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ALTERNATIVE DISPUTE RESOLUTION SECTION

NEWS & TIPS

BOB HOYLE, CHAIR • MEAH TELL, CHAIR-ELECT

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CELEBRATE MEDIATION WEEK WITH THE ABA OCTOBER 11 - 17, 2015

Chair's Message


Bob Hoyle

Let me begin by saying how privileged I am to have the opportunity to serve as Chairman of the ADR Section for the upcoming year.

As the Section enters its sixth year, mention must be made of the successful efforts of past chairs Alan Bookman, Jake Schickel, Chuck Chance, Karen Evans and Michael Lax, to help create and grow a Florida Bar Section of 1,129 members. That growth could only be achieved through their diligence, hard work and the work of the Section's Executive Council. As a result of those efforts, our Section is recognized by The Florida Bar and the Florida Supreme Court as an influential and active organization. *Click here to read more*

In Search of a "Clear Conflict" – The Implications of Rule 10.340(a)

by W. Jay Hunston, Jr., Esq.

"A mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest."

The language of Rule 10.340, Florida Rules for Certified & Court-Appointed Mediators, including all subparts, is clear – any relationship the mediator has to the participants or subject matter of a dispute that could result in a potential conflict of interest must be disclosed by the mediator. Following disclosure and if all parties agree, the mediator may serve. There is one exception to this rule. If a matter presents a "clear conflict of interest," the mediator "shall not" mediate. In further explanation of the concept of a "clear conflict," subparagraph c of the Rule explains that the parties cannot waive a conflict of interest that "clearly impairs a mediator's impartiality" and the mediator must withdraw regardless of any agreement by the parties to the mediator's participation. *Click here to read more*

Arbitration as a Form of Dispute Resolution Can Be More Efficient Than Litigation, But How Do We Get There?[1]

by Michael H. Lax

The Board of Directors of ABC Corp. has decided upon the acquisition of XYZ Corp. It has retained you, outside counsel, to prepare all of the documents including the purchase/ acquisition agreement. Being the cautious corporate attorney, you have prepared a purchase/acquisition agreement which you believe covers every topic/issue in this transaction. Then the President/ CEO of the ABC Corp. comes to you and inquires: "… what happens if XYZ Corp. fails to perform or comply with any of the terms and conditions?" Normally you would respond that the company would have to sue them. But the President/CEO then asks: "Is there any other way to enforce the agreement without the time and expense of litigation?" *Click here to read more*

Do You Have A Settlement?

by Bob Hoyle

"A good deal is a state of mind." – Lee Iacocca

When representing a client in a mediation, the goal must always be to craft a written and enforceable agreement that deals with all possible issues, including a release. The provision for a release must be done with specificity at the time the agreement is signed; otherwise, your client may become involved in unexpected costly litigation that could have easily been avoided. The agreement/release should specifically state who is releasing, who is being released, what claims are being released, and any other terms and conditions. Do not leave the mediation conference without a clear written agreement on these points, as you may not have a settlement. *Click here to read more*

"CHAIR'S MESSAGE" *from page 1*

Our Section has enjoyed a very successful year. Please be sure to mark your calendars for the week of October 11th through October 17th and join us in celebrating "**Mediation Week**." Take a few minutes and review this message so you can observe firsthand all the developments we have experienced.

In the past year the Executive Council stepped up and asserted itself with regard to two sets of proposed rules that affected the practice of ADR and the ethical standards governing mediators. The ADR Section filed a comment to SC 2014-1852, a proposed controversial change to the rules regarding "Other ADR Processes." The Section participated in the oral argument before the Florida Supreme Court on July 3, 2015, and our position was heard and received favorably by the Justices. **(https://efactssc-public.flcourts.org/casedocuments/2014/1852/2014-1852_notice_74829.pdf)**

On August 24, 2015, the ADR Section filed comments and requested oral argument before the Florida Supreme Court in response to SC2015-875, which proposed amendments to the Florida Rules for Certified and Court Appointed Mediators. Once oral arguments are concluded and the Court issues a decision, the Section will report the Court's decision to its members. **(https://efactssc-public.flcourts.org/casedocuments/2015/875/2015-875_response_44739.pdf)**

Our Section has chosen to step into the 21st Century by developing a new Section website. You may view the Section website at www.fladr.org. Much effort was spent creating the website and making it operational. As with all websites, it will continue to improve as we expand. Suggestions from all members regarding content will be most welcome.

There is a section on the website devoted to CLE programs. The Section sponsored two webinars this past year and a half-day seminar on June 25th at The Florida Bar Annual Conference. Stay tuned for announcements regarding our upcoming CLE titled "Mediation and Domestic Violence: Negotiating a Path Through the Storm." We encourage suggestions for relevant programs and possible participation by our members.

The ADR Section Executive Council includes distinguished members from the legal practice, the judiciary, and academia. We serve at the pleasure of the membership and your participation is appreciated and encouraged.

If you have not done so before, consider serving on a Section committee. The Section has committees for CLE events, legislation, website development, the newsletter, and recruitment. In particular, if you have a suggestion for a CLE topic and you want to be involved in a CLE program, or if you would like to submit an article for the Newsletter, please contact Beth Anne Trombetta at etrombetta@flabar.org.

I am looking forward to a year of continued progress by the Section in providing its members and members of The Florida Bar with opportunities to learn and improve skills in mediation, arbitration, and other ADR processes. With input from our members, I know we will continue to thrive.

I have always maintained that none of us is as smart as all of us. Combining our individual abilities as attorneys and ADR professionals will provide the Bar and the public with a greater ADR experience.

D. Robert Hoyle
Chair, ADR Section

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Note: Newsletter editor A. Michelle Jernigan is soliciting articles for the Spring edition of the ADR News & Tips. All articles should be submitted to mjernigan@uww-adr.com by February 15, 2016.

"CLEAR CONFLICT" *from page 1*

The purpose of this article is to examine what circumstances give rise to a clear and non-waivable conflict. Additionally, an attempt will be made to describe a methodology by which a mediator may determine the existence of a clear conflict and avoid the ultimate consequences of a violation of Rule 10.340. Throughout this article the terms "clear conflict" and "non-waivable conflict" will be used interchangeably, as the language of the Rule requires disclosure of any potential conflict of interest by the mediator in all circumstances, but only contemplates the prohibition of mediator participation in those instances when a mediator's impartiality is clearly impaired and the parties' waiver is ineffective.

The express language of the Rule provides no guidance in determining when a clear conflict exists. The language speaks only to a conflict that "clearly impairs a mediator's impartiality." Thus, as is the case in interpretation of any rule, the Committee Notes should be instructive. The Notes for the 2000 Revision of the Rule provide instances of potential conflicts of interest that would require disclosure. The list is not intended to be exclusive, but is intended to be illustrative.

The Notes list a number of instances that could, if a pure "status" analysis is performed, suggest a clear and non-waivable conflict. Such instances include service as a representative or advocate to a mediation participant, stock ownership in a mediation participant or a managerial, financial, or family interest in a mediation participant. Additionally, the Notes require disclosure of any past or present client relationship a mediator's law firm may have with a mediation participant. The most instructive language of the Notes is as follows: "While impartiality is not necessarily compromised, full disclosure and a reasonable opportunity for the parties to react are essential."

Thus, the Notes specifically contemplate that a mediator may, in fact, be an advocate for a mediation participant, may own stock in a mediation participant, or may have a managerial or family interest in a mediation participant without necessarily compromising the mediator's impartiality. In fact the Notes contemplate that the mere fact that a mediator is a member of a law firm that currently represents a mediation participant does not necessarily compromise the mediator's impartiality. The only requirement is full disclosure and an opportunity for the parties to react.

The Notes point out that a conflict that clearly impairs a mediator's impartiality arises "when circumstances or relationships involving the mediator cannot be reasonably regarded as allowing the mediator to maintain impartiality." By including this language in the Notes, the drafters of the Rule have injected a "reasonableness" standard in determining the existence of clear conflicts. However, when read in conjunction with each other, the statements in the Notes appear to confirm that mere "status" of a mediator's relationship to a participant is not sufficient, in and of itself, to create a clear conflict. There must be additional circumstances or relationships that would cause a "reasonable person" to question the mediator's impartiality.

Historically, the Mediator Ethics Advisory Committee ("MEAC") has addressed issues regarding clear conflicts primarily from a status perspective. Inquiries into the situational aspects of the circumstances or relationships involving a potential conflict have not been generally undertaken. Three MEAC Opinions that address the question of a mediator's law firm's previous or existing representation of a mediation participant are contained in MEAC 2002-005, MEAC 2008-007, and MEAC 2012-004.

In MEAC 2002-005, a mediator was appointed by the Federal Court to act as mediator in a pending ADA lawsuit. In a conflict check, the mediator discovered that other members of the mediator's law firm were currently representing the Plaintiff in the proposed mediation in two unrelated claims. However, the Plaintiff was represented by other counsel in the pending case. The mediator disclosed this information and was awaiting waivers from the parties involved in the mediation. The mediator requested an opinion regarding whether this was a non-waivable conflict. The mediator expressed personal confidence that the mediator could remain neutral and impartial since the mediator's law firm represented none of the parties involved in the mediation.

Citing the "circumstances or relationships" portion of the Committee Note, the MEAC opined that this situation created a "clear conflict." The analysis in the brief Advisory Opinion was limited to the status of the parties, rather than the specific situation involved. The Opinion contains no discussion or analysis of the portion of the Committee Note that specifically contemplates the situation presented. That portion of the Note states: "A mediator who is a member of a law firm … is obliged to disclose any past or present client relationship that firm … may have with any party involved in a mediation." There is no indication in the Committee Note that the example used to illustrate a duty to disclose was somehow an example of a non-waivable "clear conflict." Yet, the MEAC, reviewing only the status of the parties, found a clear conflict. This position was reaffirmed in MEAC 2008-007 with an emphasis on the fact that the mediator, as a partner in the law firm, had a "monetary interest" in the outcome of the mediation.

In MEAC 2012-004, a situation was presented in which an attorney/mediator had disassociated from his/her prior law firm and now was presented with a request to mediate a matter in which one of the parties was a client of one of the mediator's former law partners during the mediator's tenure with the firm. With no mention of the "monetary interest" factor, the MEAC stated that it continued to have confidence in its prior opinions in 2002-005 and 2008-007 that it was a "clear (non-waivable) conflict of interest" for a mediator to mediate a case in which former law partners represented any of the parties while the former firm was in effect regardless of disclosure and waivers.

In MEAC 2012-004, the "clear conflict" issue was raised as a second question in the Inquirer's request. In answer to the first question, which related to what period of time must elapse before a mediator could mediate a case in which a former law partner was representing a party, the MEAC set forth a "filter" analysis, which provides a basis upon which

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a mediator may analyze conflicts based upon the specific situation involved, rather than the mere status of the parties. The MEAC states that the first filter should always be the mediator inquiring of him or herself whether the mediator can be unbiased given the parties and the situation. In applying this first filter, a mediator must necessarily be able to evaluate his/her impartiality, based upon his/her own beliefs and biases. The MEAC continues to point out that a mediator in performing this "filter test" must examine not only the actuality of a conflict, but also the appearance of a conflict. The mediator is encouraged to perform this evaluation from the perspective of an outsider hearing of the situation for the first time and applying a "reasonable person" analysis.

It is submitted that this "filter test" is exactly the type of situational analysis that should be applied in every conflict situation. Once a "status analysis" has been performed to determine the existence or non-existence of potential conflicts, the mediator should then apply the "filter test" to determine if the identified conflicts are "clear conflicts" which cannot be resolved by disclosures and waivers.

The linchpin of the process of mediation is the concept of "self-determination by the parties." Self-determination applies not just to the outcome, but to the entire process. The process consists first of an agreement to mediate and second of an agreement to selection of a mediator who is deemed by the parties to be appropriate to assist them in resolving their differences. Full and complete disclosure of any actual or potential conflicts of interest is mandatory in assisting the parties in making their choice. Once a mediator has applied the "filter test" to the parties and the situation involved and has determined that he/she can be unbiased in performing his/her function, the mediator makes full disclosure of all conflicts. If the parties then agree to waive any actual or apparent conflicts based upon the disclosures, the parties have exercised their right of "self-determination" in selection of the mediator and that right should be honored.

Traditionally, some of the most effective and frequently used mediators have come from the ranks of the legal profession, whether the bench or the bar. Over a period of many decades of legal service, such a mediator will have crossed paths and swords with many, if not most, of the professionals involved in the legal community. Additionally, that mediator may have been a partner with some of the attorneys now representing parties in mediations. Bright line "status tests" are not beneficial in assisting a mediator in determining whether a "clear conflict" exists. If the mediator had a particularly contentious relationship with a former partner, the parties to a mediation would not generally know this. If the mediator determines that, regardless of disclosure of the past relationship, the mediator would be unable to put the underlying tensions involved in the relationship behind him/her, the internal "filter test" would not be passed and the mediator, without mention of the reason, would decline the appointment based on a "clear conflict."

Likewise, if a party to a mediation was previously represented by a former partner of the mediator and, through the period of representation, the mediator became aware of facts and circumstances involving the party that might tend to bring the party's credibility into question, the internal "filter test" would not be passed and the mediator again, without mention of any reason, would decline the appointment based on a "clear conflict." However, if there is nothing in the former partner's past representation of the party and nothing in the mediator's opinion of credibility of the party that would cause the mediator to be biased, the "filter test" would be passed and, following full disclosure of the past relationships, as well as waivers by the parties, the mediator could accept the appointment.

If Rule 10.340 is read in conjunction with the "Committee Notes", the mere status of the parties or the parties' attorneys should not be dispositive of a clear conflict analysis. It is only if the mediator's subsequent application of the internal "filter test" of whether the conflict of interest "clearly impairs [the] mediator's impartiality" produces a failure, the mediator must decline the appointment, based upon a "clear conflict."

Although the mediator's determination of whether a "clear conflict" exists will always be subject to review by the Mediator Qualifications Board ("MQB") if a party files a grievance, that review relates only to the mediator's status as a "certified mediator" in the state of Florida. The more important question is whether the process is subject to attack or an agreement reached in mediation is subject to be set aside, based upon an alleged "clear conflict" previously disclosed by the mediator and waived by the parties. Although there is not a large body of case law specifically addressing this issue, there are some cases that are instructive.

Dating back to 1990, the issue of the "status" of a mediator in relation to the parties was raised in the extensive asbestos litigation conducted in the Northeast. In In Re Joint Eastern and Southern Districts Asbestos Litigation, 737 F.Supp. 735 (U.S.D.C., Eastern & Southern Districts, NY, 1990), Kenneth R. Feinberg, a well-respected lawyer and mediator, was appointed by the Court to conduct four months of intensive mediation sessions in cases involving asbestos exposure at the Brooklyn Navy Yard. Partway through his efforts, one of the parties sought to have him disqualified, based upon the fact that he and his law firm had previously acted on behalf of that party and other asbestos manufacturers, "in connection with public education and legislative efforts aimed at promoting alternative compensation systems to mass tort litigation." The objecting party, although aware of this potential conflict from the outset, had not raised any objection previously and had actually participated in the preliminary mediation sessions with the mediator, without complaint. The Court applied a situational or "filter test" analysis, rather than a mere "status-based" analysis, in determining that no conflict existed requiring removal. The decision is lengthy but thorough in its discussion of the specialized role of a mediator, the confidentiality of the mediation process, and the different ethical standards to be applied to a conflict

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of interest analysis in mediations as compared with other dispute resolution proceedings.

More recently, in CEATS, Inc. v. Continental Airlines, Inc., et al., 755 F.3d 1356 (U.S.Ct.Apps., Fed. Circ., 2014), after an adverse jury verdict, a party filed a Rule 60(b) Motion for Relief from Judgment, based upon a Court-appointed mediator's relationship with the law firm representing the prevailing parties in the litigation. The mediator apparently had a long-standing relationship with the Defendants' law firm, including "lavish gifts and outings and … matters in which [the law firm] retained [the mediator] as a neutral, and the fact that [the mediator] requested and was granted an opportunity to make a presentation to [the law firm's] attorneys, which [a prior court] characterized as a business development pitch by [the mediator]." The relationship was so extensive that, during the pendency of the mediation, a prior multi-million dollar arbitration award rendered by the mediator in favor of one of the law firm's other clients, was set aside by a state court based upon the mediator's lack of impartiality. The mediator in the instant case disclosed none of this information, including the setting aside of the arbitration award.

After analyzing the differences between mediators, arbitrators, judges, and special masters, the Court held that the mediator definitely had a duty to disclose these conflicts of interest, both prior to accepting appointment as the mediator and during the pendency of the mediation itself, but failed to do so. Despite the non-disclosure and the Plaintiff's allegation that a risk existed that the mediator had released confidential information to Defendants' counsel during or after mediation that may have impacted the ultimate outcome at trial, the appellate court refused to set aside the jury's verdict without actual proof that such confidential information was revealed. Although expressing its reservations over "failing to provide a remedy for a mediator's non-compliance with his or her disclosure obligations," the Court ultimately affirmed the trial court's denial of the Rule 60(b) relief, thereby allowing the jury verdict to stand.

In Diggs v. Diggs (#14-11-00854-CV Memorandum Opinion, 14th Ct. App., TX 2013), the Court addressed the issue of whether a conflict of interest of a mediator could be waived by a party, based upon the party's knowledge of the conflict and acquiescence in the mediation process through conclusion. The mediator, prior to being selected, had been contacted by counsel for the husband in a pending dissolution of marriage proceeding and had one phone call in which the possibility of using the mediator as a business evaluator in the case was discussed. The mediator was not selected as a business evaluation expert by the husband and no further discussions concerning the issues in the case were held. Later, upon being suggested as a mediator in the case, the fact of the prior contact and discussion was disclosed and both the attorney for the husband and the attorney for the wife agreed to the mediator serving.

Following a protracted mediation session, there was a question as to whether the parties had reached an agreement and whether the attorney for the wife was authorized to agree to the terms and conditions of the mediated settlement agreement. The trial court entered a final decree of divorce, incorporating the terms and conditions agreed to at mediation. The wife appealed, alleging in part that the agreement was procured with the use of an "unqualified mediator", based upon the conflict of interest arising from the prior contact between the husband's attorney and the mediator. Without addressing whether the conflict of interest of the mediator would qualify as an appropriate ground for revocation of the agreement, the appellate court ruled that the wife had waived any objection to the mediator's involvement, based upon the wife's agreement to use the mediator and her participation in the mediation following full disclosure of the potential conflict of interest. The court pointed out that the wife did not raise the allegation of mediator disqualification until one month after the divorce decree was signed by the trial judge and nearly six months after the mediation agreement was entered into. Based upon the court's analysis, it determined that the wife had waived any objection to the mediator's service.

Thus, it appears the risk that a mediation settlement agreement reached in mediation may be set aside when the mediator has a disclosed conflict of interest that all parties specifically waive by declaration and participation in the mediation, is minimal, especially when the parties are represented by counsel in the mediator selection and the mediation process. By exercising their right of self-determination and by a knowing waiver of a disclosed conflict of interest, the integrity of the mediation process is protected and a mediation agreement reached through that process would appear to be enforceable.

The courts are consistent in repeating that the only grounds for setting aside a mediation settlement agreement are grounds of fraud, misrepresentation, mistake, overreaching or coercion [See: Chantey Music Publishing, Inc. v. Malaco, Inc., 915 So.2d 1052 (Miss. 2005) and Pierce v. Pierce, 128 So.3d 204 (Fla. 1st DCA 2013)], rather than a disclosed and waived conflict of interest of a mediator. Thus, it would appear that the risk a certified mediator in Florida runs in consistently applying a "situational" or "filter test" analysis in determining the existence of clear conflicts, rather than applying only an initial "status" analysis, is to possibly run afoul of the MQB if a party files a grievance, rather than to affect the actual mediation process or the efficacy of agreements reached through that process.

Thus, honoring the parties' rights to self-determination by utilizing a "filter test" analysis, rather than a one-step "status" analysis in determining clear and non-waivable conflicts, may be the preferred approach to conflict analysis in mediation.

W. Jay Hunston, Jr., Esq.

"ARBITRATION" from page 1

Generally, litigation has been the preferred process by which to resolve conflicts or controversies arising out of the formation or performance of a contract. However, arbitration provides an alternative dispute resolution procedure. In determining which procedure will best suit resolving the parties' contractual differences, various factors are involved including the ease of commencing and proceeding with the process, the time and expense involved in the process and the efficiency of obtaining a resolution of the conflict. It has been argued that arbitration is more expensive than litigation because of the additional costs of the fees of the arbitration panel.

Normally if the parties do not choose to arbitrate "disputes" arising out of a contract, any "dispute" must be resolved by litigation. As we know litigation is an adversarial proceeding in which a judge is randomly assigned, follows a specific set of rules and procedures both in discovery and trial, and determines all questions of law. These questions may include his/her authority to decide all issues arising in the case including enforceability of the contract and his/her jurisdiction. This process may prove to be lengthy and expensive, therefore, more expensive than arbitration.

After conducting your due diligence and discovering that in 2013 over 650,000 lawsuits were filed in the circuit and county courts in the State of Florida and that during the first 6 months of 2014 over 308,000 lawsuits were filed, you seriously consider the possibility that the purchase/acquisition agreement should have an arbitration clause. (http://trialstats.flcourts.org/)

After detailed discussion with your client concerning the potential delay in resolving contractual disputes through litigation and the potential benefits of arbitration, the decision to arbitrate rather than litigate issues arising from the contract is made. The next step is to insure that the language you use in drafting the arbitration clause effectuates this goal.

Arbitration is a "creature of contract". It is a contractual substitute for litigation, in which the parties may agree during the formation of the contract that any controversy or claim, arising out of the contract shall be decided by arbitration and not by litigation. In order to eliminate time and inefficient procedures often associated with litigation, the parties must create an arbitration clause which provides clear and convincing language delegating the authority and jurisdiction to resolve all issues.

After reviewing the Florida Arbitration Code and the procedural rules of various organizations that specialize in alternative dispute resolution, you finally propose language that you believe will lead to a more efficient form of resolving all disputes arising out of the agreement. You suggest the following language to your client: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration..."[2] You believe this clause will allow the parties to resolve all issues arising out of the agreement.

Once the parties have decided that they will arbitrate any "controversy or claim arising out of the contract", the delegation of the authority to resolve all issues arising over the interpretation of the agreement or the intent of the parties is the next step. When writing the arbitration clause, the parties should decide whether the court or the arbitrator will have the authority to determine the enforceability of the contract, the enforceability of the arbitration clause or the arbitrability of a particular dispute. These are different questions which are handled differently by the law and the courts. The parties' ultimate decisions will determine the scope of the arbitrator's authority throughout the arbitration proceeding and could avoid the additional time and expense of having to seek court intervention when questions arise concerning the interpretation of the contract, arbitration clause or arbitrability. If the arbitrator is given clear and "unmistaken" authority to answer these threshold questions, then the arbitration may ultimately proceed without lengthy and expensive court proceedings to decide these issues. Otherwise resolution of these issues may require court intervention and may cost the parties unanticipated additional time and expense.

The Florida Arbitration Code (Revised) addresses these threshold questions and defines and distinguishes the authority between the arbitrator and the courts. Section §682.02 of the Florida Arbitration Code (Revised) differentiates between enforceability of the contract, enforceability of the contract's arbitration clause or provision, and arbitrability. The revised code provides that the issue of the enforceability of the contract as a **whole** is a matter for the arbitrator. However, the issue of enforceability of the **arbitration provision** itself and whether a "**controversy**" is subject to arbitration is a matter for the court to decide when determining whether to compel arbitration:

§682.02 Arbitration agreements made valid, irrevocable, and enforceable; scope.—

1. **An agreement contained in a record to submit to arbitration** any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.
2. The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
3. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.
4. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders. **(Emphasis added)**

Therefore, unless otherwise provided in the arbitration clause, the court determines arbitrability and the arbitrator determines the enforceability of the contract. Arbitrability as a threshold question is defined as the authority to determine

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the jurisdiction to decide what claim, controversy or dispute should be arbitrated. If the parties intend that the arbitrator have this authority, they may waive the prior statutory provision by agreement but must do so **specifically**.

Section §682.14 of the Florida Arbitration Code (Revised) states that provision Section §682.02 can be waived by agreement of the parties:

§682.014 Effect of agreement to arbitrate; non-waivable provisions.—

1. Except as otherwise provided in subsections (2) and (3), a party to an agreement to arbitrate or to an arbitration proceeding may **waive, or the parties may vary the effect of**, the requirements of this chapter to the extent permitted by law. **(Emphasis added)**

Therefore, if the parties ultimately decide that the arbitrator, and not the court(s) shall resolve all issues arising from the contract including enforceability of the contract, enforceability of the arbitration clause and arbitrability of the claim, they must do so in the arbitration clause itself. It is argued that if the purpose of the arbitration clause is to eliminate the need to litigate "matters" arising out of the formation, interpretation and enforcement of the contract, then let the arbitrators do it. Why go back to the courts every time there is a question of "interpretation"? This is counterproductive and could be very expensive for the parties.

Arbitration is party driven. Therefore if the parties have decided to arbitrate all "controversies or claims" then it is incumbent upon them, or their attorneys, to make sure this intent is expressed by the language in the arbitration clause.

One way the parties can "waive" the "provision" language of Section §682.02 is to agree that the arbitration will be administered by one of the organizations that provide arbitration services or agree to proceed according to the rules of one of these organizations. For example, if the parties' arbitration clause states that the arbitration of all matters arising out of the contract will be administered by the American Arbitration Association (AAA) pursuant to its rules and procedures, such language would result in a waiver of the requirements of Section §682.02.[3]

If the parties do intend the arbitrator to have this authority, then the language used in the delegating clause must be clear and unequivocal. Such clause may include the following additional language: " [*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration*] administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."[4]

The AAA rules grant the arbitrator the "exclusive" authority to decide the enforceability of a contract's arbitration provision, the enforcement of the contract as a **whole, and arbitrability**. (See Rule R-7 of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures Effective October 1, 2013) The Commercial Rules of the American Arbitration Association state: …"the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Additionally, "…the arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part…" (Rule R-7 of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures Effective October 1, 2013).

The Supreme Court in *Rent-A-Center, West Inc. v. Jackson*, 561 U.S. ____ 2010 has generally endorsed the right of the parties to arbitrate matters arising out of the agreement/contract between the parties, based on the parties' insertion of an arbitration clause in the contract.[5] The Court held that when the parties have unambiguously agreed to give the arbitrators the authority to decide enforceability, including possible unconscionability of the contract, then a challenge to the arbitration clause as being unconscionable should be decided by the arbitrator(s).[6] However, sloppy language can sabotage the intent of the parties.

An example of the confusion that may result if the arbitration clause is not "clear and unequivocal" can be found in the language of a recent state court appellate decision. The West Virginia Supreme Court of Appeals was presented with the issue of whether a specific delegation of authority to the arbitrator in an arbitration clause to determine "all issues regarding the arbitrability of the dispute" was sufficient to grant the arbitrator the authority to determine the enforceability of the arbitration clause itself. The West Virginia Supreme Court of Appeals held that that provision did not "**clearly and unmistakably** reflect an intention by the parties to assign to the arbitrator all questions about the enforceability of the arbitration clause." (*Schumacher Homes of Circleville, Inc. v. Spence*, 2015 W.Va. Lexis 562 (April 24, 2015). **(Emphasis added)** Concluding that "arbitrability" was an ambiguous term, the Court reasoned

> that unless the clause "clearly and unmistakably" confers authority to the arbitrator to decide the "validity, revocability and enforceability of the arbitration" clause, it does not grant authority to the arbitrator to do so. (See, *Schumacher*)

Therefore, lack of specificity in the delegating clause may result in confusion and ensuing litigation over interpreting and deciding the delegation of authority. It is clear that, although case law and the Florida Arbitration Code (Revised) provide that, in the absence of an agreement stating otherwise, "the **court** shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate" (See FAC §682.02(2)(Revised)); the parties may agree by contract to waive this provision. The parties may agree to grant the arbitrator not only the authority to determine the enforceability of the contract, but the authority to decide "whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate," i.e. arbitrability of the claim or claims before him/her. If this is the

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"ARBITRATION" from previous page

parties' intention, then the language they use must be "clear and unmistakable." Then, if one of the parties challenges the authority and jurisdiction of the arbitrator(s) to determine the enforceability of the contract, enforceability of the arbitration clause or arbitrability of the controversy or claim(s), a "clear and unmistakable" delegation of authority will grant jurisdiction to the arbitrator to resolve these questions.

Finally, the real question for party and practioner alike is "Why is this important?" The simple and obvious answer is that this procedure will lead to a more expeditious resolution of any dispute arising out of the agreement. In turn this procedure will save the parties time and expense borne out of a more efficient process. An arbitrator, given the authority to decide his/her own jurisdiction, has the authority to answer all questions concerning the enforceability of the agreement, or the existence or scope of the arbitration clause. The Arbitrator can determine what issues are to be submitted to arbitration i.e. "arbitrability." The clear and "unmistakable" delegation of authority, will save significant time and expense otherwise involved in "litigating" these "jurisdictional" issues. When time and expense are factors in conflict resolution, arbitration can be a most effective way for resolving these conflicts.

Therefore, once the decision has been made to arbitrate all matters arising out of the contract, specificity in drafting the arbitration clause will avoid confusion which can result in expensive journeys to the courthouse each time these questions arise. This decision and specificity in drafting the arbitration clause will ultimately benefit the parties. There will be no interruption of the proceedings and delay in the resolution of the "controversy or claim." This will make the process as a whole more time efficient and cost effective for the parties.

Michael H. Lax
Chair of the ADR Section of The Florida Bar 2014-2015

Endnotes:

1 Full disclosure: The Author is a member of the AAA Commercial Arbitration Panel.

2 AAA, A Guide to Commercial Arbitration for Business People, Amended and Effective October 1, 2013.

3 See prior proposed arbitration clause.

4 AAA, A Guide to Commercial Arbitration for Business People, Amended and Effective October 1, 2013.

5 *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. __ (2010).

6 *Id.*

The Florida Bar's Grievance Mediation and Fee Arbitration Programs Need More Volunteers!

Persons eligible to be program arbitrators are:

(1) retired judges and justices of the courts of the State of Florida;
(2) persons who were members of the circuit fee arbitration committees at the time or prior to the merger of the grievance mediation and fee arbitration programs;
(3) persons who have served on a circuit grievance committee for 1 year or more; and
(4) any other person who, in the opinion of the committee, possesses the requisite education, training, or certification in alternative dispute resolution to be a program arbitrator.

Persons eligible to be program mediators are:

(1) Supreme Court of Florida certified mediators;
(2) retired judges and justices of the courts of the State of Florida;
(3) persons who were certified program mediators at or before the merger of the grievance mediation and fee arbitration programs; and
(4) any other person who, in the opinion of the committee, possesses the requisite education, training, or certification in alternative dispute resolution to be a program mediator.

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If you or anyone you know may be interested in serving as a volunteer arbitrator and/or mediator under The Florida Bar's Fee Arbitration and Grievance Mediation Program, and in accordance with the eligibility requirements list above, please review the Grievance Mediation and Fee Arbitration Manual and complete the Program Mediator/Arbitrator Application form. Return your application to The Florida Bar, Attn: Susan Austin, 651 E. Jefferson St., Tallahassee, FL 32399. For further information, you may also contact Shanell M. Schuyler, Director, ACAP/Intake, at (850)561-5647.

"SETTLEMENT" *from page 1*

In O'Neill vs. Scher, 997 So. 2d 1205 (Fla 3d DCA 2008) the parties participated in a mediation, which resulted in the parties and their counsel executing a document entitled, "Memorandum of Settlement." In the Memorandum of Settlement, O'Neill agreed to release any present and/or future interest that she may have had in the Estate of Benjamin Scher, the Benjamin Scher Revocable Inter Vivos Trust, the Benjamin Scher Irrevocable Trust, the Estate of Sophie Scher, the Sophie Scher Revocable Inter Vivos Trust, and the Estate of Richard Scher. The agreement further provided that it was a memorial of the terms of the settlement and the parties agreed to execute formal releases after the mediation in accordance with the terms set forth in the agreement.

Almost immediately after the mediation the parties were back in court on motions to enforce the settlement. One of the issues in dispute was whether the release language in the agreement should be limited to its own terms or read broadly to encompass a universal general release. The trial court ruled in favor of the general release argument. The 3rd DCA reversed, stating: "…the release that the trial court ordered O'Neill to execute is overly broad and does not accurately reflect the release of interests and/or claims to which O'Neill agreed in the settlement agreement. Indeed, O'Neill only agreed in Paragraph 3 of the Memorandum of Settlement to release six specific present and/or future interests. The general release, on the other hand, contains broad provisions releasing O'Neill's present and/or future claims for matters, persons, and entities not listed or considered in the settlement agreement. On remand, the parties shall draft a release concerning only those six specific claims contained in Paragraph 3 of the Memorandum of Settlement, and shall release no other present and/or future claims."

The use of the term "general release" in a settlement agreement as a document to be signed as part of the agreement can also create substantial problems, as noted in Johnson vs. Clark, 2006 WL 3780511, a case from the United States District Court for the Middle District of Florida. In this case a dispute arose as to the scope of a release signed by Clark in light of the terms of the mediation agreement, which provided that "full general releases" would be exchanged. The court denied Clark's attempt to expand the scope of the release. The court noted that "the Florida Supreme Court has recognized that there are no standard general releases; all are unique. The fact that a proposed release is described as being general is virtually meaningless. It would be essential to know what is being released, who is being released, and any conditions and terms of the release. In other words, the covenant to execute "mutual general releases" as set forth in the mediation agreement essentially had no meaning until the actual general releases were executed and, in any event, the covenant can only be understood in the context of the mediation itself...."

If, as part of your negotiations during the mediation, a proposal is made that the parties agree to sign a "standard general" release, avoid the temptation of taking the easy way out on that non-monetary term. Insist on an agreement as to the explicit language of the release. Keep in mind the issues discussed in these two cases. As a practice tip, if a general release is part of the bargain, then write it into the agreement, or attach the release to your mediation agreement as a stand-alone exhibit. Communicate with opposing counsel prior to the mediation and make every attempt to reach an agreement as to the release language that will be incorporated into a settlement agreement. It will be in the best interests of your client to have this issue agreed upon prior to, or at the mediation, so as to avoid any post-mediation expenses associated with a part of the settlement agreement that should have been anticipated.

Bob Hoyle
Chair of the Alternative Dispute Resolution Section

8221001 Item Number

Membership Application for
The Florida Bar
Alternative Dispute Resolution (ADR) Section

Name: _____Bar #:_____(Required)

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Complete this form and return with your check payable to "THE FLORIDA BAR" in the amount of $35.

Send form and check to:

The Florida Bar
ATTN: Beth Anne Trombetta
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Tallahassee, Florida 32399-2300

Or pay $35 by credit card by faxing the completed form to Fax # (850) 561-9404.

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Mail your application today!

(Please Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues cover the period of July 1 to June 30.)

The Florida Bar
Alternative Dispute Resolution (ADR) Section

Alternative Dispute Resolution (ADR) Section

Organized 2010

The Alternative Dispute Resolution (ADR) Section was designed to provide a forum for lawyers interested in alternative dispute resolution and to share common interests, ideas and concepts. The Section will provide continuing legal education as well as be a central source for either advocacy or communications and deal with all forms of alternative dispute resolution.

Membership Eligibility:

Any member in good standing of The Florida Bar interested in the purpose of the Section is eligible for membership upon application and payment of this Section's annual dues. Any member who ceases to be a member of The Florida Bar in good standing shall no longer be a member of the Alternative Dispute Resolution Section.

Affiliate Members. The executive council may enroll, upon request and upon payment of the prescribed dues as affiliate members of the section, persons who are inactive members of The Florida Bar and who can show a dual capacity of interest in and contribution to the section's activities. The purpose of affiliate membership is to foster the development and communication of information between arbitrators, mediators, and the people who often work with arbitration and/or mediation lawyers. Affiliate members must not encourage the unlicensed practice of law. The number of affiliates will not exceed one-half of the section membership. "Affiliate" or "affiliate member" means an inactive member of The Florida Bar. Affiliate members have all the privileges accorded to members of the section except that affiliates may not vote, hold office, or participate in the selection of officers or members of the executive council, or advertise affiliate membership in any way. Affiliates may serve in an advisory nonvoting capacity which the executive council may from time to time establish in its discretion. Affiliate members will pay dues in an amount equal to that required of section members.

The purposes of the Section are:

a. To provide an organization within The Florida Bar open to all members in good standing in The Florida Bar who have a common interest in Alternative Dispute Resolution.

b. To provide a forum for discussion and exchange of ideas leading to an improvement of individual ADR skills and abilities, both as a participant and as a neutral.

c. To assist the Courts in establishing methods of expeditious administration of mediations by making formal recommendations to the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy.

d. To assist members of The Florida Bar who generally desire to increase their effectiveness as ADR participants.

e. To keep the membership informed and updated regarding legislation, rules, and policies in connection with mediation and other ADR processes and the responsibilities they impose on mediator and arbitrator members (as well as other ADR professionals who may ultimately be included).

f. To provide a forum for the educational discussion of ethical considerations for ADR participants.

Membership Information:

Section Dues $35

The membership application is also available on the Bar website at www.floridabar.org under "Inside the Bar," Sections & Divisions.

8221001 Item Number

Rev. 02/13

The Florida Bar Continuing Legal Education Committee and the Alternative Dispute Resolution Section present

Mediation and Domestic Violence: Negotiating a Path Through the Storm

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Audio Webcast Presentation: Thursday, December 3, 2015

4:00 pm – 5:00 pm

Course No. 2113R

4:00pm – 4:05pm
Welcome and Introduction of Speaker
Kim Torres, Melbourne

4:05pm – 4:55pm
Lecture
James Haggard, Esq., Rockledge

1. Charting A Course: Review of Injunction Types
   a. Domestic Violence
   b. Dating Violence
   c. Repeat Violence
   d. Sexual Violence
   e. Injunctions "on behalf of"
2. Assessing The Damage: Impact of Injunctions
   a. Legal Remedies Available
   b. Related Costs
      i. Time
      ii. Relocation
      iii. Access to children
      iv. Lost friends, family, employer, etc.
      v. Lost places and awkward moments
   c. Panicky Parties and Strangers
      i. What confidentiality extends to whom
      ii. Disclosure requirements and advising parties
      iii. Balancing Evidentiary Needs With Disclosure
      iv. Obligation to report to the court (threats, false reports)
3. Entering Dry Dock: Settlement and Smoothing Rough Waters
   a. Barriers and Advantages to Settlement
   b. Complex Power Dynamics
   c. Screening Intimidation Tactics
      i. Third-Parties (allies and enemy problems)
   d. Un-Social Media
      i. Coded Language
      ii. Gathering and Exposing Intel.
      iii. Isolating Parties (digital lives)

4:55pm – 5:00pm
Question and Answer Session
Kim Torres, Melbourne

AUDIO WEBCAST CONNECTION

As an audio webcast attendee, you will listen to the program over the Internet. Registrants will receive audio webcast connection instructions prior to the scheduled course date via email. If you do not receive the email 2 days prior to the event, contact InReach Customer Service at 877-880-1335.

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May be eligible for CME credits

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(Max. Credit: 1.0 hour)
General: 1.0 hour Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 1.0 hour)
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Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

TO REGISTER ON-LINE	www.tinyurl.com/FloridaBarCLE2113R

REFUND POLICY: A $25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid.

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LIVE AUDIO WEBCAST REGISTRATION FEE:	HOW TO REGISTER
• Member of the Alternative Dispute Resolution Section: $60 • Non-section member: $95 • Full-time law college faculty or full-time law student: $60	**Click Here to Register** *OR* **go to www.tfb.inreach.com and search by course number**

Register for the "Mediation and Domestic Violence: Negotiating a Path Through the Storm" Audio Webcast Seminar at the link above.

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TO REGISTER, FOLLOW THE LINK ABOVE OR BY MAIL, SEND THIS FORM TO: The Florida Bar, Order Entry Department, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831.

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☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX Exp. Date: ____/____ (MO./YR.)

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❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

❑ Enclosed is my separate check in the amount of $35 to join the Alternative Dispute Resolution Section. Membership expires June 30, 2016.

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