

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 COMMENTS FILED PURSUANT TO THE COURT'S
OCTOBER 11, 2006 NOTICE OF PUBLICATION**

The Court on October 11, 2006, pursuant to Rule 2.140(f), Florida Rules of Judicial Administration, through its Clerk, ordered publication of proposed amendments to the Florida Rules for Certified and Court Appointed Mediators in THE FLORIDA BAR NEWS and sent copies of the Clerk's publication letter along with the Notice to the individuals specifically listed in the Rule. Interested persons were to file comments by December 1, 2006. The Court directed the Committee to file a response to any comments filed by December 21, 2006.

1. Three letters were timely filed (Messrs. Lebio, Rodriguez-Quilichini, and Feder) while two letters were not timely filed (Mr. Starr and Ms. Yeend). The Committee will respond to all five letters in the sequence they were received since the Court, despite the untimely filings, may still consider the Starr and Yeend letters.

2. It is clear from the contents of the Lebio, Feder, and Starr letters that the writers understood the distinction between the Committee's proposed amendments removing The Florida Bar membership requirements (thus having no specific bar membership requirements) for circuit court mediators and the actual published Rule 10.100(d), Florida Rules for Certified and Court-Appointed Mediators and the table illustrating the point system in the Committee Note to Rule 10.105 which incorrectly stated the Committee's proposed amendments. It is unclear from attorney Rodriguez-Quilichini's letter whether he understood this distinction and whether his stated position would have been the same or different understanding the difference. (See the Committee's Motion to Correct Notice of Publication, et. al., which was denied by the Court on November 15, 2006.) Ms. Yeend's letter simply does not reflect whether she made the above-described distinction. Nonetheless, she succinctly states her compelling position, a position which the Committee has urged the Court to accept through its May 11, 2005 Petition and September 8, 2006 Response to The Florida Bar's Letter.

3. The Committee would note that all of the letters contain a

recitation of the writers' background and experience and the ultimate position that they have the appropriate attributes to mediate circuit court cases, i.e., they all agree that the current requirements should be amended.

4. The Committee disseminated its proposed amendments for comment far and wide including organizations with national and international membership.

5. The Committee consisting of eighteen (18) members with well over three centuries of legal (bar membership) experience, well over a century of judicial and certified mediator experience in all areas of certification, respectively, after considering all of the comments received and after fully vetting the issues, determined that mediator competence can best be assured by basing certification, not on subject matter expertise (bar membership) but on the recommended point system in conjunction with the following factors:

- A. Good moral character requirement
Rules 10.100 (a) and 10.110, Florida Rules for Certified and Court-Appointed Mediators
- B. Training
Rule 10.100(b), (c), (d), and (e), Florida Rules for Certified and Court-Appointed Mediators
- C. Education
Rules 10.100(b), (c), (d), (e) and 10.105(a), Florida Rules for Certified and Court-Appointed Mediators

- D. Mediation experience
Rules 10.100(c), (d), (e) and 10.105(b), Florida Rules for Certified and Court-Appointed Mediators
- E. Mentorship
Rules 10.100(b), (c), (d), and (e) and 10.105(c), Florida Rules for Certified and Court-Appointed Mediators
- F. Standards of professional conduct
Rules 10.200-10.690, Florida Rules for Certified and Court-Appointed Mediators
- G. An effective mediator disciplinary system
Rules 10.700-10.900, Florida Rules for Certified and Court-Appointed Mediators
- H. Continuing mediator education requirements
Administrative Order AOSC06-9

6. Mr. Lebio supports the Committee's proposed amendments, which would remove bar membership requirements for circuit court mediators. The Committee does not agree with his stated basis for the requirement removal. We do not agree that circuit court mediations necessarily "involve matters of business or relations between parties rather than issues of law." It is the Committee's position that salient qualifications of mediators do not involve subject matter expertise (bar membership) but specific expertise to assist the parties in identification of issues, foster joint problem solving, explore settlement alternatives, and to otherwise facilitate voluntary agreements without any decision-making. All of this expertise can best be accomplished through mediation training, mediation experience, mediation mentorship, and continuing mediator education requirements. The Committee would again point out that most parties in a circuit civil case are

represented by counsel. It is counsels' responsibility (not the mediators' responsibility) to provide appropriate legal advice to their clients and to protect the legal rights of their clients. Lastly, Mr. Lebio recognizes and points out the appearance of attorney protectionism that is found in the current rules when he states, "Clearly the intent of the present requirement, as well as the current position of The Florida Bar, is intended to preserve Circuit Court Mediations for lawyers." This economic protectionism was recognized in the Committee's Response to The Florida Bar in paragraph 17.

7. Attorney Rodriguez-Quilichini, evidently not understanding the Committee's proposed amendments versus the actual published rules (See paragraph 2, supra, and The Committee's Motion to Correct Notice of Publication, et. al.) and believing that an attorney's legal training to persuade a fact-finder is a transferable skill to the role of a mediator takes the position that circuit court mediator applicants should be required to be a member in good standing of any United States bar for the five years immediately preceding an application. A mediator's role is simply and clearly antithetical to the role of an attorney. Facilitation, rather than advocacy, is the essence of mediation. The Committee also disputes the subsequent distinction made between circuit and county mediation (the former needing an attorney mediator; the latter functioning adequately with a non-attorney

mediator) as not following from the reasoning preceding it. The Florida Bar effectively took the same position and the Committee addressed that position in paragraph 17 of its Response calling it economic protectionism with no valid substantive rationale. The mediator's role and the skills they utilize to perform their function do not change based on whether the amount in controversy is \$14,999 or \$15,001. County and circuit mediators both deal with cases involving legal matters and the ethical standards for mediators found in Part II of the Florida Rules for Certified and Court-Appointed Mediators apply equally to all certified and court-appointed mediators, regardless of area of certification or professional background. These rules specifically prohibit a mediator from providing a personal or professional opinion intended to "decide the dispute or direct a resolution of any issue." Rule 10.370(c). If the mediator believes that a party does not understand or appreciate how an agreement may affect the party's legal rights or obligations, the mediator "shall advise the party of the right to seek independent legal counsel." Rule 10.370(b). The mediator is ethically prohibited from providing any legal advice.

8. CPA Feder also supports the Committee's proposed amendments, which would remove bar membership requirements for circuit court mediators. He also requests what he terms "reasonable exceptions" if the

Court denies the Committee's request to eliminate Florida bar membership for circuit court mediators. The requested exceptions, except one, are encompassed in the factors in the current point system, such as other certifications, work and mediation experience. CPA Feder's fifth catch-all category is too vague and too subjective and would be impossible to consistently administer. A catch-all category also would not provide applicants with certainty as to their ability to become certified prior to investing the time and money in completing a certified mediation training program and the requisite mentorship hours.

9. Attorney Starr also agrees with the Committee's "well-explained and well-reasoned" proposed amendments, which would remove bar membership requirements for circuit court mediators and is clearly interested in whatever amendments gives him the earliest opportunity to mediate circuit court cases.

10. Ms. Yeend's letter is the most insightful of all of the letters. She very eloquently states: "Bar membership with a five-year practice component has no validity, if quality is the intent of the mediator qualification requirements. There is no research that supports that bar membership or years of legal practice create competent mediators. Only

specific training in the mediation process and development of requisite skills creates competent mediators.” This is and has been the Committee’s position from the filing of its Petition. Ms. Yeend also recognizes the protectionism when she states, “The present and proposed changes to the requirements foster a drawbridge mentality, ‘I am in and want to keep others out’.” She clearly supports the elimination of a bar membership requirement and believes mediation should stand as a separate profession and practice area. She hopes that the Court is able to distinguish between mediation and the practice of law. The present inability of Ms. Yeend to qualify as a circuit court mediator based on her qualifications (See paragraph three of her letter) arguably, is a prime example why a denial will generate less confidence in the current system. (See paragraph 7 of the Committee’s original petition).

11. The Committee notes that only five comments were received after this publication and only a total of thirteen comments have been received since the Committee filed its original petition on May 11, 2005 (including the Court directed response from The Florida Bar). Unlike the Committee’s petition, which contained data to support its position along with stated positions of organizations with national and international membership none of the comments other than Ms. Yeend’s have provided anything other than opinions and subjective feelings about appropriate qualifications. Ms.

Yeend noted that there is no research that supports the position that bar membership creates competent mediators. No one who has responded in opposition has provided a specific response to the Committee's rationale for the recommended change as stated in May 11, 2005 Petition or September 8, 2006 Response to The Florida Bar's letter. Thus, the Committee's recommendations still stand unrefuted and uncontroverted.

12. There was and has been no hue and cry against the Committee's proposals in its Petition, including the qualifications point system.

13. The undersigned, only knowing the process he goes through in reaching judicial decisions, and making no assumptions on how other judges (or justices) reach their decisions and with the utmost respect would ask each Justice to read the Committee's Petition and Response to The Florida Bar's letter and ask themselves the following question:

Is the Committee's proposed amendments strongly urging the Court to eliminate Florida Bar membership (thus having no specific bar membership requirements) for circuit court mediators supported by sound reason and rational and not based simply on belief, subjective feelings or pure speculation?

14. This Court has previously held that its decisions must be based on evidence and not on pure speculation. See Clay Electric Cooperative, Inc. v. Johnson, 873 So.2d 1182, 1189-1190 (Fla. 2003), Bush v. Holmes, 919 So.2d 392, 412 (Fla. 2006).

15. The Committee would submit that the answer to the question asked in paragraph 13 is a resounding YES!

16. This 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.” See page 8 of slip opinion.

17. In the same Opinion, this 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”. See page 9 of slip opinion.

18. 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 (or any bar membership requirement) in favor of the suggested point system for circuit court mediator qualification.

19. The Committee, in the strongest terms possible, respectfully requests that the Court adopt the attached amendments to the Rules for Certified and Court-Appointed Mediators and an amended Administrative Order consistent with the changes adopted.

Submitted on behalf of the Committee,

Judge Shawn L. Briese, Chair
Supreme Court Committee on
Alternative Dispute Resolution Rules and Policy

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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