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MEAH TELL, CHAIR • ROBERT A. COLE, CHAIR-ELECT

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CHRISTINA MAGEE, EDITOR

Chair's Message

Meah Tell

I have the distinct privilege and pleasure of serving as the Chair of the ADR Section of the Florida Bar this year, following in the footsteps of those leading ADR practitioners who have served before me. This year our Section is committed to helping serve you, our members, and to enhance the ethical and professional practice of ADR in Florida so that we can better serve the lawyers, the public and the courts in the State of Florida. Towards that end, the ADR Section, in conjunction with ADR Section on Policy and Practice and DRC is examining a proposal to require Florida Supreme Court certification of all mediators who are appointed or

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Diversity In Mediation – Domestic and International Challenges

By Ricardo J. Cata, Esq., Mediator and Arbitrator, Upchurch Watson White & Max, Miami, FL

Cross-cultural mediations can be more complex because of the impact cultural differences may have on negotiation styles and strategies. Mediators involved in a cross-cultural mediation should be culturally informed to improve the likelihood of success and minimize any negative impact of cultural factors on a mediation. Florida mediators are likely to be involved in disputes between people of different ethnic, racial, or national origin cultures. Likewise, cross-border disputes are increasing in Florida. Mediators should investigate the potential for any cultural, foreign legal system or tradition to bear on the dispute.

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Practical Tips For Mediating Labor and Employment Law Cases

By Bruce A. Blitman, Esq. and Kimberly A. Gilmour, Esq.

Bruce A. Blitman, Esq. is a Certified County, Family, & Circuit Mediator and a Qualified Arbitrator/Umpire in Pembroke Pines, FL
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During the past twenty-plus years, we have been privileged to mediate thousands of disputes. Although every case is unique, we have found that there are certain common denominators to cases which are resolved at mediation (or shortly thereafter). We hope

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Hybrid Mediation and Arbitration Processes In Florida: What Dual Roles Can A Florida Supreme Court Certified or Court-Appointed Mediator Be Engaged In?

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Overview

Hybrid ADR has been described by its advocates as "Packaging non-contentious mediation in the same box as adversarial arbitration." The benefit of this mix being that "it encourages the development and use of hybrid forms that drive synergy from the best features of both processes to generate holistic benefits."[1] This article addresses whether a Florida Supreme Court Certified or Court-Appointed Mediator or Qualified Arbitrator can ethically participate in Hybrid ADR, and discusses

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selected in cases involving circuit or family court matters. We will be conducting a quick Survey of our membership as part of this process. Please take a few minutes from your schedule to respond to our very brief questions on this important topic when you get the Survey link via email from our Bar Liason, Gabrielle Tollok.

For those of you who do not know me, my passion is bilingual mediation. I began my career in the field of alternative dispute resolution as an Arbitrator with the American Arbitration Association and continue to serve on their employment and commercial arbitration panels today. I began my work as a mediator in the Eleventh Judicial Circuit mediation program in 1989 and I am a Florida Supreme Court Certified Family, Circuit Civil, Appellate and County Court Mediator and Florida Supreme Court Qualified Arbitrator. I have served as President of the Florida Academy of Professional Mediators, and have served on three of the four existing Florida Supreme Court ADR Committees: ADR Rules and Policy, Mediator Training Review Board and the Mediator Ethics and Advisory Committee.

The other nineteen members of the Executive Council of this Section similarly have contributed tens of thousands of hours working as mediators, arbitrators, and ADR professionals, as well as training, lecturing, writing articles, and serving in leadership positions in the field of ADR throughout Florida. I am fortunate to have the support and assistance of our multi-talented Executive Council in carrying out my duties as Chair this year. The Executive Council is making efforts this year to connect to other Sections of the Florida Bar, Florida Supreme Court ADR Committees, local bar associations, and other groups involved in legislation, rule making, or programming that impacts the field of ADR. We want to collaborate with you and/or to provide our assistance or input in your ADR endeavors. Please contact us, and let us know how we can work with you, or what kind of programming or other resources we can offer to you. Thank you/mil gracias.

Meah Tell
Chair, ADR Section

News & Tips is a publication of The Alternative Dispute Resolution Section of The Florida Bar. Statements of opinions or comments appearing herein are those of the contributing authors, not The Florida Bar or the ADR Section.

Note: Newsletter editor Christina Magee is soliciting articles for the Winter edition of the ADR News & Tips. All articles should be submitted to cmagee@brevardmediation.com by January 31, 2017.

"DIVERSITY IN MEDIATION"

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Mediation is not understood, practiced, or accepted everywhere in the same manner and same process as it is in the U.S. This discussion will address the principle studied and recognized cultural differences on negotiation approaches and strategies, their potential impact on mediation, and how a mediator may prepare to cope with such cultural differences.

I. What is Culture?

"Culture" is comprised of values, norms, beliefs, activities, institutions, communication patterns, and standard practices particular to a group, such as: individual experiences, socio economic status, occupation, gender, race, religion, national origin, languages. These various factors can come into play not only with individuals from other cultures, but even with sub-cultural groups. Culture is pervasive and invisible. Culture can be compared to water around fish, or air around people. Cultural differences can play a role in domestic and cross-border mediations, especially if the parties, counsel or mediator come from different cultures. A person's culture can impact that person's attitudes toward and during a mediation, and the outcome of a mediation. Cultural differences can create friction and make parties question whether they want to negotiate with members of another culture.

I. Communication Context

Living in Florida makes it clear that using and hearing multiple languages is the norm, not the exception. Therefore, mediator needs to be aware of any language and cultural concerns. A discussion of cross-cultural factors in mediation should begin with the concept of "Low-Context" and "High-Context" communication. The concept of Low-Context and High-Context communication was pioneered by Edward T. Hall. Communication differences are important cultural difference in cross-cultural and/or cross-border mediations. Low and High Context refers to how people interact and communicate with other members of their culture.

In "Low-Context" cultures, people communicate directly and rely on verbal communications, as opposed to non-verbal communication to express themselves. The discussion is straight forward and to the point. Important issues are explicitly discussed no matter how sensitive the subject matter is. Low-Context cultures are more present and future-oriented, and value change over tradition. People from the USA, Canada, Australia, Europe (with the exceptions noted bellow), Israel, and Scandinavia use a direct, explicit, low-context communication style.

In "High-Context" cultures, the information lies in the context, is not always verbalized, and the conversation goes around like a circle. Much of the meaning of the communication is "programmed" into the receiver of the message as a result of the shared experience, connection and history of the sender and the receiver. People are more likely to infer, suggest and imply than say things directly and to the point. Often no words are necessary – a gesture or even silence is sufficient to communicate meaning. High-Context cultures are more past oriented and value traditions over change. Asian, Indian, Mexican, most Middle Eastern, French, Spanish and Greek people use indirect, implicit High-Context communication.

If one party in a mediation is a High-Context communicator and another is a Low-Context communicator, the mediator needs to act as a communication "translator," in helping the parties understand messages. People form Low-Context cultures are more focused on facts, whereas people from High-Context cultures will be generally implicit, indirect and assume the mediator and the other party understand the nuances of communication as well as they do. These two prominent cultural communication styles can have a significant, and at times negative, impact in mediation negotiations and outcome. Members of High-Context cultures are often uncomfortable with direct confrontation and prefer negotiations with more caucusing, rather than direct negotiations. People from Low-Context cultures are generally focused on facts, and people from High-Context cultures will be generally implicit and indirect.

II. Individualist vs. Collectivist Negotiations

Dutch psychologist, Geert Hofstede, in his *"Culture and Organizations: Software of the Mind"*, notes that in general, people from the U.S. and Northern and Western Europe are "individualists" whose pattern of negotiation emphasizes the individual's personal preferences, goals, rights, needs and interests, all of which tends to be self-reliant and competitive. Hofstede observe that these cultures tend to be very rules-driven, with laws spelling out what is and is not acceptable. At mediation, "individualists" parties generally insist on getting down to business, because in these cultures "time is money." In joint sessions and private caucuses, communication tends to be direct and to the point. They ask direct questions, their language is often colorful, loud and forceful.

On the other hand, "Collectivists" predominate in much of Africa, the Middle East, most of Asia, South America, Mexico, Nepal, and parts of Eastern Europe. Israel is in mid-scale, according to Hofstede. These cultures tend to be more focused on group harmony and solidarity based on communal duty and responsibility. Their framework focuses less on rigid standards of behavior and more on how the behavior itself impacts group harmony and solidarity. Preservation of relationships is very important. There is a sense of communal duty and responsibility to the family, to the company or to society. There is a correlation between High-Context communication and Collectivist cultures.

The implications for mediators is that mediations among so-called Individualists follow a more "lineal" model, focused on the negotiation task starting with fact gathering, then issues clarifications, then to needs and interests identification, ending with the generation and selection of options. Collectivists will approach mediations in a more relationship-oriented way, initially establishing a basis of

trust in the mediator and each other upon which to build negotiations. Maintaining harmony and avoiding discomfort is very important for this group. In mediation, Individualists are focused on the negotiation task; Collectivists are focused on building and maintaining a relationship within the group. An experienced mediator should be able to find a common thread between these poles to benefit the mediation process and the ultimate outcome of the mediation. In dealing with "Collectivists" it is also important to keep in mind that all decision makers may not be at the mediation table, and that negotiating teams may not have authority to make concessions to reach a final agreement.

III. Assertiveness vs. Cooperativeness

Also related to Hofstede's work is what he calls "Assertive" vs. "Cooperative" cultures. A culture of Assertiveness values achievement, control, power, the accumulation of money and wealth, independence, recognition, "hardball," aggressiveness, dominance, challenges, ambition, competition, physical strength, and can be summarized with the phrase "win at all costs." In these cultures, their ethic is one of a "live to work" orientation. Countries with a tendency to be more assertive are: Australia, China, Japan, Slovakia, Switzerland, Austria, Venezuela, Italy, Mexico, Ireland, Jamaica, Great Britain, Germany, and the Arab World. The U.S. and most European countries and Israel appear to be in mid-scale, according to Hofstede's research.

A culture of Cooperativeness has a more "win-win" approach to negotiations, and values not raising your voice, small talk, agreement, and being warm and friendly in conversation. These cultures value cooperation, nurturing, and relationship solidarity, and the ethic is more one of "work to live." The Scandinavian countries, as well as Finland, Thailand and South Korea tend to be more cooperative.

These cultural differences can have an impact on mediation, since Assertive negotiators will attempt to dominate the others through power tactics, and will be reluctant to make concessions, as opposed to Cooperative negotiators, who will prefer to discuss interests, offer concessions, try to separate the people from the problem, and consider the dispute in a more neutral way. Mediators should familiarize themselves with, and consider, the way these cultural roles may play out in the cultural context of the mediating parties.

IV. Uncertainty Avoidance

Another of Hofstede's cultural indexes is whether people in a culture are prone to avoid risks or to take risks, and therefore, how well they may adapt to change; that is, the level of tolerance for uncertainty and ambiguity within a culture. This index measures the extent to which people feel threatened by unstructured or unknown situations, compared to the more universal feeling of fear caused by known or understood threats. This index focuses on the level of tolerance and the importance of truth in a culture, as compared to other values.

A High Uncertainty Avoidance culture creates a rule-oriented society that institutes laws, rules and controls in order to reduce the amount of uncertainty in the environment. People from these cultures tend to dislike risky and unclear situations, and prefer rules and structured circumstances. Precision and punctuality are important. In general, negotiators from a High Uncertainty Avoidance culture prefer to keep the mediation structured, and will follow the ground rules indicated by the mediator, since they are not comfortable in unconventional situations. They value precision and leave very little to chance, and will choose strategies that offer lower rewards, but have a higher probability of success. They prefer to have precise answers to questions, precise instructions and, will distrust negotiating partners who display unfamiliar behaviors, and have a need for structure and ritual in the negotiation process. Negotiating teams from High Uncertainty Avoidance cultures put a premium in the maintenance of harmony and the absence of discord. Countries which have High Uncertainty Avoidance cultures are Greece, Israel, Portugal, Guatemala, Uruguay, Belgium, Salvador, Japan, Yugoslavia, Peru, France, Chile, Spain, Costa Rica, Panama, and Argentina.

Cultures which have a Low Uncertainty Avoidance usually tolerate a greater degree of uncertainty, are less rules oriented, and are open to new situations and new ideas, are more creative in their problem solving approach, show more tolerance for a variety of opinions, and accept more risks and change. These cultures value risk-taking, problem-solving, and tolerate ambiguity. Negotiation teams from these cultures are more motivated by the hope of success, and tend to be less expressive and less openly anxious. Countries with Low Uncertainty Avoidance are: the U.S., China, Jamaica, Denmark, Singapore, Hong Kong, Ireland, and Great Britain.

These cultural differences are important in mediation, since the parties may find trouble negotiating if one side is constantly proposing new options toward settlement, and the other is unwilling to change its position, or to consider more creative or riskier or unusual solutions. These cultural differences could affect a mediation's outcome, and potentially lead toward failure from the outset.

V. Long-Term v. Short-Term Orientation

Long-Term Orientation focuses on the extent that a culture embraces traditional, forward thinking values and exhibits a pragmatic future-oriented perspective, rather than a conventional historic or short-term point of view. These cultures are more likely to make long-term commitments and have a great respect for tradition. There is a strong work ethic, and long-term rewards are expected as a result of today's hard work. These cultures tend to respect thrift, status, perseverance, order, sense of shame, and have a high savings rate. There is a willingness to make sacrifices now in order to be rewarded in the future. Asian countries score high on this dimension.

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Long-Term Orientation cultures may experience people from Short-Term Orientation cultures as being irresponsible, and as willing to throw away money. This perception can be an important factor that a mediator should keep in mind. Also, Long-Term Orientation cultures may engage in extended negotiations. During the Vietnam Paris Peace Talks, the Americans came to Paris and rented hotel rooms for a month; the Vietnamese rented rooms for a year!

In a culture of Short-Term Orientation, change can occur more rapidly because long-term traditions and commitments are not impediments to change. A Short-Term Orientation expects that efforts should produce quick results, has a concern for saving face; they may experience people from Long-Term Orientation cultures as being stingy and cold. Most Western countries, the Philippines and Australia score high on this dimension. Negotiators from Short-Term Orientation cultures should be mindful that parties from Long-Term Orientation cultures may see the past or the distant future as part of the present. Likewise, negotiators from Long-Term Orientation cultures need to remember that a present orientation can bring needed change. This is an important difference in perspective for mediators to keep in mind.

VI. Monchronic Culture vs. Polychronic Culture

A Monchronic Culture perceives time as linear, quantifiable, and in limited supply; they believe that it is important to use time wisely and not waste it. Efficiency is important, and the needs of people are adjusted to suit the demands of time, resulting in developing schedules and deadlines in the manner considered most efficient to do one thing at a time. Unforeseen events should not interfere with plans, and interruptions are seen as a nuisance. A monchronic culture's approach to time is linear, sequential and focusing on one thing at a time. These approaches are most common in the European-influenced cultures of the U.S., Switzerland, Japan and Scandinavia.

A Polychronic Culture orientation involves simultaneous occurrences of many things and the involvement of many people. The time it takes to complete an interaction is elastic, and is considered more important than any schedule. Time is perceived as limitless and not quantifiable, and time is adjusted to suit the needs of people. Schedules and deadlines get changed as needed, and people may need to do several things simultaneously. It is appropriate to split attention between several people and tasks, and it is not necessary to finish one thing before starting another. Mediterranean and Latin American cultures, as well as African and the Middle Eastern cultures rank high on this orientation.

Conclusion

For the mediator to be insensitive to the cultural or ethnic differences discussed here could result in missed opportunities. If the mediator recognizes cultural differences and learns how to address them, a new set of "tools" becomes available. Cross-cultural or sub-culture mediations are more complex because of the differences noted above. However, in these settings, mediators can apply the information discussed here to improve the likelihood of success.

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ADR Section's Comments on Dual Service Result in Policy Change

The ADR Section submitted comments to the Supreme Court earlier this year resulting in a shift in policy and amendments to the Code of Judicial Conduct. Effective October 1, 2016, senior judges cannot engage in dual-service, same-circuit dispute resolution roles where they have presided in any case within the circuit. Previously, these prohibitions had been put in place for mediation services provided by senior judges, so that a senior judge presiding in a circuit was unable to mediate cases within that circuit. These amendments extend those restrictions to judges serving as voluntary trial resolution judges or arbitrator. The Supreme Court's Comments on the changes endorsed the positions taken by the ADR Section on the appearance of potential impropriety of such dual service.

"PRACTICAL TIPS FOR MEDIATING"

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that the following tips will help you and your clients effectively mediate your labor and employment law disputes and achieve durable mediated settlement agreements:

1. KNOW WHAT YOU AND YOUR CLIENTS WANT AND NEED

Your clients cannot get what they want from others if you don't know what your clients want for themselves. Establish specific goals. Consider what it will take to satisfy your clients' interests, needs and objectives. If you are an attorney representing a client on a contingent fee basis, wouldn't it be helpful to know as early as possible that your client really only wants an apology, rather than money damages?

For example, in a Fair Labor Standards Act (FLSA) dispute, is the client entitled to unpaid overtime or is it a half-time case? Was the employee paid for any overtime? Was the employee paid their hourly rate for all hours worked, but not the half time rate? Other issues might involve the Statute of Limitations-is it two years or three years? Plaintiff's counsel will argue it is three years and claim there is intent not to comply with the FLSA and the defense attorney will argue compliance or "good faith" mistake. The parties need to know that the FLSA allows for liquidated damages-doubling the amount of unpaid overtime owed and, more importantly, this is a Prevailing Plaintiff attorney fee statute. As long as the Plaintiff is entitled to $1.00 in unpaid overtime, the Defendant is required to pay the Plaintiff's attorney fees and costs.

PRACTICE TIP: IT IS ESSENTIAL THAT THE ATTORNEYS AND THE PARTIES KNOW AND UNDERSTAND THE APPLICABLE LAW.

2. DEVELOP A GAME PLAN

Once you know what your clients want, establish a negotiating strategy to achieve their objectives. Before presenting your first offer, consider where you and your clients want to start and where you want to finish. Give yourselves some room in which to negotiate.

You and your clients need to present a unified presence (united front). Clients should be advised prior to the mediation that the lawyer will do most of the talking. When the lawyer and client meet in private sessions with the mediator, then the client can do all-or some-of the talking. This strategy may vary from case to case, but it should be discussed with the client well before the scheduled mediation. The client should also be advised that the opposing counsel may say things that would not be admissible at trial, but this is the only opportunity for them to address the party. Sometimes attorneys in their opening statements will ask the other party a question. Please make sure that your client is aware of this and prepare your client as to how you would like the client to respond-if at all.

PRACTICE TIP: LAWYERS AND THEIR CLIENTS MUST BE FULLY PREPARED FOR THE MEDIATION PROCESS.

3. KNOW WHAT THE OTHER PARTY NEEDS

It takes two to tango and to negotiate. To reach an agreement, all parties must feel that some, if not all, of their interests have been satisfied. Your negotiating partners also have motivations and concerns. Ask open-ended questions to gather information in order to understand their positions, perspectives, motivations and concerns.

Mediation is the art of compromise-know what the other parties want or need to come to an agreement. Make sure that your clients know what their "best case" (Best Alternative To A Negotiated Agreement-BATNA) and "worst case" (Worst Alternative To A Negotiated Agreement-WATNA) would look like. Prepare yourself and your client to answer the mediator's questions that are likely to arise during your private conversations. Be prepared and let the mediator know in advance that an interpreter may be needed. Do not rely on the mediator to serve as the interpreter nor should you rely on a family member who may have no understanding of the law to act as your client's to faithfully and accurately interpret what is being said during the mediation process. If a party does not have a good command of the English language, and does not have the benefit of a skilled interpreter, it may be virtually impossible for them to meaningfully participate in the mediation process and resolve the case.

Employment discrimination cases are not always about money. Sometimes the former employee may want an apology or wants to know if there is some kind of awareness training so that the problems do not continue in the future. Another option to consider is whether the former employee wants to be rehired. This can be very effective, but employers have to remember that the lawsuit may not end just because the employee has accepted a position with the company.

PRACTICE TIP: KNOW WHAT THE PARTIES NEED TO SATISFY THEIR INTERESTS IN ORDER TO RESOLVE THE CASE. LET THE MEDIATOR KNOW IN ADVANCE ABOUT ANY SPECIAL CONSIDERATIONS, ISSUES AND ACCOMODATIONS FOR YOUR CLIENTS AND PARTICIPANTS. THESE SHOULD INCLUDE PHYSICAL ACCOMODATIONS UNDER THE ADA, LANGUAGE AND OTHER CULTURAL MATTERS, AS WELL AS POTENTIAL SAFETY ISSUES. THIS SHOULD TOUCH ON THE IMPORTANCE OF HAVING A PROFESSIONAL INTERPRETER RATHER THAN A FAMILY MEMBER-OR THE MEDIATOR (WHO IS PROHIBITED BY MEDIATOR STANDARDS OF CONDUCT FROM SERVING IN THIS CAPACITY), AS WELL AS THE SIGNIFICANCE OF MAKING SURE THE MEDIATION CONFERENCE WILL BE HELD IN A SAFE AND SECURE ENVIRONMENT. SAFETY OF THE PARTICIPANTS MUST ALWAYS BE THE HIGHEST PRIORITY. IF THERE ARE ANY CONCERNS ABOUT SAFETY, THESE MUST BE ADDRESSED WITH THE MEDIATOR IMMEDIATELY IN ORDER TO DETERMINE WHETHER THE CASE IS APPROPRIATE TO BE MEDIATED, AND IF IT IS, WHERE IT CAN BE CONDUCTED SO THAT ALL OF THE PARTICIPANTS WILL BE SAFE.

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4. BE AN EMPATHETIC LISTENER

Attentive listening enables us to better understand the motivations of others. Make eye contact when anyone else in the mediation is speaking. Pay attention to the words and language they use, as well as to their body language. At one recent mediation training course, a student in the class said that her child would admonish her by saying, "Mommy, listen to me with your face!" when she was distracted and not paying attention. This is outstanding advice for all of us to follow.

The attorneys' opening statements are the only opportunity for them to address the opposing parties. Some attorneys use this time to scare and intimidate the opposing parties, and may sometimes even go as far as to threaten them. This strategy does not usually work and can even cause a mediation conference end abruptly. On the other hand, attorneys who are well prepared can advise the opposing party how they see the case unfolding and identify the problems with the case. An effective mediator will be able to ask open ended questions based on what has been said by the attorneys in order to facilitate the discussions and move the mediation forward. Attorneys who are prepared and are able to deliver a well-structured and developed opening statement will usually have a more successful and productive mediation experience. Just because the parties may not like one another does not mean that their attorneys should treat each other in a hostile, antagonistic manner. The attorneys and the mediator should treat everyone with dignity and respect, and model good behavior for the other participants in the mediation process. Attorneys who yell, scream and threaten each other do not help their clients or themselves achieve a mutually acceptable agreement.

PRACTICE TIP: BE PREPARED TO DELIVER A COMPELLING AND EFFECTIVE OPENING STATEMENT. LEAVE YOUR "BOXING GLOVES" HOME.

5. ATTACK THE PROBLEM, NOT THE PEOPLE

Focus on finding solutions to your shared problems. Screaming at the other party may let off steam, but it isn't conducive to effective joint-problem solving. Be courteous and tactful.

Employment case are like family cases in that they can be very emotional and volatile. In Title VII discrimination cases, the employee may feel he/she was wrongfully harassed or discriminated against because of their sex, race, or religion and then lost their job. They have not been able to find another position or a comparable one and blame the former employer. Their economic lives have been jeopardized, as well as the lives of their families. Similarly, those who have been accused of discriminatory behavior, may believe they have been wrongfully targeted and falsely accused to the extent their professional reputations have been tarnished. These parties may need to vent their feelings and frustrations before the mediations can progress and move forward. Sometimes, in these situations trying to find non-monetary solutions can be helpful; reference letters, rehiring, training for managers, etc.

PRACTICE TIP: EMPLOYMENT CASES CAN BE VERY EMOTIONAL. BE PATIENT. KEEP CALM AND CARRY ON THROUGHOUT THE MEDIATION PROCESS.

6. TREAT THE OTHER SIDE AS YOUR ALLY, NOT YOUR ENEMY

Your negotiating partners at mediation may have to persuade others in their organization to agree to your offer. As your friends, they can sell your proposal; as your enemies, they can sink it.

Mediation is a "win/win" process, instead of the case continuing and going to trial and there being a winner and loser. However, when an attorney's opening statement attacks the other side, it does not foster a "win-win" scenario. Similarly, if there have been settlement negotiations between the parties prior to mediation, there is nothing that requires the parties to start where they left off. We have both experienced cases in which the plaintiffs demanded six figures, which was significantly more than the last figure discussed between the parties. It can be frustrating and will probably take longer, so be prepared and make sure your client knows what to expect.

PRACTICE TIP: ATTACK THE PROBLEMS, NOT THE PEOPLE. PERSUADE, DON'T INTIMIDATE.

7. EDUCATE, DON'T INTIMIDATE

Be prepared to explain, document and justify to your negotiating partners why they would be well-advised to accept your client's proposal. Help them understand your client's position.

Attorneys need to be prepared to explain their demand-the plaintiff worked five extra hours each week. They did not take lunch or they worked off the clock. When the argument is an average of five extra hours a week it is hard for the other side to accept. The more details the better. When the employer's office is only open 8 hours a day, five days a week, it is hard to understand how the plaintiff could work so many extra hours.

PRACTICE TIP: DON'T DEMAND. EXPLAIN AND JUSTIFY YOUR CLIENT'S PROPOSAL AND GIVE REASONS, NOT ULTIMATUMS.

8. BE PATIENT AND PERSISTENT

Don't be angry and insulted if the first offer you receive is not what you and your client hoped it would be. Treat this proposal as the first of several in the negotiating process. Slow but steady movement can lead you down the road to resolution. Explore as many options as possible to help the parties and their counsel achieve a mutually acceptable agreement.

Patience is a virtue. Many times the parties are quick to end the mediation without giving the process a chance.

PRACTICE TIP: VETERAN MEDIATOR AND COLLEAGUE MARTIN I. LIPNACK USED TO TALK ABOUT THE "RULE

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OF TOO'S": TOO MANY PARTIES-AND MEDIATORS-ARE TOO QUICK TO DECLARE IMPASSE TOO SOON." DON'T LET THIS HAPPEN TO YOU.

9. CONSIDER THE CONSEQUENCES OF NO AGREEMENT

Think about what could happen-both good and bad-if your clients are unable to agree. Can your clients afford to "walk away" from the table or are they desperate to make a deal now?

An impasse is not the best resolution. While 99% of the FLSA cases settle, the cases that go to trial do not always get decided in favor of the plaintiff. Consider this case: Plaintiffs claimed they were not allowed to take lunch breaks and worked off the clock. The Plaintiffs claimed damages of $100,000. The jury decided for the Plaintiffs BUT only awarded $1,800 in damages. The real winner in the case was the Plaintiff's attorney. The consequences of no agreement were not the best for the plaintiffs.

PRACTICE TIP: CONSIDER YOUR CLIENT'S BEST AND WORST ALTERNATIVES TO A NEGOTIATED AGREEMENT (BATNA AND WATNA) BEFORE GIVING UP. WHAT COULD GO WRONG AT TRIAL? WHAT COULD GO RIGHT?

10. BE FLEXIBLE AND CREATIVE

Rolling Stone Mick Jagger made famous the line "You can't always get what you want." In negotiations, this is often true. Always have a fallback position, some alternative that satisfies your clients and the other parties enough to make a deal. Be imaginative. Be creative. You just might find you get what you (and your clients) need. Flexibility is important.

PRACTICE TIP: BE AS FLEXIBLE AS A CONTORTIONIST AT A CIRCUS. NEVER GIVE UP. NEVER QUIT TRYING TO EXPLORE MUTUALLY ACCEPTABLE SETTLEMENT OPTIONS.

We hope that these suggestions will help you and your labor and employment law clients get the most out of your future mediation experiences. We wish you much good health, good luck and good mediation.

We hope to write future columns which address subjects such as: (a) Who should appear at the mediation conference (and who should not)?; (b) What you should consider in selecting a mediator for your case?; (c) The importance of reading court orders referring cases to mediation; and (d) The importance of preparing written mediation summaries (and to whom they should and should not be sent). We welcome your thoughts, comments, questions and suggestions about these and other mediation-related topics.

"HYBRID MEDIATION AND ARBITRATION"

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relevant statutes, case law, ethics rules and ethics opinions. Significantly, utilizing Hybrid ADR processes can present traps for the unwary.

A Brief Description of Hybrid Processes

Hybrid Mediation and Arbitration processes which are in use today are:[2]

ARB-MED: The parties begin this process as an arbitration. The arbitrator renders an award[3] but seals it in an envelope and does not reveal it to the parties. The parties agree that the arbitrator will then mediate the dispute.[4] If the parties are unable to settle the dispute within a given time, or if they end the mediation phase without an agreement, the award is rendered. The parties decide in advance whether the arbitration award is binding or non-binding,[5] or a court may enter an order referring the case to non-binding arbitration or there may be a statutory provision that makes the arbitration non-binding. Sometimes arbitrators have been known to begin the arbitration process and then mediate the dispute, or have a mediator employed by their firm mediate the dispute before the arbitrator renders his award. If the mediation is unsuccessful, the arbitrator continues the arbitration and renders the award.[6]

MED-ARB: The mediator tries to help the parties reach their own resolution but if the parties cannot settle all issues the mediator becomes the arbitrator and renders a decision on those issues the parties could not resolve.[7] The arbitrator's decision can be binding or non-binding.

This article addresses only the issue of whether the same person can act in the dual role of adjudicator and mediator of the issues involved in, related to or arising from the same dispute.

Ethical Rules for Certified and Court-Appointed Mediators

The Standards of Professional Conduct found in Florida Supreme Court Rules 10.200-10.690 ("Florida Mediator Ethics Rules") apply solely to Florida Supreme Court Certified Mediators and Court-Appointed Mediators. As a result, the Florida Mediator Ethics Rules do not govern the conduct of other ADR providers unless expressly provided. Rule 10.210 requires mediators to be neutral[8] and impartial. Rule 10.340 states that a mediator shall not mediate a matter that presents a clear conflict of interest. "A conflict of interest arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator's impartiality. Rule 10.330 defines impartiality as "freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed ot any one individual." Rule 10.370 states that a mediator "shall not decide the dispute, or direct a resolution of any issue."

Ethical Rules for Arbitrators

Rules 11.010-11.130 of the Florida Rules for Court-Appointed Arbitrators are Standards of Conduct which apply to arbitrators who conduct arbitrations pursuant to Chapter 44 and "are a guide to arbitrator conduct in discharging their professional responsibilities in the arbitration of cases in the State of Florida. While Rule 11.070 states that ex-parte communications are not permissible, there are certain exceptions, which include "If all parties request or consent that such discussion take place." Rule 11.080 provides that arbitrators should be impartial and impartiality is defined a "freedom from favoritism or bias in word, action, and appearance." Arbitrators "shall withdraw from an arbitration if the arbitrator believes the arbitrator can no longer be impartial." An arbitrator "shall not use the arbitration process to solicit, encourage, or otherwise incur future professional services with either party."

Statutory Provisions/Procedural Rules

As a threshold issue, it should be noted there may be statutory provisions or procedural rules that restrict mediation or arbitration. Hybrid ADR in those types of cases may be proscribed regardless of whether the same person acts as the mediator and/or arbitrator.

A. Chapter 44:[9]

Chapter 44, although named "Mediation Alternatives to Judicial Action," contains provisions regarding (1) court-ordered mediation[10] conducted according to the rules of practice and procedure adopted by the Supreme Court, (ii) court order of referral to mandatory non-binding arbitration[11] of any contested civil action filed in a circuit or county court according to the rules of practice and procedure adopted by the Supreme Court , and (iii) the parties agreeing in writing to submit a civil dispute to binding arbitration prior to or after a lawsuit is filed provided no constitutional issue is involved, and (i) voluntary trial resolution in lieu of litigation of the issues involved provided no constitutional issue is involved.[12]

F.S. 44.102 (2)(c) requires a court in circuits in which a family mediation program has been established and the finding of a dispute, to refer to mediation all or part of custody, visitation, or other parental responsibility issues as defined in s. 61.13. However, upon motion or request of a party, the court shall not refer a case to mediation if it finds that there has been a history of domestic violence that would compromise the mediation process.

F.S. 44.104 (14) prohibits voluntary binding arbitration and voluntary trial resolution of "any dispute involving child custody, visitation, or child support, or to any dispute which involves the rights of a third party not a party to the arbitration or voluntary trial resolution when the third party notifies the chief arbitrator or the trial resolution judge that the third party would be a property party if the dispute were resolved in court, that the third party intends to intervene in the action in court, and that the third party does not agree to proceed under this section."

In Toiberman v. Tisera, 998 So.2d 4 (Fla. 3d DCA 2009)[13]

the parties attended mediation with retired Judge John Gale, and the sole agreement that arose from the mediation was that the parties agreed to binding arbitration with retired Judge Gale of all of the issues involved in their pending dissolution of marriage action. The majority opinion held that F.S. 44.104 (13) prohibits binding arbitration of a "dispute" involving child custody, visitation, and child support, and found that the arbitrator could not adjudicate those issues or any other issues involved in the pending dissolution of marriage action. While the Third District Court of Appeal did not discuss the issue of the mediator serving in the dual capacity of mediator and then arbitrator in a voluntary binding arbitration, they refused to enforce any part of the voluntary binding arbitration award as a matter of public policy, and called the arbitration "a wholly illegal procedure prohibited by statute. Fundamental or plain error, such as this one, is not waived simply because the parties and the trial court ignored the clear statutory prohibition against arbitration of cases involving child custody, visitation, and child support. Fundamental error, which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." Id. at 8.

In 2010, the Third District Court of Appeal decided Martinez v. Kurtz, 45 So.3d 961 (Fla. 3d DCA 2010). In Martinez, the parties reached two settlement agreements in the pending divorce case, which were ratified by the final judgment of dissolution of marriage . One settlement agreement involved the financial issues ("Assets Agreement") and was not filed in the public record; the attorneys and parties are the custodians of that agreement. The second settlement agreement involving child custody and visitation was dictated on the record (the "Children's Agreement"). There was no child support or alimony payable from one parent to another. The parties also agreed that in the event of any future disputes regarding the Children's Agreement or the Assets Agreement the dispute would be resolved by arbitration. Subsequent disputes regarding financial issues only arose and the parties initiated the arbitration process. However, in light of Toiberman, the trial judge and the appellate court agreed the arbitration clause was not enforceable and the trial court resumed jurisdiction.

B. Chapter 682: The Revised Florida Arbitration Code.

Effective July 1, 2013, the Florida Arbitration Code was amended to prohibit arbitration of child-related disputes in arbitrations which are governed by Chapter 682. The Revised Florida Arbitration Code provides:

> "682.25 Disputes excluded.–This chapter does not apply to any dispute involving child custody, visitation, or child support."

The scope of Chapter 682 is contained in 682.02 which makes valid, irrevocable and enforceable non-court connected arbitration agreements where (1) the agreement is contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement, and (2) written interlocal agreements under ss. 163.01 and 373.713 in which two or more parties agree to submit to arbitration any controversy between them concerning water use permit applications and other matters, regardless of whether or not the water management district with jurisdiction over the subject application is a party to the local agreement or a participant in the arbitration.

The ethical standards for arbitrators contained in F.S. 682.041 and 682.041 relate to neutrality, impartiality, conflicts of interest, and disclosure, and how the failure to abide by these standards can impact the arbitration award. However, like Chapter 44, there is nothing in the Revised Florida Arbitration Code that expressly addresses the same ADR provider serving in the dual capacity of a mediator and arbitrator of the same dispute, or issues arising from or related to that dispute.

C. Procedural Rules Governing Court Orders of Referral to Mediation and Arbitration**.**

Florida Rule of Civil Procedure 1.800 specifically states that under no circumstances may the following categories of actions be referred to arbitration by a court:

(1) Bond estreatures.
(2) Habeas corpus or other extraordinary writes.
(3) Bond validations.
(4) Civil or criminal contempt.
(5) Such other matters as may be specified by order of the chief judge in the circuit.

Florida Rule of Civil Procedure 1.700 requires an order of referral to arbitration upon stipulation of the parties, with the order of referral incorporating the stipulation.[14] Florida Rule of Civil Procedure 1.800 refers specifically to mediation in conjunction with arbitration and provides that when the parties have voluntarily stipulated to arbitration in conjunction with mediation, the court shall enter an order based upon this stipulation. The court or upon motion of any party may also order a case to arbitration in conjunction with mediation "if the judge determines the action to be of such a nature that arbitration could be of benefit to the litigants or the court."

There is a 1994 Committee Note to Rule 1.800 penned by the Supreme Court Committee on Mediation and Arbitration Rules (now merged into ADR Rules and Policy Committee) which states that the Committee "encourages crafting a combination of dispute resolution processes without creating an unreasonable barrier to the traditional court system." However, these rules and Committee Note are silent as to whether "mediation in conjunction with arbitration" or the "combination of dispute resolution processes" means that the same person may serve in the dual capacity of mediator and arbitrator in the same dispute.

Cannons and Ethical Opinions Addressing Hybrid ADR.

Once the carve-outs for subject matter are set aside, there are still several categories of rules and ethical opinions that restrict dual service as an adjudicator and mediator.

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A. Code of Judicial Conduct.

On July 7, 2016, the Florida Supreme Court amended Cannon 5 F (2) of the Code of Judicial Conduct in SC 2016-63 to prohibit a Senior Judge from acting in the capacity of a mediator, arbitrator or voluntary trial resolution judge in any case in the circuit in which the judge is presiding as a senior judge. The Florida Supreme Court stressed the ethical concerns that are raised by a senior judge acting in a dual capacity.

B. MEAC Opinions

MEAC[15] provides written advisory opinions to mediators subject to the Florida Mediator Ethics Rules, but will not address questions related solely to arbitration.[16]

However, there have been several MEAC Opinions which relate to the mediator serving in the dual capacity of decision-maker and a mediator of the issues involved in the same dispute, or arising out of or relate thereto, or the settlement of those issues.

1. MEAC Opinion 2015-003:

The most recent MEAC opinion 2015-003 dealt with a question from a Florida Supreme Court Certified Family, Circuit Civil and County Mediator who mediated a PIP (Personal Injury Protection) case in County Court which resulted in no agreement. At the mediation's conclusion, counsel for both parties asked the mediator whether the mediator would be willing to arbitrate the case. The mediator felt it would be inappropriate to conduct an arbitration in the same case since the mediator received confidential information from both sides in private caucuses during the mediation, even though both sides said they were willing to waive any potential conflicts. The mediator believed that this scenario presented a non-waivable conflict. However, the mediator then asked MEAC to address the following question:

> "May a mediator who has (or has not) received confidential information during a mediation, also act as an arbitrator in the same case, with (or without) the parties agreeing to waive any potential conflicts of interest (or any confidentiality) from the prior mediation in the same case?"

The mediator did not specifically state that the arbitration proceeding in which the mediator would act as an arbitrator was a mandatory non-binding arbitration, but stated that the case would be referred to arbitration by the county-court judge. F.S. 44.103 provides that such court-ordered arbitrations are mandatory, non-binding arbitrations. MEAC, however, made no distinction in its opinion between mandatory non-binding and binding arbitrations.

The majority of the MEAC panel opined that the parties to a lawsuit may exercise self determination in deciding whether to have a prior mediator act as an arbitrator in the same case and the Florida Mediator Ethics Rules do not contain a prohibition against a mediator serving as an arbitrator in a case the mediator mediated previously. However, the mediator must ensure the parties

- are exercising self-determination;
- are voluntarily agreeing to select this mediator as their arbitrator;
- understand the implications of the change in roles, and;
- are advised there may be other methods of alternative dispute resolution available.

The mediator must explain the possible conflicts of interest and the loss of confidentiality resulting from the mediator becoming the arbitrator. The parties must then agree to waive any conflict and agree to the loss of confidentiality, preferably in writing.

The MEAC majority relied on the Committee Note to Rule 1.310 which states: "On occasion, a mediator may be requested by the parties to serve as a decision-maker. If the mediator decides to serve in such a capacity, compliance with this request results in a change in the dispute resolution process impacting self-determination, impartiality, confidentiality, and other ethical standards. Before providing decision-making services, therefore, the mediator shall ensure that all parties understand and consent to those changes."

It is important to note that the last sentence of MEAC Opinion 2015-03 warned:

> "In summary, while it is not expressly prohibited for a mediator to serve as an arbitrator in the scenario described, the MEAC believes that doing so is inherently laden with hazards and suggests great caution for any mediator that accepts this change in roles."

Additionally, in MEAC Opinion 2015-03, the majority addressed the issue of the arbitrator at a later date becoming the mediator. The panel reaffirmed the language in MEAC 2009-02: "If the parties voluntarily agree to have their previous mediator act as an arbitrator, 'the mediator should clearly inform the parties, preferably in writing that he or she will no longer be serving as mediator and would not be able to mediate the present or related matters for them in the future.'"

The Opinion was not unanimous. First, the dissent found that the Committee Note to Rule 1.310 does not provide a mediator can mediate and then arbitrate the same case. Rather the Committee Note states that parties can decide they want to "change" the dispute resolution process, and the mediator can ethically engage in a different process from mediation–that of decision maker–which impacts self-determination, impartiality, confidentiality, and other ethical standards–all of which the mediator is required to inform the parties of if the mediator is not going to act as the mediator. However, the Committee Note does not state that the mediator can perform both roles.

Second, the dissent noted that Florida Mediation Rule 10.420, requires a mediator to advise the parties in the orientation session that the mediator is without authority to impose a resolution or adjudicate any aspect of the dispute. The dissent believed that the principles espoused in MEAC Opinion 2009-001 (which were not addressed

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by the majority) were dispositive, and the mediator could not subsequently act as the arbitrator of a case previously mediated by that arbitrator. The dissent noted that it agreed with the majority, that having once arbitrated a dispute, the mediator could no longer mediate that dispute or any matters related thereto.

2. MEAC Opinion 2009-02:

In MEAC 2009-02, the specific question addressed by the MEAC panel was:

> "In a court referred mediation, may a mediator, per agreement of the parties, be designated, in an executed mediation settlement agreement, as the final arbiter and interpreter in the event of a later disagreement between the parties over interpretation of that agreement so as to avoid the necessity of further court proceedings in that regard?"

The panel stated that the mediator must not suggest changing roles to serve as the arbiter or interpreter. A mediator who facilitates an agreement identifying the mediator as the future arbiter or interpreter, is in the awkward ethical position of assisting to draft an agreement which may accrue to the mediator's benefit (in terms of future work and fees). Further, when a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek legal counsel. Rule 10.370. The Committee believed this includes deciding whether it is in the parties' best interests to choose an arbiter, as well as selecting a specific arbiter. Additionally, a mediator shall decline an appointment, withdraw, or request appropriate assistance when the facts and circumstances of the case are beyond the mediator's skill or experience. Rule 10.640. Parties may not be aware or appreciate that the knowledge and skills required to become a Florida Supreme Court certified mediator are not the knowledge and skills required to serve as final arbiter or interpreter of a mediated agreement.

However, the panel concluded that despite the significant ethical and legal concerns, parties still have self-determination and may exercise their right to contract, including limiting rights and remedies. Designating a final arbiter and interpreter of a settlement agreement in order to avoid further court proceedings is consistent with the right of the parties to self-determination Rule 10.310. However, the Opinion went on to state:

> "Prior to accepting a decision-making role, the mediator should clearly inform the parties, preferably in writing, that he or she will no longer be serving as mediator and would not be able to mediate the present or related matters for them in the future. The former mediator must no longer refer to himself or herself as mediator for the case. Prior to changing roles, the mediator must also explain how his or her role will change and fully address any foreseeable implications, including resulting loss of party protections afforded by the Florida Rules for Certified and Court Appointed Mediators or the courts. The parties must agree, again preferably in writing. A mediator would do well to consider declining serving as arbiter or interpreter following service as a mediator for the same parties regarding the same subject matter. It may be the wise decision, better serving the parties, process, and profession."

This Opinion distinguished MEAC Opinions 1996-002[17] and 1998-006[18] on the basis that these two earlier opinions did not involve party-self determination at the end of a mediation

3. MEAC Opinion 2009-001:

A third significant opinion in the MEAC repository sheds light on the dual service/hybrid process ethical conundrum. 2009-002 failed to address MEAC Opinion 2009-001 dated May 28, 2009.

In MEAC Opinion 2009-001, the mediator asked: "Is it permissible, by party agreement or court appointment, to serve as a mediator and general magistrate for the same case? .... If so, should a General Magistrate subsequently hear the case by way of motions, to take consents or surrenders, Case Plan, Judicial and/or Status Reviews, etc. after mediation has been completed, either successfully by agreement or unsuccessfully by impasse?" MEAC'S answer was as follows:

> "It is not permissible to serve as a mediator and general magistrate for the same case. Doing so would create a clear nonwaivable conflict of interest. A mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromisethe mediator's impartiality. Rule 10.340(a). Additionally, mediation is based on the concepts of self determination of the parties (rule 10.310), impartiality and neutrality of the mediator (rule 10.330), and confidentiality of the process (rule 10.360). Serving in a dual capacity is problematic in all of these areas.
>
> Because the question did not specify the order in which one might serve in these capacities, the Committee will discuss the situation both from the perspective of a general magistrate mediating a case that is before him/her and a mediator subsequently serving as a general magistrate for the case s/he previously mediated.
>
> Serving first as a mediator and then as a general magistrate for the same case is nearly identical to the question raised in MEAC 96-002 in which the mediator inquired how to respond to a request by the trial court that he serve as special master in an estate proceeding after having served as the mediator for the case. The MEAC responded that the mediator should decline serving as a special master for a case he mediated based on the rules and statute governing confidentiality of mediation communications and a mediator's obligation to decline any act which would

compromise the mediator's ntegrity. MEAC 96-002. The MEAC reaffirms this opinion.

Mediating a case in which you are serving as a general magistrate creates a clear, nonwaivable conflict of interest. Rule 10.340. In addition, because there is no guarantee that the case will resolve in mediation, you could find yourself in the same position as discussed above, serving as an adjudicator for a case in which you mediated and learned confidential information. Rule 10.360(a). Finally, it is likely that serving in a dual role would have a chilling effect on the parties' self determination. Rule 10.310(b). Senior judges who also serve as mediators are in an analogous situation to the one posed. Thus, it is instructive to note that rule 10.340(e) states unequivocally, "[a] mediator shall not serve as a mediator in any case[in a circuit sic] in which the mediator is currently presiding as a senior judge."

3. It is not permissible to serve as a general magistrate and mediator for the same case, regardless of the order of service, and even if the parties were to agree. " (emphasis added)

Mediator/Arbitrator Immunity

As if the potential ethical snares that dual service present were not enough, mediator/arbitrator immunity might also be affected when the same neutral moves from role to role in the same case.

F.S. 44.107 provides that arbitrators serving pursuant to F.S. 44.103 and 44.104 have "judicial immunity in the same manner and to the same extent as a judge."

Mediators who serve in any non-court ordered mediation have immunity from liability arising from the performance of that person's duties while acting within the scope of the mediation function if the mediation is (a) required by statute or agency rule or order, (b) conducted under F.S. 44.401-44.406 by express agreement of the mediation parties, or (c) facilitated by a mediator certified by the Supreme Court unless the mediation parties expressly agree not to be bound by F.S. 44.401-44.406. However, the mediator does not have immunity "if he or she acts in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."

Similarly, F.S. 682.051 provides for immunity from civil liability for an arbitrator or arbitration organization acting in that capacity, to the same extent as a judge of a court of this state acting in a judicial capacity, and this immunity supplements any immunity under other law.[19]

Whether a Florida Supreme Court Certified or Court-Appointed Mediator may lose his or her quasi-judicial immunity based upon dual service as a mediator/arbitrator in a HYBRID mediation/arbitration process in which ethical concerns are not properly addressed by the mediator/arbitrator with the parties, or properly understood by the parties, should be considered by the mediator prior to engaging in subsequent service as an arbitrator of the same case. Certainly since dual service as an arbitrator and then mediator in the same case is ethically prohibited in Florida, query whether this dual service will result in the loss of quasi-judicial immunity for the ADR provider.

Conclusion

Dual service as an arbitrator and then mediator of the same case raises serious ethical concerns in Florida. It is well-settled given MEAC Opinions 2015-003 and 2009-002 that service as an arbitrator and then a mediator in the same or related case or in a settlement arising therefrom constitutes a nonwaivable conflict of interest. Both the Toiberman and Martinez cases raise the issue of whether engaging in such ethically proscribed processes jeopardizes the enforceability of any settlement agreement or award reached as a result of such a prohibited process. Additionally, the case of Vitakis-Valchine v. Valchine, 793 So.2d 1094 (Fla. 4th DCA 2001) holds that if there was misconduct by a mediator acting as an agent of the court, this is a valid basis to set aside the settlement agreement. "Misconduct" was characterized as the mediator's substantial violation of the standards of professional conduct set forth in the Florida Rules for Certified and Court-Appointed Mediators.

Service as a mediator and then a decision maker has been described as "inherently laden with hazards" for the mediator and imposes strict duties upon the mediator to inform the parties how this dual service impacts confidentiality, impartiality, party self-determination, and conflicts of interest. The failure of the mediator to properly explain this "change" in roles and the impact of this change may be a basis for vacating a binding arbitration award. F.S. 44.104 (10) (b) provides that a voluntary binding arbitration decision can be appealed on the basis of "Any alleged partiality or misconduct by an arbitrator prejudicing the rights of any party."

Similarly, F.S. 682.13 (1) provides that an arbitration award shall be vacated if:

(a) The award was procured by corruption, fraud, or other undue means:

(b) There was:

1. Evident partiality by an arbitrator appointed as a neutral arbitrator;

2. Corruption by an arbitrator; or

3. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.....

Regardless of the order of dual service as a mediator and decision-maker, the mediator and the parties should consider the admonition of MEAC. It may be the "wiser" choice, better serving the parties, the mediation process and the mediation profession for a mediator to decline such dual service. The roles of a mediator and an arbitrator/decision-maker are fundamentally different.

In conclusion, parties considering dual service should heed the words of the Fifth District Court of Appeal in Evans v. Evans, 603 So.2d 15 (Fla. 5th DCA 1992). In Evans, the trial judge, with the consent of the parties, agreed to mediate the underlying civil dispute with the explicit understanding that this would not result in the trial judge being recused. The judge attempted to mediate, but the parties

did not reach a settlement. Thereafter one party's attorney filed a motion to disqualify the trial judge based upon statements he heard during the mediation conference, and the judge held the attorney in direct criminal contempt for lying that he would not use the mediation as grounds to seek recusal. The Appellate Court reversed and remanded for entry of a judgment of not guilty. The Fifth District Court of Appeal explained:

> "[T]his case points out the basic fallacy in such an agreement-that a judge can act as both mediator and judge. The function of a mediator and a judge are conceptually different. The function of a mediator is to encourage settlement of a dispute and a mediator uses various techniques in an attempt to achieve this result..... Because a mediator will not be deciding the case, both the mediator and the parties are free to discuss without fear of any consequence the ramifications of settling a particular dispute as opposed to litigating it. This is one of the reasons that a mediator must generally preserve and maintain the confidentiality of all mediation proceedings.....
>
> In contrast, the judge's role is to decide the controversy fairly and impartially, consistent with established rules of law. In this regard to paraphrase Socrates: Four things belong to a judge: to hear courteously, to consider soberly; to decide impartially; and to answer wisely.
>
> As a caveat, we suggest that mediation should be left to the mediators and judging to the judges. If a judge decides to mediate a case with the consent of all concerned parties, the judge should act only as a settlement judge for another judge who will hear and try the matter in the event mediation fails, such as in the situation where a retired judge mediates a case but does not try the case. If this had been done in the instant matter, an unnecessary, unproductive and unrewarding confrontation between a member of the bar and a member of the bench would have been avoided."

Id. 16-18

Endnotes

[1] Michael Leathes, Director, International Mediation Institute, "Dispute Resolution Mules Preventing the process from being part of the problem." Mr. Leathes notes that a mule which is derived from the union of a female horse and a male donkey, is more patient, sure-footed, hardy and longer-lived than the horse, and less obstinate, faster and considerably more intelligent than the donkey. His article advocates the use of Arb-Med.

[2] This article does not address other ADR Processes such as Early Neutral Evaluation, Conciliation, Evaluative Mediation or Non-Binding Arbitration because they are not "mediation" processes as defined by F.S. 44.1011 and Florida Mediator Ethics Rule 10.210.

[3] The term "award" or "decision" is used interchangeably to describe the adjudication of the dispute by the arbitrator.

[4] Parties can agree that a third party who is not the arbitrator will mediate the dispute.

[5] In "Einstein's lessons in Mediation," www.managingip.com, July/August 2006, Michael Leathes describes an Arb-Med process conducted when two companies could not agree on a price for the sale of one company's trade mark to the other. In this case the process was conducted by the same neutral (with the assistance of a valuation consultant with expertise to answer the neutral's questions on valuation technicalities on an objective and impartial basis). It is not explained how this valuation consultant was selected by the arbitrator. Both parties had already agreed to retain their own independent professional firm expert in valuing brands to arrive at a fair price and the parties had exchanged their valuation reports. After the arbitration award was placed in a sealed envelope by the arbitrator, the parties mediated the case and reached their own agreement.

[6] In Christy L. Hertz, P.A. v. Richard Shusterman, Eleventh Judicial Circuit, Case No. 13-015281 CA 17, Arbitrator Richard Preira commenced the arbitration of a fee dispute between the attorney and her client, and in the middle of the arbitration proceeding, and prior to the rendering of the award, the arbitrator's associate, who attended the arbitration proceeding, kept track of exhibits, and later reviewed the arbitrator's award, unsuccessfully attempted to mediate the dispute.

[7] Leathes opines that there are drawbacks to Med-Arb. "The first is the effect that it has on the integrity of the mediation–not only are parties unlikely to be as honest and truthful with a mediator who may later impose an outcome as an arbitrator. Second, for an arbitration award to be enforceable, any significant confidential information disclosed during the mediation phase must be disclosed to all parties before the arbitration proceeds. To counteract the first, parties often agree that if a settlement is not reached in the mediation phase, a different neutral will be engaged to act as arbitrator. But the confidentiality issue is a serious problem. Med-Arb lacks the psychological incentive to settle that is inherent in Arb-Med."

[8] Frenkel and Stark explain that "Neutrality means that the mediator has no personal preference that the dispute be resolved in one way rather than another. The mediator is there to help the parties identify solutions that *they* find acceptable, not to direct or steer the parties toward results he favors. Understood this way, neutrality means indifference regarding *outcomes*." Douglas N. Frenkel and James H. Stark, The Practice of Mediation, page. 86 (Wolters Kluwer Second Edition, 2012)

[9] F.S. 44.102 (2)(a) which relates to Court-ordered mediations provides that a court must upon request of a party refer to mediation any civil action for monetary damages provided the requesting party is willing to pay the costs of mediation or the costs can be equitably divided between the parties, unless:

1. The action is a landlord tenant dispute that does not include a claim for personal injury.
2. The action is filed for the purpose of collecting a debt.
3. The action is a claim of medical malpractice.
4. The action is governed by the Florida Small Claims Rules.
5. The court determines that the action is proper for referral to nonbinding arbitration under this chapter.
6. The parties have agreed to binding arbitration.
7. The parties have agreed to an expedited trial pursuant to s. 45.075.
8. The parties have agreed to voluntary trial resolution pursuant to s. 44.104.

Notwithstanding, F.S. 44.102 (2)(b) permits a court to refer to mediation all or any part of a filed civil action for which mediation is not required under F.S. 44.102.

[10] F.S. 44.102

[11] F.S. 44.103

[12] F.S. 44.104.

[13] The dissent in Toiberman noted that this was a Med/Arb process and looked to Chapter 682, the Florida Arbitration Code and determined that the request to vacate the arbitration award was untimely, and could not be vacated based upon the limited grounds for vacating an arbitration award. At that time Chapter 682 did not have the same prohibition as F.S. 44.104 (14).

[14] Rule 1.700 does not specify whether the parties have agreed to binding arbitration or non-binding arbitration.

[15] Rule 10.900 of the Florida Mediator Ethics Rules provides for the appointment of 9 members of the Mediator Ethics Advisory Committee by the Chief Justice of the Florida Supreme Court who shall serve for 4 years, and may not serve more than 2 consecutive terms. MEAC opinions are not a defense to disciplinary proceeds but shall be evidence of good faith and may be considered in relation to any determination of guilt or in mitigation of punishment imposed by the Mediator Qualifications Board.

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[16] MEAC Opinion 1998-006. .

17 In MEAC 1996-002, the Mediator wrote: "I successfully mediated an estate adversary proceeding. At the conclusion of mediation, a written settlement agreement was entered into by the parties. It was fully executed by all parties, their counsel and myself as mediator. Apparently, a dispute has arisen as to some party or parties' obligation(s) under the agreement. One of the parties has at least twice been before the court seeking entry of order(s) to compel enforcement of settlement. In an order entered April 1, 1996, the trial court, in pertinent part, ordered myself appointed as special master to: "...resolve any disputes among ...(the parties) ...arising from the settlement agreement...". I am ordered to file a report, the parties are granted leave to file exceptions." MEAC opined that the Mediator should decline the appointment.

18 In MEAC Opinion 1998-006, a Florida Supreme Court certified mediator asked if he could prepare two form agreements which can be entered into by non-client attorneys and business people with whom they find themselves in a business dispute stating. "One agreement would be a presuit mediation agreement which would state that any business related dispute between the parties to the agreement must be mediated by me prior to any suit being filed by either party. The second agreement would be an arbitration agreement which would provide that any dispute between the parties must be arbitrated by me in a binding arbitration proceeding subject to the rules of the American Arbitration Association or the [Central Division County] County Bar Association Arbitration Service. Both agreements would provide for my compensation at my regular hourly rates, but I would not provide the agreements to individuals who I knew were in any existing dispute. Please advise whether there are any ethical issues that would prohibit my giving such persons the contemplated form agreements without charge." MEAC stated that the propriety of the agreement selecting the mediator as the sole arbitrator is outside the purview of the panel. As to the pre-suit mediation agreement, MEAC expressed "concerns" about a mediator drafting a form agreement which names that mediator as the exclusive mediator, but did not find that it was a "per se unethical" business practice.

19 This article does not discuss Chapter 684, International Commercial Arbitration, or the Federal Arbitration Act, 9 U.S.C. §1 et seq. enacted in 1925.

NEWS & NOTES

Call for Speakers and Liaisons

The ADR section is fortunate to have in its membership so many experienced and wide-ranging dispute resolution specialists. The variety of backgrounds, personalities and expertise of our members provide us with a vast pool from which to draw for presentations on our craft. Would you like to share your knowledge?

We are seeking ADR professionals who can make **presentations** at local Bar Association meetings or at state-wide Florida Bar Section meetings. The objective is to raise awareness of how ADR services can be utilized in numerous areas substantive to help prepare participants for the mediation process. The pay-off to our Section members is a chance to raise their own marketing profiles while simultaneously fulfilling the ADR Section's goal of spreading the word on Dispute Resolution. We are creating a **list of available topics and speakers** to be made available to other Bar groups and Sections.

The ADR section is also seeking members to volunteer as Liaisons between our Section and other Florida Bar Sections. The Liaison attends the other Section's meetings and keeps us informed of opportunities to educate Florida Bar members about the benefits of ADR processes.

Fill out the **Survey** (on page 20) if you are interested in joining this list, and return it to the address at the bottom. Let us know what you can contribute. It's time to "toot your own horn" about your special talents.

Animal Law Section

The Florida Bar's newest Section addresses animals. This Animal Law Section is a forum for legal issues concerning animals, and promotes the study and understanding of laws, regulations, and court decisions dealing with animal-related issues. For more information, see the Animal Law webpage http://www.flabaranimals.org.

MEAC Opinion Update

MEAC's most recently published opinion, MEAC 2016-001, has been posted on the DRC website. In that opinion, MEAC takes up the inquiry posed by a mediator regarding the use of Caucus as a device to terminate "free discovery" in a consumer finance dispute. Citing the obligation of the mediator to protect the integrity of the mediation process, MEAC advises that Caucus can be a useful tool that the mediator may choose to employ in these circumstances. The complete opinion elaborates on the ethical issues that are raised by the inquiry and should be consulted in its entirety.

News & Notes, continued on next page

Looking for CLE/CME Credits?

The ADR Section has a growing collection of recent CLE/CME presentations. The recordings in our CLE/CME library include:

- Mediation Conflicts of Interest: Ethical Traps for the Unwary (1.0 hrs) - presented by D. Robert Hoyle, Attorney and Mediator
- Practical and Ethical Issues Involving ADA Court-Ordered Mediation (1.5 hours Diversity/1.0 hrs. Ethics) - presented by Jeanne Chipman, Court Operations Analyst, Brevard County Court Administration and Philip Fougerouse, Attorney, Mediator and former County Court Judge, 18th Judicial Circuit
- Mediation and Domestic Violence: Negotiating a Path Through the Storm (1.0 hrs DV) - presented by James Haggard, Staff Attorney, Brevard Legal Aid
- The Oracle Speaks: Appellate Mediation Unveiled (4.0 hours, 1.0 Ethics) – presented by Judges from the 5th DCA and Seventh Judicial Circuit in conjunction with current Appellate experts and Appellate Mediators
- Arbitration, Effective Joint Opening Sessions, and Ethical Issues for Mediators and Attorneys (3.0, 1.0 Ethics)
- A Prescription for A Successful Employment Discrimination Law Mediation (1.0 hrs)
- Confidentiality and Privilege in Mediation: Getting Back to the Basics, Arbitration A to Z (3.5 hrs.)

To order the webinars, go to http://tfb.inreachce.com and then click on “Alternate Dispute Resolution.” (If the link doesn’t open automatically, copy the address and place in the search bar of your browser.)

Remember – CLE credits are pre-approved while CME credits are self-reporting.

The Florida Bar
Alternative Dispute Resolution Section

SURVEY

We are creating a **list of available topics and speakers** to be made available to other Bar groups and Sections.

Fill out this **Survey** if you are interested in joining this list, and return it to the address at the bottom. Let us know what you can contribute.

Name: _____

Address: _____

Telephone: _____

Email: _____

Subject Matter of Topic Presentation: _____

_____

_____

_____

If You Are A Member of Another Section and Would Like to Be An ADR Section Liaison, Please Identify the Section:

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

Mail to: Gabrielle Tollok
Program Administrator
651 E. Jefferson Street
Tallahassee, FL 32399-2300

8221001 Item Number

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

Name: _____Bar #:_____(Required)

Name of Firm: _____

Address: _____

City: _____ State: _____ Zip Code: _____

Office Phone: _____ Office Fax: _____

E-Mail Address: _____

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: Gabby Tollok
651 East Jefferson Street
Tallahassee, Florida 32399-2300

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

Type of Card: ❑ MasterCard ❑ Visa ❑ American Express ❑ Discover

Credit Card #: _____ Exp Date: _____

Name on Credit Card: _____

Signature of Card Holder: _____

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

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