The Supreme Court Speaks: Circuit Civil Mediation Is Not Just for Lawyers Anymore[1]

Florida is a leader in the nation in many ways. One area in which Florida is an, if not the, undisputed leader is mediation. Florida was one of the first – and still there only a few – states to require specific initial training and certification for court-appointed mediators in County Court, Family Court, Juvenile Dependency and Circuit Civil matters. The type of training and eligibility prerequisites varied by type of certification. For example, absent prior agreement of the parties, County Mediators may only be appointed in County Court cases (i.e., those involving less than $15,000[2] at issue or landlord/tenant disputes); to be appointed to mediate non-Family, non-Dependency disputes pending in Circuit Court, one must be certified as a Circuit Civil Mediator.

Over the past few years, the Florida Supreme Court has made some significant changes to the certification process. Anyone can be certified as a County Mediator: simply take the 20-hour class, observe or conduct a certain number of mediations under the supervision of a certified mediator ("mentorship"), and certification followed (assuming good moral character requirements were met). Individuals seeking Family or Dependency Mediator certification had to take their respective 40-hour training courses, and complete their mentorship. However, in order to seek these types of certification, one was also required to have one of several specific degrees and/or licensures; for example, licensure as a mental health professional, psychiatrist, attorney, or accountant. Similarly, Circuit Civil Mediators not only had to complete the 40-hour course[3] and mentorship requirements, but also they could not seek certification unless they were then a member of the Florida Bar and had been for at least five years prior to application.[4]

Last year, the Supreme Court moved from these absolute thresholds for Family, Dependency and Circuit Civil certification, and instituted a point system whereby the former threshold criteria now were simply some of the various paths to certification: one got points for advanced degrees or licensures, for example, but the degrees/licenses were not *required* – except for Circuit Civil Mediator certification, for which applicants still had to be current 5-year members of the Florida Bar.

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2 This used to be only $5,000, but the jurisdictional dollar threshold between County and Circuit Courts was changed in 1990 to $10,000, and then, in 1992 to matters not exceeding $15,000.

3 The list of approved Circuit Civil Training Providers is www.flcourts.org/gen_public/adr/provider.shtml.

4 The specific reasons for the Florida Bar membership requirement do not appear in any of the Court's opinions promulgating and revising the Rules over the years. However, anecdotal evidence suggests that this requirement was imposed for two reasons, one more conceptual and the other more pragmatic. The first reason appears to arise out of the belief that Circuit Civil matters would tend to be of a more complex nature, and legal training and experience would help Circuit Civil Mediators navigate the complexities of the substance and procedure aspects of these claims. The second, more practical concern, was the belief that the goal of making mediation commonplace would, necessarily, require the Circuit Bench to become comfortable with the idea of mediation in the first place – and many observes believed that requiring the mediators to be lawyers would make this more palatable.

That changed on November 15, 2007, with the Court's issuance of its opinion *In re: Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators*, SC-05-0998 (Nov. 15, 2007). In removing the requirement of Bar membership, the Court noted

> . . . that "the general consensus in the alternative dispute resolution field is that possession of academic degrees, including law degrees, does not necessarily predict an individual's ability to be a good mediator." Amendments, 931 So. 2d at 881. According to the Committee, Florida is currently in a minority of states that require legal training as a prerequisite to being certified as a circuit court mediator. We understand that by continuing to urge the Court to remove this requirement, the Committee seeks to ensure that Florida maintains its place of preeminence in the alternative dispute resolution field in the United States."

Id. at 5 – 6. However, the Court recognized that there are still many who would prefer lawyer-mediators to mediate their cases, believing that legal training and experience will make them more effective mediators. Consequently, the Court also amended the Rule of Civil Procedure concerning court appointment of mediators to require Circuit Courts to appoint only lawyer-mediators for disputes involving parties who express a preference for lawyer-mediators. *Id.* at 6.

What does this mean? Some observers say it may mean relatively little; others say it may mean a great deal.

On the one hand, certification is only required for a person to be appointed as mediator in a Circuit Court case when the parties were not able to reach agreement as to whom to chose as mediator, a relatively small percentage of cases. It has always been the case that the agreeing parties could choose literally whomever they wanted, certified or not, attorney or not, to mediate their dispute. If you wanted, you could choose my Great Aunt Edna to mediate your Circuit Civil dispute (she's not an attorney, nor a trained mediator, but you could choose her if you wished: say hello for me). Thus, all that may happen is that the number of Circuit Civil Mediators may grow, and, with it, the chances that parties could have a non-attorney Circuit Civil Mediator appointed. For those to whom it matters, however, the Supreme Court allows parties to opt out of appointment of a non-lawyer, so this concern may be overstated.

On the other hand, the Court's decision opens the relatively lucrative[5] field of Circuit Civil Mediation to non-lawyers, many of whom are, by virtue of personality, training,

[5] When handling court-annexed mediations, County Mediators are either volunteer or paid approximately $22/hour by the State. Family Mediators, in court-appointed cases, rather than private pay cases, make approximately $100 - $150/hour, paid for in part by the parties, if they can afford it, and the balance made up by the State; in private pay cases, Family Mediators may make similar rates or may, in unusual cases, charge hourly rates upwards of $200 - $300 or more per hour. Circuit Civil Mediators in Court appointed cases are usually limited by Court Order to no more than $125 - $150 per hour, unless the parties agree otherwise; these fees are paid by the parties. In Circuit Cases where the parties have agreed on the mediator – often expecting that person to be an attorney – the rates are all over the map, but are usually comparable to what similarly experienced attorneys might charge in that locale.

and experience, at least as good, if not better, than many currently certified Circuit Civil Mediators, who, necessarily, happen to be lawyers (many of whom were drawn to the law because of their innate propensity and skill at argument – attributes which may, frankly, make it harder for some lawyer-mediators to conduct successful mediations). I happen to be an attorney, and I believe that fact helps me bring to the mediation table information about the litigation process that I can share with the parties. My legal background also helps me reality-test and probe with the parties, especially in caucus. But the Court has recognized that a non-lawyer, who has otherwise acquired knowledge of the legal system or skill with reality-testing and asking probing questions, should be completely barred from becoming a Circuit Civil Mediator simply because s/he is not a lawyer.[6]

The article is written by Christopher M. Shulman, a mediator, arbitrator and mediation trainer in Tampa, FL.

[6] Indeed, I am aware of a fine, experienced non-Florida attorney and mediator, who moved to Florida about three or four years ago, but could not become certified as a Florida Circuit Civil Mediator because he was not a member of the Florida Bar. Under the old requirement, this person was effectively required to take and pass the Florida Bar, and then pay five years' dues to the Florida Bar (as I understand it, he had no real interest in practicing law in Florida) before he could apply for certification.