IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULES FOR CERTIFIED AND COURT APPOINTED MEDIATORS **CASE NO.:**

PETITION OF THE COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION RULES AND POLICY

The Committee on Alternative Dispute Resolution Rules and Policy (Committee) was created by the Chief Justice on July 8, 2003 by Administrative Order No. AOSC03-32. One of the Committee's assigned tasks is to monitor court rules governing alternative dispute resolution procedures and recommend to the Court necessary amendments. Chief Justice Harry Lee Anstead, on October 10, 2002, directed the Committee to "undertake a review of the qualifications for certification" and make appropriate rule amendment recommendations to the Court. The last significant amendments, resulting in the current rules, were submitted to the Court and adopted in 1999. The attached proposed rule amendments have been prepared to meet the Committee's continuing mandate.

The proposed amendments can be classified into three different areas: Mediator Qualifications (Fla. R. Med. 10.100 – 10.130), Standards of Professional Conduct (Fla. R. Med. 10.360, 10.370 and 10.420), and Discipline (Fla. R. Med. 10.800 – 10.880). Also included are technical amendments to rules (Fla. R. Med. 10.720 and 10.740). The amendments are presented in full-page format (Appendix A) and two-column format (Appendix B).

A subcommittee on mediator qualifications developed a new qualifications "point system." The subcommittee published its "work in progress" for comment in the December 2003 issue of *The Resolution Report*, which is sent to all persons who have completed a Supreme Court certified mediation training program, regardless of whether they have sought certification. Comments were collected and reviewed, and revisions were made. The full Committee, at its August 2004 meeting, unanimously agreed to release the proposals, as modified, for additional comment. The proposed

rule revisions, point system description, and other proposed changes to the administrative order governing certification were presented at the Dispute Resolution Center's Annual Conference for Mediators and Arbitrators, attended by approximately 1000 individuals in August 2004, and published again in the October 2004 issue of *The Resolution Report.* Over sixty individual comments were received and considered by the Committee as a result of its publications of the proposals.

The full ADR Committee, at its January 2005 meeting, reviewed all of the comments received. Judges Briese and Conner made and seconded the motion to approve the work product creating the point system, with a clarification as to when the system should go into effect. The motion passed unanimously. The Committee then considered the proposals relating to revisions to Continuing Mediator Education. The motion made and seconded by Judges Bateman and Conner passed (11 in favor and one opposed).

Qualifications

1. The most significant changes proposed by the Committee deal with mediator qualifications. Fla. R. Med. 10.100 is revised to modify the mandatory degree-based requirements with a more flexible point system to be promulgated in an administrative order of the Chief Justice (see Appendix C). The rule would retain the requirement for good moral character and add a minimum age requirement. The rule then defers to a point system adopted pursuant to administrative order in relation to training, education, experience, and mentorship.

2. The Committee's proposal opted for an administrative order for two reasons. First, historically matters dealing with the detailed procedures relating to mediator certification and renewal, including mentorship requirements and continuing mediator education, have been established by an administrative order. This order was originally adopted in 1990 and amended in 2000 to its present form as Administrative Order No. A0SC00-8, a seventeen page document. Second, an administrative order provides greater flexibility in that it can be amended periodically by the Chief Justice rather than necessitating invocation of the Court's rule-making process. For a more detailed discussion of the contents of the administrative order, please refer to paragraphs 22 - 30.

3. The most significant effect the qualifications proposal would have is the revision of mandatory educational and professional requirements. This is perhaps most obvious in relation to circuit mediators, who presently are required to be either members of The Florida Bar or retired judges from another state. The Committee, after witnessing seventeen years of practice under this requirement, concluded that persons other than attorneys or retired judges can possess the requisite skills to perform circuit court mediation. Currently, parties to a circuit mediation may agree to utilize anyone of their choosing, even a non-certified mediator. Competency as a mediator is not inextricably linked to any specific academic degree or professional license.

4. The requirement of membership in The Florida Bar with five years of Florida practice in order to be a circuit court mediator had practical underpinnings. When the Standards were first proposed in 1987, the Special Rules Committee, composed exclusively of attorneys appointed by this Court, was very concerned about gaining acceptance from the judiciary and The Florida Bar for this new experiment with court-ordered mediation. The qualifications then proposed represented the Committee's best attempt to inspire confidence with the new program and encourage its use.

5. However, a general consensus, starting with the 1988 Society of Professionals in Dispute Resolution Commission on Qualifications, has developed in the alternative dispute resolution field that possession of paper credentials (academic degrees) does not accurately predict an individual's ability to be a good mediator. Thus, Florida's reliance on mandatory academic prerequisites for family, dependency, and circuit court certification may not continue to have an entirely rational basis. Under Florida's present certification standards, a number of nationally known mediators who are otherwise well qualified to serve cannot be certified as circuit court mediators under the current qualifications. For example, Roger Fisher and William Ury, nationally renowned mediators and co-authors of *Getting to Yes*, as well as former President Jimmy Carter, could not be certified as circuit court mediators in Florida under our present qualification rules.

6. Consistent with this consensus, in 1999, the American Bar Association Section on Dispute Resolution adopted a resolution that provides that all individuals with appropriate training and qualifications should be permitted to serve as mediators and arbitrators, regardless of whether they are attorneys.

7. The necessity of the present restrictions has come into question after almost twenty years of practical experience. There have been many "qualified" individuals who have not pursued certification (perhaps dissuaded by the expense of training) upon learning of the qualifications. In addition, there are requests for reviews of staff denials of certification, which illustrate the problem. These reviews were initially considered by the Supreme Court Committee on Mediation and Arbitration Training and are now considered by the ADR Rules and Policy Committee. There have been many requests over the years that were problematic because the applicant appeared to be well qualified, but did not meet the mandatory requirements of the rule. One example involves a commercial negotiator with 30 years of experience who was denied circuit mediator certification because he was not an attorney licensed to practice in Florida. Another example involved a certified county mediator who was a certified financial planner and an Enrolled Agent before the Internal Revenue Service, who was denied certification as a family mediator because she was not a certified public accountant and did not have a masters or doctorate degree in one of the specified fields. Arguably, each such denied request generated less confidence in the current system.

8. The 1987 Committee attempted to mirror current practice at the time with regard to family mediation. Specifically, it was common for family mediators to be mental health professionals rather than attorneys. The qualifications reflected their inclusion.

9. All issues, since 1990, which relate to family mediation have routinely been conducted by both lawyers and non-lawyer professionals. There is no evidence to suggest that either group is superior to the other. An analysis of the 26 grievances filed against family mediators (58% of certified family mediators are attorneys) since the adoption of the grievance process in 1992, indicate that 20 (77%) were filed against family mediators who are licensed attorneys and only six (23%) were filed against non-attorneys. Of the six grievances filed against non-attorney mediators, three were dismissed as facially insufficient and three were dismissed for lack of probable cause. Of the 20 grievances filed against attorneys, sanctions were accepted or imposed in six instances. In addition, one case was dismissed after a "consent agreement" with the mediator. Another grievance was dismissed after a hearing panel was convened.

10. The Committee is concerned that, as Florida continues to become more diverse, the certified mediator pool should more accurately reflect the general populace of which 51.2% are female, 14.6% are African American, 16.8% are Hispanic, and 2% are American Indian, Alaskan Native or Asian (Year 2000 Demographics, U.S. Census Bureau). The present qualifications do not promote ethnic and racial diversity, nor do they promote diversity of practice and background. Of the 2114 Florida Supreme Court certified circuit mediators, roughly 22% are female, 1% are African American, 4% are Hispanic, and less than .3% are of American Indian, Alaskan Native, or Asian descent. The demographics of family mediators, while not totally representative, reflect the broader categories of qualifications. Of the 1596 Florida Supreme Court certified family mediators, 55% are female, 6% are African American, 6% are Hispanic, and less than .3% are of American Indian, Alaskan Native, or Asian descent. The fact that there is greater diversity in the family mediator population reflects its broader professional base.

Standards of Professional Conduct

11. Fla. R. Med. 10.360 (Confidentiality) should be amended in light of the 2004 adoption of the Mediation Confidentiality and Privilege Act, sections 44.401 – 44.406, Fla. Stat. Specifically, the Act enumerates exceptions and exclusions from confidentiality and privilege. Most are permissive, that is, confidentiality and privilege may not attach to the specific communication; however, neither the parties nor the mediator would be required to make a disclosure. In fact, only section 44.405(4)(a)(4), Fla. Stat., creates a requirement "by law" for a report of abuse, neglect, or exploitation of children or vulnerable adults. If Fla. R. Med. 10.360(a) were not amended, a mediator would therefore only be able to make a mandatory report of abuse, neglect or exploitation, but would not be able to disclose threatened violence under the ethical standards. Since a mediator may be the only person who heard the threat of violence, which may have occurred during a caucus session, the Committee believes that a mediator should be permitted, ethically, to make that disclosure.

12. Fla. R. Med. 10.370 (Professional Advice or Opinion) presently prohibits a mediator from offering a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue. A prohibition against unduly influencing the parties (an attenuated version of coercion) should be added to the rule. This revision is

consistent with the prohibition in Fla. R. Med. 10.310 (Self-Determination), which states that a "mediator shall not coerce or improperly influence any party to make a decision…"

13. Subdivision (a)(3) of Fla. R. Med. 10.420 (Conduct of Mediation) should be amended to add "or permitted" to require mediators to notify the parties that the communications made during the process are confidential except where disclosure is required or permitted by law. This amendment is also necessitated by the recent adoption of the Mediation Confidentiality and Privilege Act, section 44.401 – 44.406, Fla. Stat.

Disciplinary Procedures

14. Subdivision (c) of Fla. R. Med. 10.110 (Good Moral Character) should be amended to require a continuing requirement of good moral character, rather than imposing such a requirement only for initial certification. A certified mediator should be subjected to decertification for any knowingly and willfully submitted incorrect information in the mediator's initial or renewal applications. The addition of subdivision (d) would also establish a presumption that a knowing and willful violation has occurred if an application is completed, signed, and notarized.

15. The addition of Fla. R. Med. 10.120 (Notice of Change of Address or Name), would establish a requirement that any certified mediator, upon changing residence or mailing address or legal name, must notify the Dispute Resolution Center (DRC) of such change within 30 days. The purpose of the rule is to keep records accurate and current.

16. The Committee recommends the creation of Fla. R. Med. 10.130 to specify the effect a criminal conviction would have on a certified mediator or applicant. Subdivision (a) defines the term "conviction" to include a felony or misdemeanor of the first degree where adjudication has been withheld or sentence suspended. This is relevant to both the reporting requirement in subdivision (b) and the application disqualification provisions in Fla. R. Med. 10.110 (c). Any conviction would have to be reported in writing to the DRC within 30 days. The DRC, upon receipt, would be required to refer the matter to the Qualifications Complaint Committee (QCC). The DRC would be required to suspend certification pending QCC review of a felony conviction. Subdivision (c) also requires

that any conviction, which comes to the attention of the DRC prior to the required notification, be forwarded to the QCC.

17. Required notification is also contained in the Committee's proposed amendment to Fla. R. Med. 10.800 (b)(1), which would mandate that certified mediators notify the DRC of any change in status of professional licenses held by the mediator within 30 days of such change.

18. A number of minor changes are needed to Fla. R. Med. 10.810 (Complaint Committee Process) to clarify and expedite the process of determining facial sufficiency and probable cause. Specifically, subdivision (f) would be modified to refer to the rule violations forwarded to the mediator as "alleged" to avoid the appearance of bias in favor of the complainant. The use of registered mail would be eliminated in favor of certified mail (return receipt requested). Service on the mediator would be accomplished by mailing a list of the rule violations to the address on file with the DRC. The latter amendment is tied to the adoption of the requirement that the DRC be informed of any address change in Fla. R. Med. 10.120(a). Finally, subdivision (j) would be amended to allow meetings with mediators or applicants to be either in person, by video-conference, or by teleconference. The present rule does not address the nature of the meeting. While the rule has been interpreted broadly to authorize meetings in all the referenced formats, the addition of the proposed language will provide clarification and allow the Complaint Committee to take full advantage of any improvements in technology.

19. Fla. R. Med. 10.820 (Hearing Procedures) should be amended to add language to subdivision (b) to permit the circumvention of a hearing when the mediator is willing to admit any or all of the charges. In such a situation, the hearing panel could impose sanctions without the necessity of an in-person meeting, thereby providing a cost and time savings. Subdivision (d) should be amended to clarify that the presence of the members of a panel means physical presence.

20. A number of amendments should be made to Fla. R. Med. 10.830 (Sanctions). The first is the addition of a new subdivision (b) to call for a decertification period of two years or until civil rights are restored, whichever comes last, for mediators having a felony conviction. Such a mediator would be subject to the same procedures for reinstatement as any other decertified mediator. The procedure for failure to comply with

imposed sanctions should also be amended to include any additional alleged failures to comply which come to the attention of the DRC prior to the hearing date, with a proviso added that the failure to comply will not preclude a subsequent hearing. The proposed amendment should also include a statement that any suspension in effect at the time of the discovery of an alleged failure shall continue in effect until a decision is reached at the hearing.

21. Fla. R. Med. 10.880 (Supreme Court Review) should be renamed Chief Justice Review. The review of mediator disciplinary cases should be under the Chief Justice rather than the Supreme Court since such review is not listed as part of the Court's constitutional mandate. This change would remove any possible jurisdictional issues and make the review process much more expeditious. The Committee, in order to provide mediators guidance in seeking review, has drafted a specific procedure to be followed. The initial document to be filed would be entitled "Review of Mediator Disciplinary Action" and be commenced by filing of this notice within 30 days of the hearing panel's decision. Such notice of review would be filed substantially in the form prescribed in Fla. R. App. P. 9.900(a), which is entitled "Notice of Appeal". The filing of the initial brief (with an appropriate appendix) and additional briefs would be required to be in accordance with the designated appellate rules. To date, only two grievances have resulted in appeals to the Supreme Court.

Administrative Order

22. The proposed administrative order governing mediator certification is attached as Appendix C. The proposed amendments to Fla. R. Med. 10.100 would shift the details of the certification requirements, in the form of a point system, to an administrative order for the reasons enumerated in paragraph 2, supra. Amendments have also been made in the mentorship and continuing mediator education areas of the proposed order. The order has also been reorganized in a more understandable format.

23. The order establishes a point system, with minimum requirements for certification and categories in which points can be obtained. The rationale underlying this system is to provide applicants with more flexibility in obtaining certification and to eliminate the automatic disqualification of entire categories of persons. The point level for each of the four types of mediators (county, family, circuit and dependency) is set at

100 points. Any person meeting the Fla. R. Med. 10.100(a) requirements (good moral character and minimum age) can obtain points in the areas of training, education/experience, mentorship, and miscellaneous activities. There are minimum points required in the first three of these, for example, 25 points for education in family, circuit and dependency, but these category minimums add up to less than the required 100 points (except in the case of county) and thus must be supplemented by additional elective points.

24. The practical effect of this new system is to remove mandatory educational and professional requirements, such as the current requirements of having to be a member of The Florida Bar to be a circuit mediator or have a masters or doctorate degree to become a family mediator, and allow for applicants to obtain certification in a variety of different ways. This would not only increase the diversity of the mediation profession, but open it to otherwise qualified persons who have been excluded under the present system.

25. The administrative order also makes various conforming amendments and contains a table detailing the point system. The area of mentorship, which includes mediation observations and supervised mediation, is also addressed. The changes to the mentorship provisions are focused on increasing the availability of mentorship opportunities. Specifically, the proposed revisions to the administrative order would permit certified mediators to charge a fee to supervise or co-mediate with a trainee. The current restriction on charging for providing a mentorship would still be in place for observations of mediations conducted by certified mediators. Generally, trainees report little difficulty in obtaining observations of mediations to complete their mentorship, but extreme difficulty in obtaining supervised mediations. The second change designed to ease the difficulty in obtaining mentorship is found in the proposed revisions to the continuing mediator education (CME) requirements. Currently, certified mediators can count up to two hours of CME for providing mentorship opportunities to newly trained mediators. The proposal would increase this amount to four hours of CME, thereby rewarding those mediators for providing this valuable service.

26. The other significant proposed revision to CME includes a new requirement for domestic violence education for all certified mediators. Currently, only family and dependency certified mediators have a four hour domestic violence education CME minimum requirement during each two

year renewal cycle. Under the proposed revisions, all mediators would have a two hour minimum domestic violence education requirement, but there would be no change to the four hour requirement currently in place for family and dependency mediators. In addition, all certified mediators seeking renewal would be required to complete one CME hour relating to diversity/cultural awareness during each two year cycle.

27. The final area of change to the administrative order is related to fees for certification. While no increase is proposed for certification or renewal of family, dependency, or circuit mediators, a different fee structure is suggested for mediators certified for county court. Currently, county mediators pay $15 for initial certification and for each two year renewal. This $15 represents a subsidized certification fee and was initially created to recognize that many county mediators serve as volunteers for their respective courts. The county mediator category has changed over the years, given the increase in the maximum jurisdiction of the county courts from $5000, when the qualifications for mediators were first adopted, to $15,000 currently. In addition, the jurisdiction of small claims court was doubled from $2500 to $5000 in 1996. Some courts still rely on volunteers, while others have begun paying a small stipend to the county mediators. In addition, under the current rules, certified circuit and family mediators may add county certification by merely requesting the certification and paying a nominal fee. The new proposal, in an effort to return to the original intent, i.e., to provide recognition and appreciation for the volunteers, would raise the certification fee for county from $15 to $40 for both initial certification and renewal. The renewal fee would be waived if the mediator had served as a volunteer for the county court mediation program during the prior two year certification period, which would be evidenced by the timely filing of a letter from the ADR Program Director or designee to the DRC.

28. The second fee-related proposal relates to penalties for lapsing as a certified mediator. Currently, if an individual lapses as a certified mediator for less than 180 days, the mediator may become certified again by filing a renewal and a completed *CME Reporting Form* and submitting doubled fees. Those mediators who lapse for more than 180 days and less than 365 days must now complete a new certified mediation training program and pay double fees. If the mediator lapses for more than 365 days, the individual must apply as a brand new mediator meaning the mediator must complete a new certified mediation training program, meet all of the educational/ experiential prerequisites, and complete the mentorship anew.

29. The proposed revision to the administrative order would retain the present lapse penalties for both those who lapse for less than 180 days and those who lapse for more than 365 days. Those mediators who lapse for 180 days or more, but less than 365 days, will no longer be required to again attend a Supreme Court certified mediation training program. Instead, they would be required to pay a late fee equal to five times the mediator's renewal fee up to a maximum of $500. County mediators who are not eligible for the waiver described in paragraph 27, supra, would pay $200. Dependency mediators would pay $250, and family and circuit certified mediators would pay $500, even if certified in more than one area. While the amounts may seem punitive, mediators have requested an alternative to the current requirement that they must repeat a certified mediation training program. Since the family, circuit and dependency training programs are 40 hours in length and cost close to $1000, the feedback the Committee has received is that the penalty provision is preferable.

30. Lastly, the Committee recommends a transition period of one year during which an applicant could choose to seek certification under either the old or new standards.

The Committee respectfully requests the Court amend the Florida Rules for Certified and Court-Appointed Mediators and adopt the attached administrative order as proposed in this petition.

Submitted on behalf of the Committee,

Judge Shawn L. Briese, Chair
Dr. Greg Firestone, Vice-Chair*

Ezelle Alexander**
Judge Theotis Bronson
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Judge Matthew Stevenson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 11, 2005, a copy of the foregoing was furnished by United States mail to: John F. Harkness, Jr. Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300.

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