

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC05-998

**RESPONSE OF THE COMMITTEE ON ALTERNATIVE
DISPUTE RESOLUTION RULES AND POLICY
TO THE FLORIDA BAR'S LETTER OF AUGUST 10, 2006**

In its opinion In re: Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, 31 Fla. L. Weekly S295 (Fla. May 11, 2006), the Court adopted rule amendments submitted by the Committee on Alternative Dispute Resolution Rules and Policy (Committee), in addition to Administrative Order No. AOSC06-9, incorporating the newly adopted certification procedures. The Court directed The Florida Bar (Bar) to file, by August 9, 2006, its comment on whether the current requirement that a certified circuit court mediator must be a member of the Bar or a retired trial judge from any United States jurisdiction should be removed. The Court directed the Committee to file the instant response within thirty days after service of the Bar's comment.

1. The Bar's position is that the rules should retain the requirement of membership in The Florida Bar. They specifically recommend that persons eligible for certification under the rule must have been a member in good standing of The Florida Bar or a bar of some other United States jurisdiction for the five years immediately preceding an application. The Bar also recommended retaining the option to be a retired trial judge from any United States jurisdiction (who was a member in good standing of the bar in the state in which the judge presided for at least five years immediately preceding the year certification is sought). The Bar has failed to attach specific amendments to the Rules for Certified and Court-Appointed Mediators and the Administrative Order that would be necessitated by its proposal.

2. The sole reason for the Bar's position, as stated in its letter of August 10, 2006, is stated as follows: "It is the uniform relief [sic] of the bar that circuit court mediation in the state is extremely effective, that its effectiveness is due in large part to the quality of mediators, and that the quality of mediators is greatly dependent on the minimal qualifications contained in the rules." This approach can best be described as, "If it ain't broke, don't fix it." The Bar failed to address any of the Committee's

rationale for the recommended change contained in its May 11, 2005

Petition.

3. It is the Committee's position that the system is indeed broken.

Florida now has twenty-four years of Alternative Dispute Resolution legislative history and eighteen years of corresponding rule history. Florida's experience clearly shows, for the reasons originally cited in its Petition filed on May 11, 2005, and for the reasons cited herein, that the proposed rule amendments are necessary and appropriate to "...enhance the goals of alternative dispute resolution" and "...improve the use of mediation, arbitration, and other alternatives to supplement the judicial process." See this Court's Administrative Order No. AOSC03-32.

4. It is critically important for the Court to realize from where the Committee recommendations currently before the Court have emanated. It is akin to the precedential weight to be given to cited case law. The facts stated herein are stated with all due respect to the Bar and Board of Governors and are not meant in any way to be derogatory.

5. The Bar does not have a standing alternative dispute resolution section, division, or committee. See The Florida Bar Journal, Vol. 79, No. 8 September 2005, page 20. Thus, the current question could not have gone to a standing section, division, or committee with particular alternative dispute resolution expertise for its review and recommendation to the Board of Governors.

6. The Bar's August 10, 2006 letter indicates that its comment was authorized on July 28, 2006 by the Board of Governors. There are fifty-two members of the Board of Governors. See The Florida Bar Journal, Vol. 79, No. 8 September 2005, page 2. The Committee's information, although minutes are currently not available, is that only forty-six members were actually present for the vote. The Court does not know the voting members' experience in any relevant area.

7. The Committee or its predecessor(s) has been in existence as a Supreme Court Committee since 1987. The current alternative dispute resolution system in Florida is due in large part to the sound recommendations of the Committee to the Court over the years. The Petition, filed on May 11, 2005, which recommends the elimination of "The

Florida Bar membership” for circuit court mediators and conversion to a more flexible point system, was the specific work product of the Committee (consisting of eighteen (18) members) representing over:

- Three hundred and thirty-six (336) years of legal (bar membership) experience of which three hundred and twenty five (325) years is Florida Bar membership
- One hundred and thirty-two (132) years of judicial experience
- One hundred and thirty-one (131) years of mediation experience
- One hundred and twelve (112) years of certified mediator experience in all areas of certification
- Eleven (11) years of trial court administrator experience (by the first DRC Director)
- Nineteen (19) years of full-time graduate level professor teaching experience
- Seven (7) years of experience as a graduate level dean

8. It is appropriate to assume as fact that members of the Committee would not have been named to the Committee if the appointing Chief Justices did not believe that the members had the requisite alternative dispute resolution expertise. The Court has relied on the recommendations of the Committee in the past and can have confidence in the instant recommendation.

9. The qualifications point system was disseminated far and wide. The “work in progress” was published for comment in the December 2003

Resolution Report, which has a circulation of seven thousand. The Report goes to all chief judges, trial court administrators, ADR Committee members, certified mediators, all who took training within the preceding two years even if not certified, and other interested individuals. Comments were collected, reviewed, and revisions were made.

10. The proposed rule revisions, point system description, and proposed changes to the administrative order were presented to approximately one thousand participants at the DRC Annual Conference for Mediators and Arbitrators in August 2004, and were subsequently published again in the Resolution Report in October 2004.

11. The Committee proposals were circulated for comment from other organizations. Nationally, ADRWorld.com, an American Arbitration Association subsidiary, published three articles (February 4, 2004, August 18, 2004, and May 13, 2005) including the full text of the Committee draft proposals.

12. At the direction of the Court, the strike through/underline version of the proposed amendments to the rules, along with an invitation to submit

comments, were published in the July 1, 2005 issue of the Florida Bar News (with a circulation of 65,000). The publication contained a link to the Supreme Court's web site and the rule cases docket (containing the actual filings).

13. The Court should place very little weight on the Bar's comment for the following reasons: (a) The Bar, on notice from the time an invitation to submit comments was published in the July 1, 2005 issue of the Florida Bar News, the Bar's own periodical, failed to file any comment for some thirteen and a half months until specifically ordered to do so by the Court in its May 11, 2006 opinion, (b) The Bar has failed to state any cogent rationale for its position, (c) The Court does not know the Board of Governors voting members' experience in any relevant area, and (d) the Bar failed to address any of the Committee's rationale for the recommended change from its May 11, 2005 Petition. In summary, the Committee's recommendations stand unrefuted and uncontroverted.

14. There was no hue and cry against the Committee's proposals in its Petition and the qualifications point system by the Bar's rank and file. In fact, only one attorney out of 78,000 expressed opposition to the elimination

of “Florida Bar membership” as a prerequisite for certification as a circuit court mediator. Even this comment apparently recognized that legal competence is not always vital in circuit court mediation. See comment of John W. Day.

15. A total of seven comments were filed with the Court, excluding the Court ordered submission by Bar. Four of seven comments were positive on the issue of allowing nonattorneys to be circuit mediators and recommended that the Court adopt the Committee’s recommendations as proposed in the petition. Two of the remaining comments did not deal with the specifics of the bar membership requirement for circuit court mediators. The sole commentator opposed to the Committee’s recommendations relating to circuit mediators was discussed in the preceding paragraph.

16. Notable among those in favor are the Association for Conflict Resolution and The Florida Chapter of the Association of Family and Conciliation Courts. The Association for Conflict Resolution has a diverse national and international membership of more than 6500 mediators, arbitrators, facilitators, educators, and others involved in conflict resolution. The Association of Family and Conciliation Courts is an international

association of more than twenty countries with an interdisciplinary membership of more than 2300 members representing more than a dozen professions. While the Florida Chapter pointed out that its policies prohibit advocacy for or against specific rule changes or legislation, it expressed support of the principles underlying the proposed changes on mediator qualifications. Specifically, it supports the concept of substituting mentorship and experience for some degree requirements.

17. The Committee would note that the Bar's position only retains the "bar membership requirement" for certified circuit court mediators. They are not recommending the addition of a "bar membership requirement" for certified county court mediators despite the fact that the jurisdictional amount for the county court has risen from \$5000 to \$15,000 since the initial promulgation of the mediator qualifications rules. If five years of bar membership is so critical to circuit court mediators then why is it not identically critical to county court mediations, particularly where the county court as a practical matter is the court of last resort for parties who rarely have the financial capability to afford an appeal? What is the difference between a county court mediator handling a case valued at \$14,999 and a circuit court mediator handling a case valued at \$15,001? The Bar's position

amounts to economic protectionism for circuit court mediators with no valid substantive rationale.

18. The Committee would point out that most parties in a circuit civil case are represented by counsel. It is counsels' responsibility to provide appropriate legal advice to their clients and to protect the legal rights of their clients. The mediator's roles are completely different. See paragraphs 23 and 24, infra.

19. The Court has never required family mediators to be exclusively attorneys. The Court has permitted nonattorney professionals to mediate family cases, which often involve this state's most precious resource, our children. Family cases can also be very complex legally, often involving the equitable distribution of businesses and complicated tax issues, yet the Court saw the advantage to flexibility in parties having a choice in relation to the professional background of certified mediators. There is no evidence, including grievance activity, to suggest that attorney or nonattorney professionals are superior to the other. The same flexibility is now mandated in the circuit court mediation area.

20. The general national consensus, which began with the Society of Professionals in Dispute Resolution (SPIDR), Commission on Qualifications in 1988, is that the possession of paper credentials (academic degrees/licensing) does not accurately predict an individual's ability to be a good mediator.

21. The consensus extends to the nation's preeminent legal organization, The American Bar Association, whose Section on Dispute Resolution adopted the following resolution in 1999: "All individuals with appropriate training and qualifications should be permitted to serve as mediators (and arbitrators) regardless of whether they are attorneys."

22. The United States Mediator Certification Standards, which is a digest of statewide requirements for court mediators compiled by the Northern Virginia Mediation Service in 2003, reveals the following civil mediation requirements:

- Sixteen (16) states reported no statewide certification.
- Sixteen (16) states have no educational/experiential requirements – only mediation training.
- Ten (10) states require mediators to be legally trained (this category currently includes Florida) (one (1) of these states allows advanced degree substitution for legal training).
- Two (2) states require a minimum of a bachelor's degree.

- Six (6) states allow for flexibility in certification requirements.

23. The ultimate issue for the Court to decide is whether the salient qualification of a competent mediator is subject matter expertise, or as Margaret Shaw in her 1994 article entitled “Selection, Training, & Qualifications of Neutrals,” National Symposium on Court-Connected Dispute Resolution Research, National Center for State Courts in Williamsburg, Virginia suggests whether a combination of the following are more predictive of mediator competency:

1. Innate personal characteristics
2. Education and training, and
3. Experience.

24. The 1995 Hewlett Test Design Project, Performance-based Assessment Methodology for Use in Selecting, Training & Evaluating Mediators summarized the descriptions of a mediator’s tasks as:

1. Gathering background information
2. Facilitating communication
3. Communicating information to others
4. Analyzing information
5. Facilitating agreement
6. Managing cases, and
7. Helping document any agreement by the parties.

25. The legislature has recognized these roles in sections 44.1011(2) and 44.403(4), Florida Statutes. In addition, the Court recognized similar

roles for the mediator in rule 10.220, Florida Rules for Certified and Court-Appointed Mediators.

26. Mediator competence, in Florida, can best be assured by basing certification, not on subject matter expertise (five years of bar membership), but on a combination of the following factors which are found in the Court's present rules and administrative orders.

1. Good moral character requirement
Rules 10.100 (a) and 10.110, Florida Rules for Certified and Court-Appointed Mediators
2. Training
Rule 10.100(b), (c), (d), and (e), Florida Rules for Certified and Court-Appointed Mediators
3. Education
Rules 10.100(b), (c), (d), (e) and 10.105(a), Florida Rules for Certified and Court-Appointed Mediators
4. Mediation experience
Rules 10.100(c), (d), (e) and 10.105(b), Florida Rules for Certified and Court-Appointed Mediators
5. Mentorship
Rules 10.100(b), (c), (d), and (e) and 10.105(c), Florida Rules for Certified and Court-Appointed Mediators
6. Standards of professional conduct
Rules 10.200-10.690, Florida Rules for Certified and Court-Appointed Mediators
7. An effective mediator disciplinary system
Rules 10.700-10.900, Florida Rules for Certified and Court-Appointed Mediators
8. Continuing mediator education requirements
Administrative Order AOSC06-9

27. The point system for certified court mediators, in conjunction with the above system components, will assure the highest competency level of mediators. To exclude persons from certification who meet all of the foregoing requirements would constitute an inappropriate exclusion of qualified individuals.

28. The Court, in its May 11, 2006 opinion, understood and so stated that “[T]he new point-based certification requirements are consistent with the prevailing mediator standards and principals in the nationwide dispute resolution field, e.g., increasing ethnic and cultural diversity, providing the parties with greater choice of certified mediators, promoting the inclusion of nonlawyers, and building upon a qualification model based on mentorship, training, and experience.”

29. In the same Opinion, the Court also recognized and stated, “...[W]e are aware that the Committee, by these recommended changes, is seeking to maintain Florida in its place of preeminence in the alternative dispute resolution field in the United States”.

30. The Committee has fully vetted and provided its collective knowledge in the instant recommendation and in the strongest terms possible respectfully recommends that the Court eliminate the current requirement that a certified circuit court mediator must be a member of the Bar or a retired trial judge from any United States jurisdiction in favor of the suggested point system for circuit court mediator qualification.

31. Attached for the Court's consideration are the proposed amendments to rule 10.100 necessary to eliminate the specific requirement of Florida Bar membership for circuit mediators. Appendix A is in the single-column format, Appendix B is in the two-column format. The rule proposal submitted herein are identical to those submitted on August 8 with the exception of amendments to subdivision (d) dealing with circuit mediators. The amendments are drawn to rule 10.100 as adopted by the Court effective August 1, 2006. Since current rule 10.100(d) contains no reference to Florida Bar membership, the deletion of such requirement cannot be shown as stricken language. [Note: For the record, it should be observed that the Court moved the requirement for Florida Bar membership to the Administrative Order AOSC06-9. The Committee has recommended, at the Court's direction, moving this language from the Administrative Order

to the Mediation Rules, as part of its August 8, 2006 petition.] In light of the Committee's foregoing arguments, it is recommended that the Court adopt the version of rule 10.100(d) submitted with this petition, rather than the amendment to rule 10.100(d) submitted on August 8, specifically adding the requirement of Florida Bar membership.

32. The Committee respectfully requests that the Court adopt the attached amendments to the Rules for Certified and Court-Appointed Mediators and the Administrative Order as proposed in this petition.

Submitted on behalf of the Committee,

Judge Shawn L. Briese, Chair

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on _____, a copy of the foregoing was furnished by United States mail to the following individuals by a member of the DRC staff.

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