IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULES OF APPELLATE PROCEDURE AND FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS — **CASE NO. SC09-**

PETITION OF THE COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION RULES AND POLICY TO AMEND THE FLORIDA RULES OF APPELLATE PROCEDURE AND THE RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS

The Committee on Alternative Dispute Resolution Rules and Policy (the Committee), by and through its undersigned Chair, the Honorable Shawn L. Briese, Circuit Judge, Seventh Judicial Circuit, files this petition pursuant to Florida Supreme Court Administrative Order dated July 8, 2003, AOSC03-32, In Re: Committee on Alternative Dispute Resolution Rules and Policy. The administrative order directs the Committee to monitor and recommend amendments to court rules governing alternative dispute resolution procedures, to recommend changes in policies and training standards, and to make other recommendations that would improve the use of mediation to supplement the judicial process. The order further directs the Committee to perform such other assignments related to alternative dispute resolution as may be requested by the Chief Justice. See Appendix E.

The Court has since extended the Committee's charge through successive reappointments and the regular appointment of new members filling expiring terms. See Administrative Orders AOSC05-21, dated July 7, 2005, AOSC06-58, dated September 28, 2006, and AOSC07-29, dated June 6, 2007.

Predecessor committees established in 1988 and 1989 assisted the Court with matters relating to rules of practice and procedure for court-ordered mediation and training standards. In 2001, the Court established, as successor committees, the ADR Rules Committee and the ADR Policy Committee. The Court, in July 2003, merged responsibility for both rules and policy under the current Committee.

Then-Chief Justice Barbara Pariente, by letters dated October 12, 2004, encouraged the state's district courts of appeal to consider implementing appellate mediation programs similar to the successful program developed by the Fifth District Court of Appeal. In furtherance of the Committee's charge, the Chief Justice asked each district court chief judge for districts not already represented on the Committee's Appellate Mediation Subcommittee (the Subcommittee) to consider appointing a liaison to assist in developing procedural rules, qualifications, and training recommendations. See Appendix F.

Initially chaired by Judge Matthew Stevenson, who also served as liaison from the Fourth District Court of Appeal, the Subcommittee is now chaired by Chief Judge William Palmer. Chief Judge Palmer also serves as liaison from the

Fifth District Court of Appeal. The Subcommittee's other members include Judge Burton Conner, Greg Firestone, Mel Rubin, Alan Kahn, and Mike Orfinger. Then-Judge Ricky Polston, Judge Darryl Casanueva, and Judge Gerald Cope were appointed as liaisons from the First, Second, and Third District Courts of Appeal respectively.

The Subcommittee published its work in progress for comments in the May 2008 online edition of *The Resolution Report*. The Committee and Subcommittee Chairs, also in May 2008, jointly mailed full copies of the draft proposals to all appellate judges with an accompanying request for comments. The Subcommittee collected and reviewed all comments, then made further revisions to the proposed rules. The Committee, at its July 2008 meeting, approved the revised Appellate Mediation Rules by a vote of eleven in favor, one opposed, and two abstaining, at the same time unanimously approving proposed qualifications for certified appellate mediators. The Committee, subsequent to the meeting, agreed to add a committee note to proposed rule 9.730, thereby making support for both proposed rules unanimous.

Historical Use of Appellate Mediation in Florida

Fourth District Court of Appeal

The Fourth District Court of Appeal first explored the use of ADR in appellate cases in Florida in 1989. Supported by a grant from the State Justice Institute, the Fourth District designed and implemented a settlement conference program that utilized retired judges trained in mediation techniques. Incorporating aspects of various other programs, the Fourth District:

- scheduled settlement conferences early in the process;
- stayed all briefing during participation in settlement conferences;
- imposed a confidentiality requirement for settlement conference discussions;
- permitted caucusing;
- mandated attendance if referred;
- excluded criminal appeals, civil appeals in which one of the parties is pro se, and juvenile appeals; and
- required monitoring by the Chief Judge acting, if necessary, as a troubleshooter.

The Court participated in a controlled study in which every third appeal was assigned to the program. Sponsored by the National Center for State Courts, the study found cases assigned to the program more often resulted in settlement and shorter case processing times. The study further disclosed a programmatic

emphasis on alternative dispute resolution was strongly supported by the Bar. *An Evaluation of the Florida Fourth District Court of Appeal's Settlement Conference Program,* 1990. After the initial study period, the program was state-funded through 1991.

The Fourth District again implemented a state-funded appellate mediation program effective October 1, 1998, utilizing two staff mediators housed in an off-site location. All civil final appeals were eligible for mediation and cases were screened for suitability by the mediators. Once selected, participation in mediation was mandatory. The mediation and litigation "tracks" were kept separate and the briefing schedule was unaffected. The cost of the program was just under $300,000 per year. The Court, in July 2001, upon determining state-funded appellate mediation was not a cost-effective means of disposing of pending cases, voted to discontinue the program effective September 30, 2001. The final report written by Judge Matthew Stevenson observed, however, "[m]any judges of the court expressed an interest in monitoring closely the Fifth District's pilot appellate mediation program which features mandatory appellate mediation with the use of private mediators paid by the parties themselves." The administrative order discontinuing the program stated the court's "decision to discontinue a court-funded appellate mediation program should in no way be perceived as a disapproval of the process . . . ."

First District Court of Appeal

The First District Court of Appeal implemented a staff appellate mediation and case management program two years prior to the Fourth District's second undertaking. Staff mediators, because of the First District's statewide jurisdiction, often conducted mediations via telephone or video teleconference. Parties could opt for mediation with a private mediator selected by the parties at their expense, but private mediators were afforded no authority to deal with case management matters. Referral to mediation did not stay the briefing schedule. The program was in effect July 1, 1996 through December 31, 2001, when it was abolished pursuant to Administrative Order 02-1 as "necessitated by recent severe budgetary constraints."

Fifth District Court of Appeal

The Appellate Mediation Program organized by the Fifth District Court of Appeal, which began as a pilot program in 2001 for final civil and family appeals with attorney representation of all parties, was deemed a success by the court and adopted as a permanent program in 2004. The court determined that the program was achieving the goals of saving litigants time and money by resolving disputes more quickly and less expensively than the appellate process and helped to narrow and clarify issues for appeal so that cases could be expedited.

The Fifth District Mediation Program is different from previous appellate mediation programs in the state. Selections of cases appropriate for mediation are made by one of three screening judges on the court. The parties complete and file with the court a mediation questionnaire setting forth the issues involved in the appeal and their position on whether mediation would be helpful.

Mediation is mandatory once a case is selected, within a limited time span, so that the delay will not significantly affect the course of the appeal if mediation fails, and so that most of the costs of the appeal can be avoided if the mediation is successful.

The parties are free to select their own mediator from a list of mediators who are certified in civil, family or dependency mediation and who have taken the appellate mediation training conducted by the court. Mediators agree to accept referrals from the court at a rate of $200.00 per hour for parties who cannot agree on a mediator and to accept up to two pro bono cases per year, for a limited time span per case, for parties unable to afford mediation. More than 250 mediators have completed the training district wide and are eligible for selection as mediators. The parties, in almost all cases, mutually agree on a mediator, so the court has rarely had to randomly select a mediator.

Proposed Amendments to Rules of Appellate Procedure

The Committee, with thanks for the substantial work undertaken by the Appellate Mediation Subcommittee and liaisons representing Florida's five district courts of appeal, offers the following amendments to the Florida Rules of Appellate Procedure and Rules for Certified and Court-Appointed Mediators. The Committee's proposals are set forth in summary below and in full as appendices. The proposed appellate rules appear first in full-page legislative format and in a two-column chart with explanations of new and changed text in Appendices A and B respectively. Proposed appellate mediator qualifications appear respectively in legislative and two-column formats in Appendices C and D.

The Committee's recommendations for procedural rules governing appellate mediation, proposed Florida Rules of Appellate Procedure 9.700 – 9.740, are based on comparable provisions governing the state's trial court mediation program. See Fla. R. Civ. P. 1.700 – 1.730. Initially adopted in 1987 and effective January 1, 1988, these rules have been utilized extensively and modified as experience has dictated. The Committee also has gained substantial insight from the experience of the successful appellate mediation program developed by the Fifth District Court of Appeal.

Proposed Rule 9.700

The proposed rules would be applicable not only in the state's district courts of appeal, but in all appellate courts, including the supreme court and circuit courts hearing appeals of county cases. See *proposed* Fla. R. App. P. 9.700(a). The Committee, while anticipating the most common use would be in the district courts of appeal, saw no reason to limit mediation of appellate cases to the district courts and believes the proposed procedure will be appropriate for any level of appeal. Proposed rule 9.700(b) provides matters on appeal may be referred to mediation at any time by the court on its own motion or upon the motion of a party. Under proposed rule 9.700(b)(1)-(3), a party movant would be required to consult with opposing counsel or an unrepresented party and certify there is no objection or, if there is an objection, to cite the specific reasons for the objection or advise the court an objection will be promptly filed by the other party. Parties, under the rules governing mediation in the trial courts, may seek a referral only upon a written stipulation. See Fla. R. Civ. P. 1.700(a).

The Committee, considering the potential savings to both the courts and parties through earlier resolution of appeals, set a more restrictive time frame for appellate mediations than in the rules governing mediations in the trial courts. Proposed rule 9.700(c) provides the first mediation conference shall be commenced within 45 (rather than 60) days of the order of referral, cf. Fla. R. Civ.

P. 1700(a)(1), and shall be completed within 30 (rather than 45) days following the initial conference, cf. id. at 1.710(a). The times for processing cases would be tolled for the period extending from referral of cases to mediation until the mediations end, though the appellate courts may extend deadlines by administrative order. See *proposed* Fla. R. App. P. 9.700(d). The proposed rule further provides a party's motion for mediation filed within 30 days of a notice of appeal tolls all deadlines until ruled upon by the court. See id. The Committee believes tolling is necessary because of the strict time frames for appeals.

Proposed rule 9.700(e) mirrors, in pertinent part, the rule relating to motions to dispense with mediation in the trial courts. See Fla. R. Civ. P. 1.700(b). Specifically, a party may move to dispense with mediation within 15 days after referral if the court impermissibly orders mediation of an action not subject to mediation under proposed rule 9.710 or can otherwise show good cause.

Proposed Rule 9.710

The Committee's intent, as has largely been the practice in the trial courts, is to limit appellate mediations to civil matters. While providing any case may be referred to mediation at the discretion of the court, proposed rule 9.710 enumerates several categories of actions not subject to referral to appellate mediation. In addition to habeas corpus, extraordinary writs, civil and criminal contempt, see *proposed* Fla. R. App. P. 9.710(b) and (c) (all also excluded from referral to

mediation in the trial courts), other actions excluded from referral to appellate mediation are criminal and post conviction cases, see id. at 9.710(a), involuntary civil commitments of sexually violent predators (Jimmy Ryce cases), id. at 9.710(d), and collateral criminal cases, id. at 9.710(e). Just as in the trial courts, the proposed rule permits exclusion of other matters as may be specified by administrative order. Id. at 9.710(f).

Proposed Rule 9.720

Proposed rule 9.720(a), relating to required appearances, is substantially the same as its counterpart governing mediations in the trial courts. Cf. Fla. R. Civ. P. 1.720(b). The proposed appellate rule differs from the rule governing trial level mediations in that there is no provision in the appellate rule permitting the parties to stipulate to an appearance other than as provided by the rule. Neither does the proposed appellate rule further limit full authority to settle by a representative of an insurance carrier. Compare *proposed* Fla. R. App. P. 9.720(a)(3) (full authority to settle) with Fla. R. Civ. P. 1.720(b)(3) (full authority to settle *up to the amount of the plaintiff's last demand or policy limits, whichever is less*) (emphasis added). The proposed rule specifically permits one attorney's presence to satisfy physical appearance by an attorney when a party is represented by more than single counsel. See *proposed* Fla. R. App. P. 9.720(a)(2). Otherwise, unless changed by order of the court, cf. Fla. R. Civ. P. 1.720(b) (additionally permitting parties to stipulate to

a changed appearance requirement), a party's appearance at a mediation conference is satisfied in the same manner as provided in the civil rules.

Specifically, persons required to be physically present under the proposed rules governing appellate mediation are: 1) the party or the party's representative having full authority to settle without further consultation, 2) the party's trial or appellate counsel of record, if any, and 3) a representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle without further consultation. See *proposed* Fla. R. App. P. 9.720(a)(1)-(3).

The attorney required to appear may be either trial or appellate counsel in order to accommodate a referral to mediation at any point in the process. If a party is represented by more than one attorney, only one must appear.

Allowing sanctions for failure to appear at appellate mediation is consistent with mediation practice in the trial courts. Upon failure to appear at a duly noticed mediation conference without good cause, the proposed appellate rules permit imposition of sanctions including, *but not limited to*, any or all of the following: 1) an award of mediator and attorney fees and other costs or monetary sanctions, 2) the striking of briefs, 3) elimination of oral argument, and 4) dismissal or summary affirmance. See *proposed* Fla. R. App. P. 9.720(b)(1)-(4). The proposed

rule makes clear the court may impose sanctions upon its own motion, as well as upon the motion of a party. Cf. Fla. R. Civ. P. 1.730(c).

Mediators, under proposed rule 9.720(c), upon first consulting with the parties, are charged with responsibility for scheduling, noticing, adjourning, and reconvening conferences consistent with time frames set forth in proposed rule 9.700(c). The proposed rule frees the appellate courts from responsibility for initial scheduling and providing written notice to parties as required by the rules governing mediation in the trial courts. Cf. Fla. R. Civ. P. 1.700(2).

Proposed rules 9.720(d) and (e) mirror provisions in the civil rules giving the mediator control of procedures as well as explicit authority in relation to private communication with parties and counsel. Cf. Fla. R. Civ. P. 1.720(d) and (e). Proposed rule 9.720(e) similarly permits counsel to communicate privately with their clients. Cf. id. at 1.720(d).

Proposed Rule 9.730

The proposed rules would restrict parties to selection of a supreme court certified mediator in order to satisfy a referral by the court. By contrast, the rule governing mediation in the trial courts currently allows parties to select either a certified mediator or a mediator (other than a senior judge) who is not certified but is "otherwise qualified." This rule was initially adopted when certification as a circuit mediator required membership in The Florida Bar and five years

experience or prior service as a judge. The rule was amended in 2007, permitting certification of non-attorneys. The Committee believes the proposed rule appropriately limits to supreme court certified mediators the pool of appellate mediators permissibly satisfying a court-ordered referral to mediation.

Proposed rules 9.730(a) and (b) provide for selection of certified appellate mediators either by stipulation of the parties or, failing agreement, by court appointment. Under proposed rule 9.730(a), parties may file a stipulation with the court within ten days of the court's order of referral, said stipulation designating a mediator certified as an appellate mediator in accordance with proposed rule 10.100(f), Florida Rules for Certified and Court-Appointed Mediators. Should the parties fail to agree within ten days of the order of referral, the court would appoint a certified appellate mediator in accordance with provisions determined by administrative order. Because the Committee is recommending that the qualifications for appellate mediators track the point system adopted by the Florida Supreme Court in 2007, all certified appellate mediators will not necessarily be attorneys. Thus, the court, upon the request of either party, would be required to appoint a certified appellate mediator licensed to practice law in Florida or another United States jurisdiction. This requirement follows from language approved by the Florida Supreme Court when it adopted the point system for the trial courts. Cf. Fla. R. Civ. P. 1.720(f)(2) (requiring,

upon request of either party, appointment of a certified circuit court mediator licensed to practice law in Florida).

The Committee's expressed preference for use of certified mediators in appellate matters follows from extensive discussion over the course of successive meetings. The Committee, at its March 14, 2008 meeting, voted unanimously to delete draft text alternatively permitting parties to select a mediator who does not meet certification requirements, but who, in the opinion of the parties, is otherwise qualified by training or experience to mediate all or some of the issues in a particular case. Meeting again July 11, 2008, the Committee voted 12-2 to reject a motion which would have allowed parties to stipulate to a non-certified mediator upon consent of the court.

The Committee subsequently approved a proposed committee note addressing party self-determination. Though the proposed rule anticipates selection or appointment of a certified mediator within ten days of a court order of referral, the note makes clear parties are not deprived of the ability to select a *non-certified* mediator any time in advance of referral. Neither would the proposed rule preclude parties from using *non-certified* mediators to facilitate settlements within the ten-day period following referral. Further, even though a mediation conducted by a non-certified mediator would not satisfy the court's referral to

mediation, the court nonetheless retains the ability to accept a resulting settlement. See Committee Note to *proposed* Fla. R. App. P. 9.730.

Proposed rule 9.730(c), again paralleling provisions governing mediation in the trial courts, permits any party, upon a showing of good cause, to move for entry of an order disqualifying a mediator. A motion for disqualification, while pending, tolls the time for mediation. Language not reflected in the rules governing mediations in the trial courts provides motions to disqualify must be filed within ten days after discovery of facts constituting grounds for disqualification. Cf. Fla. R. Civ. P. 1.700(d) (providing no time frame for filing motion to disqualify). The court's order must set forth the name of a qualified replacement. Under proposed rule 9.730(d), a substitute mediator may be agreed upon or appointed in the same manner as the original mediator. Proposed rule 9.730(e) provides that fees shall be set by the court only if the court selects the mediator. Cf. Fla. R. Civ. P. 1.720(g).

Proposed Rule 9.740

Proposed rule 9.740(a) provides mediators must report to the court, within ten days, any mediation in which the parties fail to reach an agreement (an impasse). Such reports are to be made without comment or recommendation. Cf. Fla. R. Civ. P. 1.730(a). Proposed rule 9.740(b) provides that mediators must reduce mediation agreements to writing and secure the signatures of the parties and

their counsel, and, within ten days, file a report with the court on an approved form. Cf. Fla. R. Civ. P. 1.730(b).

Proposed Amendments to Rules for Certified and Court-Appointed Mediators

Qualifications

The Committee's recommendations regarding qualifications for Florida Supreme Court certified appellate mediators are set forth in proposed amendments to rule 10.100 of the Florida Rules for Certified and Court-Appointed Mediators. Proposed revisions to the rule are minimal, first making applicable to appellate mediators general provisions requiring all applicants for certification to be at least 21 years of age and be of good moral character. The Committee further proposes new language providing that an applicant for initial certification as an appellate mediator "must be a Florida Supreme Court certified circuit, family or dependency mediator and successfully complete a Florida Supreme Court certified appellate mediation training program." See *proposed* Fla. R. Med. 10.100(f).

Before reaching this determination, the Committee discussed at length whether membership in The Florida Bar should be a requirement for certification of appellate mediators. Some committee members pointed to differences in trial and appellate cases, noting legal issues predominate in matters before the state's appellate courts. Those members also advanced a second rationale similar to

concerns initially raised regarding mediation in the trial courts, namely the process should quickly gain acceptance by the bench and bar. Several other members of the Committee pointed to the benefit potentially derived from encouraging a diverse experience among appellate mediators especially since the parties have the freedom to pick an attorney or non-attorney mediator as they prefer. The Committee, in this regard, considered as a model the successful program developed by the Fifth District Court of Appeal in which Bar membership is not a prerequisite.

The Appellate Subcommittee, in January 2006, recommended to the Committee qualifications for appellate mediators which would open certification to applicants not licensed as attorneys. The Subcommittee's recommendation embraced the potential benefit inherent in requiring current certification as family, dependency, and/or circuit mediators. The Subcommittee, acknowledging substantial differences in trial and appellate cases, recommended required completion of approved appellate mediation training as a condition of certification. The Committee, although expressing general agreement, postponed a vote pending the Court's adoption of mediator qualifications for the trial courts. See In re: Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, 969 So. 2d 1003 (Fla. 2007) (supplementing 931 So. 2d 877 (2006)). The Committee,

in July 2008, following release of the Court's supplemental opinion, unanimously agreed to proposed appellate mediator qualifications which opened certification to non-attorneys and required substantial training keyed to appellate matters.

Disciplinary Procedure

The Committee recommends minor amendments to the Florida Rules for Certified and Court-Appointed Mediators which would slightly expand the Mediator Qualifications Board (MQB) to better permit handling of grievances filed against appellate mediators. The expanded membership might then employ already-established procedures and policies in relation to any grievance filed against a certified appellate mediator. The Committee, much as the MQB was expanded when adding dependency mediators as a new area of certification, recommends that each division of the MQB have at least one and no more than three certified appellate mediators. These members would also be eligible to serve as the third member of a complaint committee or the fourth or fifth member of a hearing panel.

Rather than add another member to the nine currently serving on the Mediator Ethics Advisory Committee (MEAC), the Committee recommends that at least one of the nine also be certified as an appellate mediator. This proposal is consistent with how dependency mediation was incorporated into the MEAC in 1994.

Training

The Committee further agreed to develop an appellate mediation training program modeled after the successful program in the Fifth District Court of Appeal. The Fifth District's program provides not only a framework around which the Committee would structure a statewide appellate mediation training program, but invites, as well, reflective examination based on substantial experience over a period of years.

The Committee has named a Subcommittee on Training which is already working to complete recommended revisions to training standards for trial court mediators. This subcommittee is also prepared to develop appellate mediation training standards, including specific learning objectives, which should be available by the time the Court adopts these proposed rules. The Committee, anticipating changes as successive training events reveal new and better ways of pursuing appellate mediation, recommends the Court continue its practice of adopting training standards by administrative order.

WHEREFORE, the Committee on Alternate Dispute Resolution Rules and Policy respectfully requests this Court consider and adopt the proposed

amendments to the Florida Rules of Appellate Procedure and the Rules for Certified and Court-Appointed Mediators.

Respectfully submitted this ____ day of _________________ 2009.

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Judge Shawn L. Briese, Chair
Supreme Court Committee on
ADR Rules and Policy
125 East Orange Avenue, Room 106
Daytona Beach, FL 32118
386/257-6090
Florida Bar Number 316202

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by a Dispute Resolution Center staff member by United States mail this ____ day of ___________ 2009, to John F. Harkness, Jr. Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300.

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify this petition has been prepared in MS Word using Times New Roman 14-point font, which complies with the font requirements as set forth in Florida Rules of Appellate Procedure 9.100.

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Judge Shawn L. Briese