IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO 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 FOR CERTIFIED AND COURT-APPOINTED MEDIATORS

The Committee on Alternative Dispute Resolution Rules and Policy (hereinafter, "the Committee"), by and through its undersigned Acting Chair, Thomas H. Bateman III, 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 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 C.

In December 2004, then-Chief Justice Barbara A. Pariente brought to the Committee's attention examples of advertisements which raised concerns among the court members about the use of the designation "Judge" by former judges promoting mediation services. As detailed below, then-Committee Chair, Circuit Judge Shawn Briese, requested a newly-created subcommittee to pursue the advertising issue. The subcommittee undertook an extensive review of mediator advertising, following which successive drafts of an amended advertising rule were disseminated for public comment. By July 2007, the Committee had approved a proposed rule change for submission to the court, but chose not to file a formal petition at that time. The Committee decided that a comprehensive response to the problems sometimes created by advertising requires the development of an educational component, which the Committee is continuing to develop.

By letter dated February 10, 2009, Clerk of Court Thomas D. Hall notified Judge Briese of the court's request that the Committee study the use of the title "Judge" by retired judges providing mediation services. Specifically, the court asked whether the Florida Rules for Certified and Court-Appointed Mediators should be amended to preclude retired judges from using the title "Judge" in letterheads, pleadings, advertising, business cards, and so forth, in connection with the provision of mediation services. See Appendix D. Although the court separately directed The Florida Bar to study the issue as it relates to retired judges

who practice law, the court's explicit request of the Committee was to study the matter in light of the fact that Florida Bar membership is not a prerequisite for certification as mediator.

Although the court's request is directed to matters involving retired judges who provide mediation services, the proposed rule also applies to senior judges and to out-of-state practitioners providing mediation services in Florida. Brief comment is appropriate in relation to senior judges in particular.

In December 2004, the Committee submitted recommendations to the court relating to senior judges serving as mediators. These recommendations addressed issues arising out of the differing roles of mediators and judges. Proposed safeguards were intended to address concerns having to do not only with mediator qualifications, but also with matters including 1) possible compromise of party self-determination, 2) use of judicial status inappropriately creating an advantage in obtaining business or referrals, 3) actual or potential appearance of impropriety, and 4) more deferential behavior of attorneys anticipating appearance before the mediator in their judicial capacity. See Senior Judges as Mediators Amended Final Report, Dec. 1, 2004 at p. 14.

In November 2005, the court approved safeguards requiring senior judges serving as mediators to become qualified by certification under the Florida Rules for Certified and Court-Appointed Mediators. See Fla. R. Med 10.100(f). Canon

5F(2) of the Code of Judicial Conduct (Code) carries the same requirement. The Code further provides a senior judge may be associated with an entity solely engaged in offering mediation or other alternative dispute resolution services, "but may in no other way advertise, solicit business, associate with a law firm, or participate in any other activity that directly or indirectly promotes his or her mediation services." Id. Senior judges serving as mediators are further subject to the ethical rules and disciplinary processes governing mediators. The court now also requires senior judges to complete a continuing mediator education program before providing mediation services. See Fla. R. Jud. Admin. 2.320(b)(3).

Background

In January 2005, soon following the court's initial request, the Committee Chair appointed an Advertising Subcommittee ("the Subcommittee") and named Circuit Judge Burton Conner as chairperson. Charged with determining whether amended or new rule provisions would remedy problems relating to mediator advertising, the Subcommittee collected and analyzed many examples from both print and online publications. At or about the same time, the Subcommittee surveyed Florida Supreme Court certified mediators who previously served as judges or were at the time approved for service as senior judges. Two-thirds of the retired judges advertising mediation services referenced their status as former

judges in the advertisements. See Appendix F. At the Subcommittee's request, DRC staff canvassed ADR Directors and Mediation Program Coordinators around the state with respect to issues in mediator advertising. The Subcommittee also reviewed advertising opinions of the Mediator Ethics Advisory Committee and related opinions of the Judicial Ethics Advisory Committee.

The Subcommittee initially focused on mediator advertising deemed troublesome, in part, because of a perceived appearance of impropriety potentially impugning the integrity of the judicial system. This concern arose repeatedly in relation to possible misuse of the prestige of judicial office. The Subcommittee and the Committee realized after a time that a better way to address some of the advertising concerns was to focus in part on education so that the public might not be as easily confused by advertisements touting a mediator's judicial experience. In January 2006, the Committee chair expanded the Subcommittee's charge to encompass an education component and changed its name to the Public Awareness and Advertising Subcommittee. Among advertising concerns potentially addressed through improved education is confusion over differences between mediation and litigation processes, including the respective roles of both judges and mediators. Additionally, deference inevitably paid former judges potentially compromises informed party self-determination and selection of a mediator. Further, regulation

of truthful but potentially misleading advertising is problematic due to First Amendment concerns.

The Subcommittee met in person and by conference call no fewer than eleven times and considered public comments throughout the process before offering to the full Committee draft text recommending revisions to the mediator advertising rule. Among those providing comments were The Academy of Florida Mediators, the Florida Association of South Florida Mediators and Arbitrators, the Dispute Resolution Center's Annual Conferences for Mediators and Arbitrators in 2005 and in 2006, and various continuing mediator education programs.

The full Committee heard Subcommittee reports and considered mediator advertising as a principal order of business at seven committee meetings before unanimously approving draft text of a proposed rule in May 2007. The Committee then sought additional public comment, formally publishing the draft text in the DRC's June 2007 online edition of The Resolution Report. In the absence of comments suggesting substantive changes in the May 2007 language, the Committee voted unanimously in July 2007 to approve the text in final form. The Committee then directed the draft proposed rule be published again with a final request for comments in the DRC's November 2007 edition of The Resolution Report which was distributed to approximately 5,500 certified mediators, some additional 1,500 persons trained but not yet certified, and over

1,000 other individuals and mediation groups. Significantly, the Committee received no comments suggesting substantive revision of the draft proposed text.

Given a substantial public education component underlying the proposed rule provisions, the Committee unanimously approved development of an informational website in February 2008. The proposed Dispute Resolution Center site will permit users of mediation services to find simple answers in lay terms, as well as links to statutory and rule provisions in the event additional detail is needed. There are also pages on the website designed to provide information to lawyers and professionals who may not be familiar with mediation. Though the site is presently still in development, the Committee previewed an online demonstration in April 2009, and is hopeful the site will soon be available as a resource supplementing a revised mediator advertising rule. The online test site under development for use by the general public may be accessed at http://www.flcourts.org/gen_public/adr/MediationInformation/GenPubMedPortal.html .

Proposed Amendments to Mediator Advertising Rule

The Committee, with thanks for the substantial work undertaken by the Public Awareness and Advertising Subcommittee, offers the following amendments to Rule 10.610 of the Florida Rules for Certified and Court-

Appointed Mediators. The Committee's proposals are set forth in summary below and in full as appendices. The proposed new rule focuses on marketing practices, whereas the current rule focuses on advertising. The new rule appears first in full-page legislative format in Appendix A and in a two-column chart with explanations of new and changed text in Appendix B.

With the addition of language in the "Committee Notes" which is responsive to the court's February 10, 2009 request, the proposed rule is identical to text previously agreed to by unanimous consent of the Committee in July 2007. The proposed new rule and the "Committee Notes" were unanimously approved by the Committee in April 2009.

In brief, the proposed rule sets forth a broader frame of reference in regards to prohibited marketing practices than the current "advertising" rule. Changing the title from "Advertising" to "Marketing Practices" better reflects the new content. The proposal retains provisions in the present rule relating to false or misleading information, as well as accuracy and honesty in relation to mediator qualifications. The proposal similarly leaves in place current language relating to prohibited claims or promises. New provisions, however, are included for the purpose of clarifying matters where public confusion may occur. These include the significance of mediator certification, differences between mediation and litigation, and matters potentially compromising a party's right to self-determination. A new

committee note addresses differing roles of mediators and judges, the inevitable damage to the integrity of the courts when the prestige of judicial office is used for commercial purposes, as well as the appearance of impropriety when it seems a former judge seeks to benefit personally from the prestige of judicial office.

Proposed Rule 10.610(a)

Preserving the substance of the current rule as it relates to false statements and misleading practices, new language under rule 10.610(a) would expand the proposed rule's application to marketing practices in general. In this regard, marketing practices include advertising among an aggregate of activities potentially involved when mediators communicate with the public about their mediation services. These include claims relating to mediator qualifications, such as supreme court certification and other certifications, as well as one's background and experience. Similarly included among a more expansive range of marketing practices are prohibited claims or promises unrelated to advertising, such as improper opening statements intended to garner new business and other nuances of marketing improprieties that are occasionally manifested in the business names of entities providing mediation services.

Proposed Rule 10.610(b)

New language under rule 10.610(b) provides any marketing practice which indicates a mediator is "Florida Supreme Court certified" shall be considered misleading unless also identifying one or more areas of certification in which the mediator maintains Florida Supreme Court certification. This provision codifies a 2002 opinion of the Mediator Ethics Advisory Committee (MEAC) which concludes a generic designation is inherently misleading. See MEAC Op. 2002-003. The MEAC opined failure to specify a particular type of certification may lead the public to believe a "certified" mediator is formally certified in an area in which the mediator is not certified. Similarly, a generic claim of certification may suggest a mediator is certified in all fields or that there is but one all-encompassing certification required for persons engaged in all types of mediation. The rationale underlying the Committee's decision to propose this language rests in the all-too-frequent misuse of the generic designation and an acknowledgment the advisory opinion does not have the force of a rule.

Proposed Rule 10.610(c)

Proposed rule 10.610(c) would preclude mediators from engaging in marketing practices relating to certification which have the effect of blurring the distinction between Florida Supreme Court certified mediators and other

certifications. The proposed rule requires any claim of certification shall be considered misleading and a violation of the rule unless the mediator claiming such certification has successfully completed an established process for certification involving actual instruction. By linking certification directly with a training requirement, the Committee wishes to make clear mere payment of a fee is an inadequate basis for claims of certification. The proposed rule would also require mediators to identify the entity issuing the referenced certification and, if applicable, state the particular area or field of specialization.

Proposed Rule 10.610(d)

Proposed rule 10.610(d) addresses prior adjudicative experience. In considering this language, the Committee has attempted to take into account several key issues. These issues include the integrity of judicial office in relation to mediation and associated concerns regarding use of the title "Judge" when marketing mediation services. This is the subject of the court's February 10, 2009 request and the Committee's report filed contemporaneously with this petition, as discussed more fully below.

Though having considered prior adjudicative experience at length before approving draft text for subdivision (d) in July 2007, the Committee again examined use of the honorific at its April 3, 2009 meeting. Although changed

qualifications for mediator certification no longer require membership in The Florida Bar in any area of mediator certification, several members of the Committee expressed concern regarding potentially different standards in the respective rules. Others noted the direction given the Committee by the court recognizes that one need not be a judge or lawyer to be an effective mediator. Moreover, the ABA opinion appended to the court's request treats ADR activities differently than the practice of law. Upon concluding former judges returning to the practice of law may not continue to use the titles "Judge" or "the Honorable," the final paragraph of the ABA opinion states:

> In reaching this conclusion, the Committee emphasizes that it is perfectly proper for a former judge to inform potential clients of this prior judicial experience. For example, if the former judge is seeking to offer his services as an arbitrator, mediator, or similar neutral roles often undertaken by former judges in the area of private alternative dispute resolution, the ex-judge would certainly be free to describe his judicial experience. So long as the description is accurate, and does not convey an implication of special influence, its use will be consistent with the prohibition discussed in this opinion.

See ABA Formal Op. 95-391.

The Committee discussed the potential change in the mediation rules in light of a retired judge providing mediation services. The Committee believes this involves a substantially different frame of reference than one in which a retired

judge returns to the practice of law. Having engaged in extensive debate and discussion, the Committee decided the draft proposed text of subdivision (d) addresses the issue, without change, but voted 11–1 to add a more directly related provision under subdivision (f), as well as clarifying language in the "Committee Notes" as follows:

> The roles of a mediator and an adjudicator are fundamentally distinct. The integrity of the judicial system may be impugned when the prestige of the judicial office is used for commercial purposes. When engaging in any mediation marketing practice, a former adjudicative officer should not lend the prestige of the judicial office to advance private interests in a manner inconsistent with this rule. For example, the depiction of a mediator in judicial robes <u>or use of the word "judge" with or without modifiers preceding the mediator's name</u> would be inappropriate. However, an accurate representation of the mediator's judicial experience would not be inappropriate. This rule is not intended to prohibit appropriate reference to prior adjudicative service by use of such terms as "circuit judge retired," "former judge of compensation claims," and "former general magistrate."

<u>Proposed</u> Rule 10.610, Committee Notes.

The Committee provided the draft proposed rule, as revised, to The Bar's Professional Ethics Committee. The Bar subsequently notified the Committee it was considering withdrawing old ethics opinions and referring the issue to the Standing Committee on Advertising to adopt a formal advisory advertising opinion on the issue. On June 25, 2009, The Bar's Standing Committee on Advertising

adopted Proposed Advisory Opinion A-09-1 regarding use of the title "Judge" by former judges actively practicing law. See Appendix E. The proposed advisory opinion was published in the July 15, 2009 edition of the Florida Bar News. While any interpretation of The Bar's proposed opinion is beyond the scope of the Committee's charge, the opinion would not seem in apparent conflict with the Committee's proposed revision of Fla. R. Med. 10.610.

A second closely related issue involves the appearance of impropriety when former judges use prior adjudicative experience to promote their mediation services. This would seem a critical concern given frequent public misperception with respect to differences between mediation and litigation processes. Although general subject matter expertise and knowledge specifically with respect to the judicial process may be relevant on occasion, prior adjudicative experience is by no means a prerequisite to becoming an effective mediator.

At the same time, the Committee believes anyone who has served even briefly as a member of the judiciary should not be prohibited from including his or her tenure as a judge when describing background and experience. Important in this regard, the Committee recognizes background and experience may be relevant apart from marketing practices and has framed the proposed rule in a manner that does not interfere with the public's right to be informed regarding these matters. Describing one's judicial service in a resume or biographical sketch is not,

however, the same as stating or implying prior adjudicative experience makes one a better or more qualified mediator.

Differences between mediation and litigation processes are at the center of yet another concern to the extent selection of a mediator based on prior adjudicative experience potentially compromises party self-determination. Marketing practices encouraging selection of a mediator because of an implied or presumed advantage owing to his or her prior judicial experience is contrary to what we know about the differences between the practice of law -- particularly judicial determinations in the context of litigation -- and mediation. Again, one need not be a judge or lawyer to be an effective mediator. In a resolution adopted in 1999, the American Bar Association Section on Dispute Resolution stated all individuals with appropriate training and qualifications should be permitted to serve as mediators, regardless of whether they are attorneys [or retired judges]. The court has underscored this point upon approving new mediator qualifications in November 2007. 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) (concluding persons other than attorneys or retired judges can possess the requisite skills to serve as mediators and removing Bar membership as a requirement for all areas of mediator certification).

Rather than serving as advocates, mediators function in an impartial role helping parties open lines of communication and facilitating a process of negotiation and party self-determination. By strong contrast, judges serve as decision-makers. Consequently, marketing practices should not contribute to a blurring of the roles of judges and mediators. Because decision-making is the sole responsibility of the parties in mediation, any advantage secured through selection of a mediator whose principal experience is as a decision-maker would appear counterintuitive. The selection of a mediator should not be promoted by marketing practices which compromise party self-determination.

Proposed Rule 10.610(e)

With the exception only of a new title indicating this provision relates to "Prohibited Claims or Promises," subdivision (e) consists entirely of text retained, without change, from the current rule.

Proposed Rule 10.610(f)

Subdivision (f) prohibits other marketing practices which diminish a party's right to self-determination and mediator impartiality, as well as practices which may undermine public confidence in either the mediation process or the judicial system. The concerns the rule is intended to remedy are the same as or similar to the issues discussed above in relation to prior adjudicative experience. In regard to

mediator impartiality, the proposed rule would stand against marketing practices either promising or implying any presumptive advantage over another party which is purportedly available as a consequence of selecting one mediator as opposed to any other. As for a party's right to self-determination, the proposed rule would prohibit marketing practices inviting a belief a mediator will *decide* any matter. For example, the proposed rule would forbid advertising to the effect a mediator with a background in a given field will affirmatively make findings and offer conclusions consistent with routine practice or governing law in that area. The important distinction between adjudication and mediation is that the latter should never to be seen as anything other than a self-determined process.

The subdivision (f) prohibition of marketing practices that demean the dignity of the mediation process or the judicial system addresses the sorts of concerns raised by the court when first referring this matter to the Committee for review. One of the examples given was a prominent mediation group's distribution of several themed calendars on display in the group's offices. One of them, a swimsuit calendar, received substantial attention in the local press, an article describing public display of the calendar as "a practice more commonly associated with hardware firms and auto parts suppliers" than a group made up of attorney-mediators. A similar example was an advertisement appearing in The Florida Bar Journal which listed among several "retired judges" an individual who

had been removed from the bench for misconduct. One advertisement pitched a mediator as having "the vision to drive the deal" and another actually described the mediator as a "miracle worker." The Committee collected and reviewed over a period of months a substantial number of questionable advertisements. Proposed subdivision (f) is a component of the Committee's response intended to address unwarranted self-promotion and otherwise prohibit marketing practices that demean the dignity of the mediation process or the judicial system.

Proposed Committee Notes

The proposed "Committee Notes" are a distillation of years of discussion by Committee members regarding concerns relating to marketing practices. As is true of committee notes in general, the commentary is intended to provide guidance with respect to the purpose and meaning of rules, clarifying by explanation and example their intended effect as applied.

Upon first specifying the areas in which mediators may earn certification, the "Committee Notes" embrace a series of clarifying statements relating to several of the concerns the Committee has addressed in the body of the rule. First emphasizing the differing roles of mediators and judges, the text then warns mediators against impugning the integrity of the judicial system by using the prestige of judicial office for commercial purposes. The "Committee Notes" further caution judges and other former adjudicative officers not to engage in

marketing practices which cite prior judicial service as a means of promoting one's self-interest. The text then gives examples of prohibited conduct, including prohibited use of the title "Judge" with or without modifiers if the honorific precedes the mediator's name. The text is included as an explicit response to the court's February 10, 2009 request. The text expresses limitations which give more exacting guidance concerning the prohibitions in subdivisions (d) and (f). The "Committee Notes" thereafter distinguish between improper use of the honorific and an accurate representation of one's background and experience which may permissibly following the mediator's name.

Report in Response to Court's Request

A separate report has been prepared in response to the court's February 10, 2009 request the Committee study the more narrowly framed question as to whether the Florida Rules for Certified and Court-Appointed Mediators should be amended to preclude retired judges from using the title "Judge" in letterheads, pleadings, advertising, business cards, etc. in connection with their provision of mediation services. The report has been submitted contemporaneously with the filing of this petition.

WHEREFORE, the Committee on Alternate Dispute Resolution Rules and Policy respectfully requests this court consider and adopt the proposed amendments to the Florida Rules for Certified and Court-Appointed Mediators.

RESPECTFULLY SUBMITTED

DATE: July 29, 2009

THOMAS H. BATEMAN III, Acting Chair[1]
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[1] ADR Rules and Policy Committee members serving unexpired terms selected an acting chair for the sole purpose of ensuring timely submission of court filings in advance of regular appointment of a new committee chair.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was furnished by a Dispute Resolution Center staff member by United States mail on July 29, 2009, to **Adam P. Schwartz**, Chair, The Florida Bar's Standing Committee on Advertising, Carlton Fields, P.A., 4221 W. Boy Scout Blvd., 10th Floor, Tampa, FL 33607-5765, **David Roy Heffernan**, Chair, The Florida Bar's Professional Ethics Committee, Hamilton Miller & Birthisel, 150 S.E. 2nd Ave., Ste. 1200, Miami, FL 33131-1579, **Elizabeth Clark Tarbert**, Ethics Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300, and **John F. Harkness, Jr.** Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300.

CERTIFICATE OF TYPEFACE COMPLIANCE

I CERTIFY this petition has been prepared in MS Word using Times New Roman 14-point font, which complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

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THOMAS H. BATEMAN III