory non-binding arbitration pursuant to §44.103, Fla. Stat. (2024), except as otherwise provided or prohibited by law. See Fla. R. Civ. P. 1.700 (a). See also Fla. R. Civ. P. 1.800 for Exclusions from Arbitration. U. L. Rev. 1055, 1067 (1997).

UPDATES

The first update is that the Florida Supreme Court revised Fla. R. Civ. P. 1.820 (h), now titled Notice of Rejection of the Arbitration Decision and Request for Trial, effective July 1, 2024.[2] The revised rule requires a Notice of Rejection of the Arbitration Decision and Request for Trial (in the same document) to be filed by any party requesting a trial de novo. The revised rule states expressly: "No action or inaction by any party, other than the filing of the notice, will be deemed a rejection of the arbitration decision." The revision creates a bright line rule so that "If a notice of rejection of the arbitration decision and request for trial is not made within 20 days of service on the parties of the decision, the decision must be referred to the presiding judge, who must enter such orders and judgments as may be required to carry out the terms of the decision as provided by section 44.103(5), Florida Statutes."



[2] 386 So.3d 876 (Mem.) (Fla. 2024). The other substantive change was to 1.820 (g)(4) which requires: "Any transcripts or exhibits used in the arbitration must, unless otherwise ordered by the court or agreed by the parties, be retained by the party who introduced the transcripts or exhibits until the conclusion of the case, or until otherwise ordered by the court." (emphasis added)

[3] *Lawnwood Medical Center and Regan v. Rouse*, 394 So.3d 51(Fla. 4th DCA 2024)

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The second update is that on July 3, 2024, in the *en banc* decision in *Lawnwood Medical Center and Regan v. Rouse*,[3] the Fourth District Court of Appeal receded from a long-standing case in the Fourth District, *Nicholson-Kenney Capital Management, Inc. v. Steinberg*.[4] The *Lawnwood* court decided *Nicholson-Kenney* had "incorrectly" given trial courts the discretionary non-statutory, non-rule-based authority to grant a trial de novo if "some notice" had been given by a party to its adversary that the party rejected the arbitration decision. According to the 2006 *Nicholson-Kenny* decision, a party did not have to file a motion for a trial de novo if the facts and circumstances indicated that a party wanted to proceed to trial.

In *Nicholson-Kenny*, the court decried what it called "gotcha" litigation tactics, and noted:

> "based upon the provisions of the order setting trial, Nicholson's attorney filed a notice setting the attorney pretrial conference only four days after receiving the arbitrator's decision. In the notice, Nicholson clearly indicated a desire to proceed to trial in the case. Both attorneys attended the calendar call for the trial period, and Nicholson requested a trial date in open court, in accordance with the order setting trial. Its attorney met with Steinberg's attorneys to hammer out a joint pre-trial statement. There is no question in this case that Nicholson requested a trial within twenty days of the arbitrator's decision, and there is more than a 'hint' of that fact in the filings with the court. Even though the notice indicating a continued demand to proceed to trial was not specifically styled a 'motion for trial de novo,' we would conclude that Steinberg, through its conduct, is precluded from raising the issue of non-compliance with rule 1.820. It did not object when its attorneys were noticed to attend the pretrial conference; it worked with Nicholson's attorney to develop the pretrial statement; and it did not object to setting the trial at the docket call. All of these events occurred within the time in which Nicholson could have filed a 'motion for trial de novo' had it known that Steinberg was insisting that it file a document so styled."

Id. at 324-235.

The *Lawnwood Medical Center* court stated that the *Nicholson-Kenney* "some notice" exception created no predictability or consistency at the appellate level, and "any reasonable person reading section 44.103 (5)'s and rule 1.820 (h)'s plain language-as they are expected to do-would understand the requirement to file a 'request for trial de novo' or 'motion for trial' within twenty days of service of an arbitrator's unfavorable decision," 2024 WL 3281203 *10. Moreover, *Nicholson v. Kenney* deviated from "a long and consistent history of enforcing section 44.103(5)'s and rule 1.820(h)'s plain language that when a motion for trial de novo is not timely filed, judgment must be entered." 2024 WL 3281203 *6.

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WL 3281203 *6, 49 Fla. L. Weekly D1420 (Fla. 4th DCA July 3, 2024)(hereafter referred to as the "*Lawnwood"* case). This was an *en banc* decision by 10 of the appellate court judges, to which Judge Warner concurred specially. Judge Forst recused himself.

[4] *Nicholson-Kenny Capital Management, Inc. v. Steinberg*, 932 So.2d 321 (Fla. 4th DCA 2006)(hereafter referred to as the "*Nicholson-Kenny* case").

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The Fourth District Court of Appeal noted that their decision conflicted with two Second District cases, *de Acosta v. Naples Community Hospital, Inc.* 300 So.3d 264 (Fla. 2d DCA 2019) and *Beyond Billing, Inc. v. Spine & Orthopedic Center, P.C.*, 362 So.3d 256 (Fla. 2d DCA 2023), both of which relied on *Nicholson-Kenney*, and certified the conflict. The *Lawnwood Medical Center* court noted that their decision is "aligned" with *Smith v. Bright*, 371 So.3d 1021 (Fla. 1st DCA 2023) (hereafter referred to as "*Bright*") which also required a motion for trial to be filed.

CONCLUSION

The Fla. R. Civ. P. 1.820 (h) revision and Lawnwood Medical Center decision are based upon the principle that there must be a notice filed in the Court file that a party rejects an arbitration decision and seeks a trial de novo. Otherwise, the arbitration decision must be referred to the presiding judge, who must enter such orders and judgments as may be required to carry out the terms of the decision as provided by section 44.103(5), Florida Statutes.

The Fla. R. Civ. P. 1.820 (h) revision specifically describes the style of this notice, which should be titled "Notice of Rejection of the Arbitration Decision and Request for Trial." This dispenses with the argument made in *Kenney-Nicholson*, relied upon in *de Acosta v. Naples Community Hospital, Inc*. 300 So.3d 264, 266 (Fla. 2d DCA 2019), that "rule 1.820(h) did not even require that a pleading be styled 'motion for trial.'"

As a caveat, the *Lawnwood Medical Center* decision maintains the viability of filing a Fla. R. Civ. P. 1.540 motion to vacate a judgment on an arbitration decision on the basis of excusable neglect for failing to timely file a motion for trial de novo. The concurrence by Judge Bilbrey in the *Bright* case also raises the issue of whether the time limits in Rule 1.820 are absolute. Judge Bilbrey opined:

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"I write only to mention that time limits in the Florida Rules of Civil Procedure, including rule 1.820, are not absolute. Time can be enlarged by the trial court, including 'after the expiration of the specified period ... when failure to act was the result of excusable neglect.' Fla. R. Civ. P. 1.090(b)(1)(B). Fla. R. Civ. P. 1.090(b)(1)(B). 'The determination of whether the failure to abide by a specified time limit constitutes excusable neglect is in essence an equitable one which should take into account all the relevant circumstances, including prejudice to the other party, the reason for the delay, the duration of the delay, and whether the movant acted in good faith.' *Boudot v. Boudot*, 925 So. 2d 409, 416 (Fla. 5th DCA 2006)."

371 So.3d 1021, 1022 (Mem).

So, while the revision to Rule 1.820 (h) is designed to take a bright line approach and clarify that a Notice of Rejection of the Arbitration Decision and Request for Trial rule must be timely filed, courts may still be involved in evidentiary hearings to determine if the failure to timely file such a notice is due to excusable neglect, or to consider whether the court can grant an extension of time for the filing of such notice.

Meah Tell is a former Chair of the ADR Section of The Florida Bar, and a past President of the Florida Academy of Professional Mediators. Meah has been qualified by the Florida Supreme Court to conduct approved trainings for Florida Supreme Court qualified arbitrators.

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UF Levin College of Law's Institute for Dispute Resolution Hosts Inaugural *Litigator Mediator Forum*

by Harold Oehler
Oehler Mediation, Tampa

UF Levin College of Law's Institute for Dispute Resolution hosted its inaugural *Litigator Mediator Forum* on October 17, 2024. The program was introduced by the law school's Interim Dean Merritt McAlister and Donna Erez-Navot, Director of the UF Law School's Mediation Clinic and Associate Director of the Institute. The program was emceed by UF Law School alum, Harold Oehler of Oehler Mediation. Almost 70 legal professionals from around the country attended the Forum both in person and via Zoom.

For the first hour, a panel of trial lawyers and mediators, along with federal Magistrate Judge Phillip Lammens of the Middle District of Florida, debated several mediation related topics. The cutting-edge topics included the use of joint session versus caucus-only mediation, zoom versus in person mediation, best practices for opening statements for attorneys in mediation, and whether pressure or persuasion should be used by mediators.

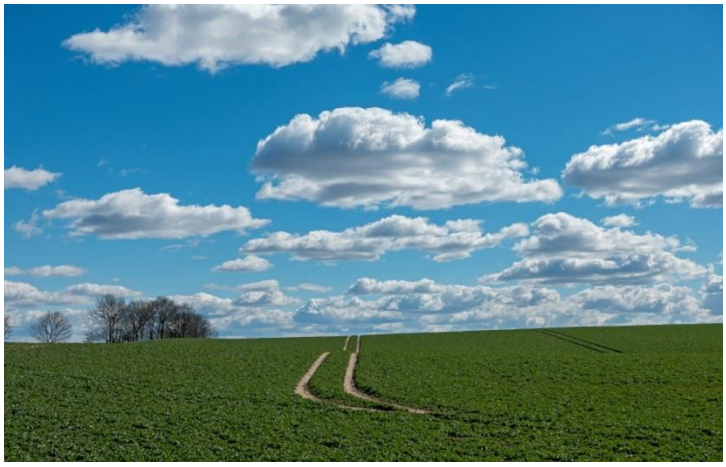
In the second hour, trial lawyers, mediators, judges and law students participated in group discussions to contribute ideas to the Florida Mediation Best Practices Handbook. The Handbook, authored by Oehler, contains best practices contributed by over 800 mediators, trial lawyers and other mediation stakeholders.

Legal organizations wishing to host a Litigator Mediator Forum may contact Mr. Oehler, who serves as Outreach Chairman for the ADR Section of the Florida Bar, at harold@oehlermediation.com. Suggested best practices for publication in the Handbook may be emailed to Mr. Oehler, as well. A copy of the Handbook is available at this link.

Collaborative Divorce: Hispano Collaborative Professionals™ (HCP) Paves the Way Serving Hispanics

by Betsy Vázquez
Vázquez Law, PLLC, Doral

Hispano Collaborative Professionals™, also known as HCP, is a new practice group in the State of Florida of bilingual, Collaboratively-trained professionals, dedicated to serving the Hispanic community and the general public.[1] HCP reached a milestone achieving their first Collaborative divorce in Spanish, paving the way for others to follow. What's unique about HCP is that all of the professionals are fully bilingual (i.e., speak, read, and write) in the Spanish and English language and have a passion to serve the legal needs of the underserved Hispanic community. Currently, 26.2% of Florida residents are of Hispanic or Latino ancestry.[2] According to the US Census Bureau, the largest concentrations of Hispanics in Florida are situated in Miami-Dade, Broward, Palm Beach, counties in Southwest Florida, those in the Florida I-4 corridor, and Duval.[3] Based on these findings, the Hispanic population would benefit greatly from legal services by bilingual professionals trained in the Collaborative divorce process.



On July 1, 2017, Florida's Collaborative Law Process Act became law as §61.56 Florida Statute.[4] The Florida Supreme Court adopted Florida Family Law Rule of Procedure 12.745, providing Florida family law lawyers with guidance as to how the Collaborative process interacts with the court system.

By laying the foundation, HCP has opened the door for others to resolve their differences in a peaceful, respectful, and dignified way with this unique alternative dispute resolution (ADR) method. Just recently, HCP completed their *first* Collaborative case in Spanish serving a family that chose the Collaborative Law Process for their divorce. Coincidentally, it turns out that this was the *first* Collaborative case for the Honorable Russell L. Healey, Fourth Judicial Circuit, who said, *"it's new, some people haven't wrapped their mind around it yet, maybe they're a little bit reluctant to it but it's a great process…it really is a great concept to have, to have a financial person, mental health or social worker type person, someone that can help with the financial issues, kid issues, whatever the case may be, so it's a fantastic program.*" Every box was checked as Judge Healey further stated, "*Collaborative, Probono, in Spanish, Fantastic!"*

The Honorable Russell L. Healey

[1] *See* hispanocollaborativepros.com

[2] FAMSEG, e-News from the Family Law Section of the Florida Bar, September 2023. "HISPANIC HERITAGE MONTH September 15 – October 15" by Marisol Cruz, Esq.

[3] U.S. Census Bureau, "Top 10 Florida Counties"

[4] Florida Collaborative Law Process Act, §61.55 – 61.58, Florida Statutes

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The Collaborative team consisted of Betsy Vázquez, Esquire, Collaborative Lawyer for one spouse; Wilda Pomales, Esquire, Collaborative Lawyer for the other spouse; Felix O. Padrón, PsyD., Neutral Facilitator shared by the couple; and Vivian Perez, the Note Taker. The couple benefited from the Spanish-speaking Collaborative team because they clearly understood the cultural insights from each spouse's perspective and knew what it's like to "stand in their shoes." Moreover, each spouse received the added value of experiencing the collaborative process in their native language from start to end. After a series of Spanish team meetings, all of their issues were resolved. For example, documents were translated to Spanish, email communications were in Spanish, agendas, minutes, and more.

The team worked closely and effortlessly together to make sure that no stone was left unturned.

L–R: Wilda Pomales, Esq., Betsy Vázquez, Esq., and Felix O. Padrón, PsyD.

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Collaborative Team Feedback and Collaboration

Each professional was asked to share their experience by answering the following question from the perspective of their collaborative role.

Q: In the role as the Collaborative lawyer, how did the Hispanic family benefit from the Collaborative process and what was it like working with a team of bilingual Collaborative professionals?

A: Betsy Vázquez, Esq., said, *"The Hispanic spouses benefited from the Collaborative process in Spanish because a comfort level was established from the start. In their native language, bilingual professionals addressed their needs and concerns effectively, making the whole process smoother. Being able to work with a stellar team of bilingual Collaborative professionals made all the difference in the world to reaching a global settlement. Words cannot express my sense of gratitude being able to give back to the Hispanic community."*[5]

Q: In the role as the Collaborative lawyer, how did the Hispanic family benefit from the Collaborative process and what was it like working with a team of bilingual Collaborative professionals?

A: Wilda Pomales, Esq., said, *"I believe the most valuable benefit to the family was that they were able to reach a resolution together, a middle ground between their wants versus the litigation route. Being able to work with a bilingual team, I found it convenient for the participants and a smooth transition for the team, ranging from drafting documents in English to explaining and conducting the team meetings in Spanish 100%. I felt a sense of gratitude to be able to give back to our Hispanic community."*[6]

Q: In the role as the neutral facilitator, how did the Hispanic family benefit from the Collaborative process and what was it like working with a team of bilingual Collaborative professionals?

A: Felix O. Padrón, PsyD., said, *"The Collaborative process in Spanish assisted the participants to feel at ease by being able to express themselves and ensured that they felt 'heard.' I appreciated how the bilingual team worked professionally and thoroughly in ensuring that the participants completely understood all aspects of the process. Too many times, I have witnessed Spanish-speaking people completely lost, but not here, because the process in Spanish opened the door for the participants to take control of their lives and their family."*[7]

Q: In the role as the note taker, how did the Hispanic family benefit from the Collaborative process and what was it like working with a team of bilingual Collaborative professionals?

A: Vivian Perez, said *"Translating the notes in Spanish for the couple made all the difference because the couple truly understood the decisions they were making throughout the process. Any questions that would arise were addressed in their native language, putting them more at ease. I found the role as a note taker very rewarding because I was on a continual learning curve in a 'listen only' mode, and the translations of the notes from English to Spanish helped everyone because this is what the couple needed."*[8]

Collaborative Process Defined for Spanish Cases

The Collaborative Process is a voluntary ADR process in which the spouses are able to create a durable agreement without resorting to litigation. The

[5] Betsy Vázquez, Esq., Vázquez Law, PLLC, Doral (Miami-Dade County), Florida
[6] Wilda Pomales, Esq., Merideth Nagel & The Legacy Team, Clermont, Florida
[7] Felix O. Padrón, PsyD., LMHC, MCAP, FACES, Coral Gables, Florida
[8] Vivian Perez, Mediator, Miami, Florida

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interdisciplinary team of professionals consists of two bilingual collaborative lawyers, a bilingual neutral facilitator, a bilingual neutral financial (when needed), a bilingual collaboratively-trained affiliate/allied (when needed) and a bilingual note taker, as needed. Each spouse is independently represented by her/his Collaborative lawyer and a team of professionals. Typically, a bilingual neutral facilitator is shared by the spouses who help to keep the process flowing smoothly and to minimize conflict. Documents are translated to Spanish and read in Spanish, as needed. All the participants come together for a series of team meetings, generally three (3) but could be more depending on complexity of the issues. Both spouses commit to working together towards a mutually beneficial outcome. If the Collaborative process terminates, the lawyers will no longer represent their clients in litigation. In other words, new independent attorneys will need to be hired for adversarial court proceedings. All the participants must sign a participation agreement in both Spanish and English before the commencement of the collaborative case. For this process to work, both spouses must agree to:

- Be open to honestly sharing their interests, goals and values
- Full and voluntary disclosure of financial information
- Negotiations in good faith

Both spouses agree to work in good-faith towards resolution for the best interest of the family, especially if children are involved. According to the International Academy of Collaborative Professionals (IACP), 86% of Collaborative matters reach full resolution of all issues and 2% of the clients reconcile.[9] And, even when a full agreement is not reached, substantial progress is often made on parenting issues and understanding finances.

[9] *See* collaborativepractice.com

The Three Cs: Benefits to the Collaborative Process in Spanish

1) **Communication.** One of the biggest benefits to the Collaborative process in Spanish is each Collaborative lawyer's ability to communicate clearly and directly with their client. For people whose first language isn't English, the American legal system can be quite frightening. Legal terms can be difficult to understand, translate, or interpret correctly. As a non-native English speaker, it can be difficult for many to communicate their fears, concerns, and questions in English. Perhaps they even feel embarrassed due to their inability to not understand something being explained in English. These communication barriers are quite common, and one cannot be expected to understand everything in the legal field without having experience.

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Benefits of the Collaborative Process in Spanish include:

- Choosing a bilingual Collaborative lawyer who speaks the client's native language, so they can openly and directly communicate with each other about the goals, concerns, and ideal strategies.
- Being free to hire a bilingual Collaborative lawyer and professional with whom the client is most comfortable.
- Being able to save money by not having to hire an interpreter/translator.
- Saving time during joint team meetings by not breaking the momentum with frequent stops. For example, the process is slower and longer when a participant isn't fluent in Spanish, which leads to continual interruptions because translations are needed in English.
- Having a group of experienced, Spanish-speaking Collaborative professionals who understand their client's values, beliefs and behaviors.

2) Culture. Divorce is never easy, even in the best circumstances. It's even harder when having to deal with cultural differences. However, feeling a bit anxious and nervous during a major life-changing event is normal. Therefore, comfort is an important factor for good and effective communication. By nature, we are all more comfortable with people who can speak our language, grew up as we did, and have a basic understanding of one's culture.

Culture, words, phrases, expressions, body language, etiquette, values, and traditions during the process do matter. The better a Collaborative lawyer understands these areas, the smoother the process will be. Being able to share similarities in language and cultural background or upbringing will also allow for fostering a deeper connection, thereby making communication easier. The team works hard and is continually proactive. Having trusted bilingual Collaborative lawyers is crucial throughout the process and will give the clients the confidence and security to know that everything will work out.

3) Cost. Hiring a Spanish-speaking Collaborative lawyer is more cost-effective than not hiring one. For starters, there will be no need for a translator/interpreter. Efficiency of time management improves when everyone on the team speaks and understands the same language. The end result is cost savings. From the outset, the bilingual Collaborative team understands each spouse's needs because there are no language roadblocks. For example, just imagine hiring a non-Spanish speaking Collaborative lawyer, the interpreter misinterprets or mistranslates and miscommunicates a question, and wrong information is communicated to the Collaborative lawyer. By the time the wrong information is rectified, time is lost and additional legal fees are incurred. And, once the right Collaborative lawyer is retained, and she/he reviews the prior lawyer's work, now the client has paid double legal fees for the same work. What's worse is the lost time, which can never be recouped. Making smart decisions from the start will save your clients money in the end.

Why Choose the Collaborative Law Process?

During a major life-changing transition, the Collaborative Law process is a smart option over the traditional courtroom setting option. By avoiding the adversarial court process, time and money are saved. Most importantly, conflict is minimized. The Collaborative process typically provides for a faster resolution outside the court system rather than litigating in it. In other words, there is no fighting and destroying of families. The process is confidential, except in rare circumstances; the privacy of personal information is maintained and kept out of the public record. The process further empowers the clients to embrace self-determination and control. The Collaborative team acts as the conduit so that the clients can make good, informed decisions. In essence, the clients get the best of both worlds when they choose two bilingual Collaborative lawyers coupled with a bilingual professional team.

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In summary, this milestone marks the beginning of future change. Change is inevitable, and the practice of Collaborative together with like-minded Collaborative professionals is how the Collaborative Law process option may very well be the preferred method of alternative dispute resolution for family conflict in the future.

Peace, for Hispanics, by Hispanics, is here to stay.

Author: *"This is truly a milestone for HCP because it is so important to get the word out to the community about the Collaborative process and how this process can help families resolve their differences in a better and healthier way."*[10]

[10] *See* hispanocollaborativepros.com

Betsy Vázquez, Esquire is bilingual (Spanish and English), the Founder and President for Hispano Collaborative Professionals™ (HCP), a nationwide Collaborative practice group, current Board member for the Collaborative Family Law Institute (CFLI), member to the Collaborative Professionals of Southwest Florida (CPSFL), Florida Academy of Collaborative Professionals (FACP), and an active member on the Membership and Outreach Committee to the International Academy of Collaborative Professionals (IACP). Ms. Vázquez is a Collaborative Family Law Lawyer, Estate Planning, Elder Law and Personal Family Lawyer®. She is also a Qualified Parenting Coordinator, Florida Supreme Court Certified County Mediator, and a Florida Supreme Court Certified Family Mediator since 2010. She is the Founder and President of Vázquez Law, PLLC, a Collaborative boutique law firm and Mediate4Peace, LLC, a mediation practice in Doral (Miami-Dade County) and works with clients throughout the state of Florida with divorce, estate planning before, during, and after divorce, pre-marital and post-nuptial agreements, parenting plans and other matters impacting families.

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Editors Ana Cristina Maldonado and Michelle Burke are soliciting articles for the Spring 2025 issue. To submit an article, please contact them at maldonadomediation@gmail.com and michelle@mburkelaw.com. Interested in advertising? Click here for information.

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