

THE FLORIDA BAR ALTERNATIVE DISPUTE RESOLUTION SECTION

NEWS & TIPS

BOB HOYLE, CHAIR • MEAH TELL, CHAIR-ELECT

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Chair's Message



Bob Hoyle

The Executive Council of the ADR Section has had a busy eight months, with several major projects being implemented.

In September, 2015, a Comment was filed by the Executive Council with the Florida Supreme Court in response to a proposal submitted by the Alternative Dispute Resolution Rules and Policy Committee for a substantial change to the Certification and Disciplinary Section of the Rules For Certified and Court-Appointed Mediators. The proposed new rule can be found at the Florida Supreme Court website at case number SC 15-875. Oral argument was scheduled for March 8, 2016, and I represented the Section before the Court.

[Click here to read more](#)

The *Special* Harmless Error Standard: How Might It Affect Appellate Mediation?

by Christina Magee, Esq., Satellite Beach, Florida

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The Florida Supreme Court's announcement in *Special v. West Boca Medical Center*, 160 So.3d 1251 (Fla. 2014), of a new standard for harmless error in Florida civil cases will have a substantial impact on how appellate cases are decided in the Florida Courts. This article looks at the impacts of the standard on mediation of appellate cases, and explores ways to utilize the standard to reach a settlement in mediation. [Click here to read more](#)

MEDIATED SETTLEMENT AGREEMENTS: Are They Enforceable when One of the Parties Refuses to Sign the Release?

by A. Michelle Jernigan, Shareholder, Upchurch Watson White & Max, Maitland, Florida

POSING THE QUESTION

You have been in mediation all day, negotiating back and forth, pushing past impasse, and finally you have reached a resolution. You, opposing counsel and the mediator prepare a settlement agreement, which is executed by the parties and their attorneys. The settlement agreement references the execution of a release by your client, the plaintiff. You call it a day, confident that the matter has settled and now you simply need to attend to the details of the settlement. [Click here to read more](#)

Strategies For Case Presentation At Mediation

by Chair Bob Hoyle, Bradenton, Florida

The conduct of mediation has changed significantly in recent years. What was once a fairly unsophisticated process has, of necessity, evolved into an accepted and often mandatory manner of resolving disputes. Ethical considerations dictate that representation of a party include representation in the mediation process. This means developing a strategy for preparation for and presentation at the mediation conference. [Click here to read more](#)

The Executive Council also filed a Comment to another proposed rule change in case number SC 14-1852. I appeared before the Court in June of 2015, on behalf of the Section.

The Comment that was submitted, in addition to comments submitted by other sections, suggested that the Court deny the adoption of the proposed rule as submitted. In October, 2015, the Court issued an Order in which it declined to adopt the proposed rule.

The Section has sponsored three seminars since June, and another is scheduled in June that deals with appellate mediation. In addition, the Section will conduct a half-day seminar at The Florida Bar Annual Conference on June 16, 2016. Meah Tell, Michael Lax, Jesse Diner, Adelle Stone, Alan Bookman and I will be participating in the presentation.

Finally, several members of the Section will be making presentations in August at the Professional Mediation Institution’s program as part of the Worker’s Compensation Institute Conference.

The Section Newsletter continues to expand the scope of the information it provides to Section members under the capable management of Michelle Jernigan. Our website at www.fladr.org is also expanding to meet the needs of Section members.

The ADR Section is part of The Florida Bar. The Section is independent and not directly associated with the Florida Dispute Resolution Center, which is under the auspices of the Florida Supreme Court. As such, the Section is devoted solely to the interests of attorneys as advocates and as mediators. The Executive Council encourages the continued participation of its members. If you have suggestions for seminar topics or articles, please feel free to contact us. Better yet, if you want to be involved in a seminar presentation on behalf of the Section or submit an article for publication, please contact Gabby Tollok at gtollok@floridabar.org.

Our Section is in its fifth year and has made great strides in the Florida mediation arena. With 1,000 members, the resources for continued growth and influence is substantial. Please consider making a contribution of your ADR experience through the Section for the improvement of the ADR experience, including mediation, arbitration, and other ADR processes, for the benefit of attorneys and the public.



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Gabrielle Tollok, Tallahassee Program Administrator
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Note: Newsletter editor A. Michelle Jernigan is soliciting articles for the Fall edition of the ADR News & Tips. All articles should be submitted to mjernigan@uww-adr.com by September 15, 2016.



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“SPECIAL HARMLESS ERROR STANDARD”

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The Special Standard

In *Special*, a medical negligence action was brought against the anesthesiologist and hospital who attended Mrs. Special as she underwent a cesarean section. Five hours after her son was delivered, Mrs. Special died. Her husband sued the hospital and doctor for negligence. The defense contended that Mrs. Special was the victim of amniotic fluid embolus (AFE), an allergic reaction that results from the mixing of the mother's blood and the amniotic fluid which can have potentially fatal consequences, and not anything caused by the defendants. At trial, Special's counsel made a proffer to admit evidence via cross examination of the defense expert to show that the condition of AFE was over-diagnosed at the hospital and exceeded national norms for frequency of occurrence. That proffer was denied by the trial judge. The trial court also refused to permit plaintiff to admit evidence concerning alleged witness tampering in connection with the chief deputy medical examiner involved in the case and ultimately, the case resulted in a defense verdict.

On appeal, the Fourth District Court of Appeal addressed the excluded proffer of the defense witness' testimony on the frequency of AFE diagnoses, ruling that the exclusion was an abuse of discretion. *Special v. Baux*, 79 So. 3d 755, 760 (Fla. 4th DCA 2011 *en banc*). Stating that the crux of the matter was whether the improper exclusion was harmless error, the Fourth DCA applied the following test: to avoid a new trial, the beneficiary of the error must show on appeal it is more likely than not that the error did not influence the trier of fact and thus, contribute to the verdict. *Id.* at 771. Utilizing the “more likely than not” test, the Fourth DCA concluded that the evidentiary errors complained of on appeal were not a factor in the verdict, and affirmed the defense verdict from the underlying trial. *Id.* at 772. *En banc*, after a comprehensive review of the myriad types of “harmless error” analyses employed by the District Courts of Appeal throughout the state in civil and criminal matters, the Fourth District Court of Appeal certified this question to the Florida Supreme Court:

In a civil appeal, shall error be held harmless where it is more likely than not that the error did not contribute to the judgment?

Id.

The Supreme Court of Florida took up the certified question. The Supreme Court disagreed with the 4th DCA as to the effect of the evidentiary errors in the medical negligence trial and announced the current standard of review for harmless error:

[I]n a civil appeal, the test for harmless error requires the beneficiary of the error to prove the error complained of did not contribute to the verdict. Alternatively stated, the beneficiary of the error must prove that there is no reasonable possibility that the error complained of contributed to the verdict.

160 So. 3d at 1257.

Appellate Decisions After Special

Has the new standard changed the outcome of appellate review? At least one reported case that has arisen since the invocation of the *Special* standard answers this question affirmatively. In *Hurtado v. DeSouza*, 166 So. 3d 831 (Fla. 4th DCA 2015), on a Motion for Rehearing, the Fourth DCA reversed its initial decision affirming plaintiff's verdict. Instead, using the newly-decided standard from *Special*, the Appellate Court concluded that plaintiff had failed to prove the error claimed by the defense did not contribute to the verdict in plaintiff's favor.

In *Hurtado*, the jury awarded DeSouza damages in excess of \$1 million in a simple auto negligence case involving a minor rear-end collision. Just prior to the trial in that case, the defense admitted liability, leaving the issues of causation and damages for the jury to determine. As trial commenced, during voir dire and in opening, plaintiff, over defense objection, alluded to plaintiff's mental anguish resulting from the defendant's delay in admitting liability in the litigation, as well as mental anguish over the defendant's failure to check on him immediately following the accident or apologize at the scene of the accident. As testimony proceeded, the plaintiff testified directly to the mental anguish he endured arising from the defendant's failure to concede liability until the eve of trial, as well as defendant's failure to apologize and defendant's desire to leave the scene of the accident. Defense counsel continued to object, sought a curative instruction and moved for a mistrial. Of these, the court permitted a continuing objection to be asserted. The following day, the trial court re-visited the issue of mental anguish and directed a verdict in defendant's favor, as well as providing a curative instruction to the jury that they were not to consider any evidence of mental anguish in assessing damages in this case. Without discussing the extent of the medical specials evidence that was adduced at trial, it seems apparent from the 4th DCA's discussion of the verdict as “unwarranted” that the value did not come near the million dollar plus verdict awarded by the jury.

Initially, the Court of Appeals reviewed the defense's asserted error in connection with the mental anguish testimony and counsel comments and found them harmless. However, following the decision in *Special v. West Boca Medical Center*, the appellate court determined that plaintiff, as the beneficiary of the error, had to demonstrate that the error did not contribute to the jury's award. Unable to make that showing, plaintiff's verdict was reversed and the case remanded.

Similarly, in *Philip Morris USA, Inc. v. Green*, No. 5D13-3758 (Fla. 5th DCA July 31, 2015), the Appellee, who had substantially benefitted in the verdict from the alleged error brought on appeal, failed to meet his burden under the *Special* standard and was sent back to trial court with a partial reversal. In *Green*, a multi-decades smoker with fatal COPD sued Philip Morris and Liggett Group, another cigarette manufacturer. The jury apportioned liability among the plaintiff and the respective defendants. The trial court did not enter damages in accordance with the liability ap-

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“SPECIAL HARMLESS ERROR STANDARD”

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portionment but instead entered them jointly and severally against the two defendants. The defendants, who had timely and repeatedly sought the damages apportionment in accord with the liability assessment made by the jury over the opposition of the smoker's estate, appealed the decision. Counsel for the smoker had discussed apportionment of liability with the jury in the underlying case in closing arguments. The Court of Appeals found that his willingness to accept apportionment in connection with liability but not with damages “misleading, unfair and unacceptable” and that so doing “[flew] in the face of the burden to prove harmless error.” *Id.* at 7.

Significance for Appellate Mediations

The change in emphasis that the *Special* standard imposes, moving from an outcome-oriented approach to one that focuses on the process undertaken by the fact-finder, could easily result in more cases on appeal being subject to reversible error. The Supreme Court's conclusion that error that contributes to the fact-finder's decision warrants reversal should cause participants in the appellate process to pause and reflect before carrying on with an appeal. In turn, that careful reflection provides an opening for mediation to be more effective.

The District Courts of Appeal's approaches to harmless error before *Special* were focused on “outcomes” and whether, “but for” the error, the result would have been, or in some DCA's, may have been, different. Finality and its underlying policy of not forcing the litigating parties to undergo the trial process and its attendant resource expenditures again when the same or substantially similar result was a possibility was a compelling reason for the development of the outcome-oriented approach. Outcome-oriented assessments tend to result in fewer verdicts being changed as a result of appeals. In turn, parties in appellate mediations where harmless error was the driving factor for the appeal were not motivated to settle. Contrast the post-*Special* environment, where the potential has increased that a verdict will be overturned and the parties sent back for a “do-over” in trial court. The party with the benefit of the error can no longer rest assured that “harmless error” translates to affirmance. Instead, that party has to demonstrate that the “harmless error” was outcome-neutral for the fact-finder, and a far more compelling argument now exists for resolving these post-verdict cases.

Another significant effect of the *Special* standard for appellate mediation may be on the parties' assessment of who should attend the mediation. Litigated cases tend to fall into two categories – those where appellate counsel has involvement before the verdict and those where appellate counsel's involvement occurs post-verdict. Where

trial counsel and appellate counsel have been integrated before verdict (e.g., appellate counsel provides evidentiary briefing, drafts jury instructions, or attends trial to preserve appealable issues) and appellate counsel handles the appellate mediation, much of the time at the mediation might be spent on the standard of review the case presents and the possible outcomes with the District Court of Appeal in question. Where appellate counsel does not get consulted on a case until after verdict, it is usually not cost-effective for appellate counsel to get fully up to speed on what happened at trial in order to appear at the appellate mediation. In those instances, trial counsel appears. While trial counsel's knowledge of the trial of the matter is detailed and minute, the fact that trial counsel have just been through war, with one side victorious and one vanquished, can get in the way of the parties' ability to move to a mediated settlement post-verdict.

The *Special* standard could have an impact on this dynamic. Who better than trial counsel to be able to argue convincingly at mediation about the ways in which the harmless error affected (or failed to affect) the fact-finder and contributed (or failed to contribute) to the verdict? Whether this factor will outweigh the challenge presented by the emotions of trial counsel to resolving cases at the appellate level remains to be seen in the unique circumstances each case presents.

Understanding the changes in the appellate landscape in the wake of the *Special* decision is crucial for conducting appellate mediations. This article attempts to demonstrate how the Supreme Court's determination regarding harmless error could affect parties' positions on appellate mediations and may lead to a greater willingness to entertain settlements in that process.

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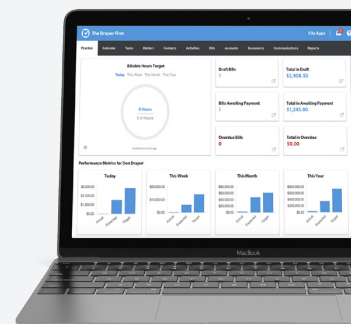
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“MEDIATED SETTLE AGREEMENTS”

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One week later you review the release with your client, who is overtaken by “buyer’s remorse” and refuses to sign the release. If you can convince your client to sign the release, all is well. However, what if he continues to refuse? Do you have an enforceable settlement agreement? As for many legal questions, the answer is “IT DEPENDS!”

FLORIDA CASE LAW ANALYSIS

In the case of Sponga v Warro, 698 So. 2d 621 (Fla. 5th DCA 1997), the trial court set aside a settlement agreement executed by the parties at the conclusion of a mediation based on newly discovered evidence. The appellate court reversed the trial court’s decision on two bases: 1) that there was not newly discovered evidence and 2) that there was no proof of a unilateral mistake. In dicta, the court expressed its sentiments on mediated settlement agreements.

Mediation, like arbitration, is an alternative dispute resolution device. It is not to be engaged in casually or carelessly. The decision to engage in mediation and to settle at mediation means that remedies and options otherwise available through the judicial system are forgone. The finality of it once the parties have set down their agreement in writing is critical. A party who makes the decision to settle with a plaintiff like Ms. Warro is entitled to rely on the finality of the mediation agreement.

Id. at p. 625. While the issue in the Sponga case is different from the issue identified in this article, Sponga does demonstrate the Court’s policy of favoring the enforcement of settlement agreements entered into in mediation.

A review of the pertinent case law reveals that Florida courts view signed mediated settlement agreements as contracts, and they are therefore enforceable as such. See Jilco, Inc. v. MRG of S. Fla. Inc., 162 So. 3d 108 (Fla. 4th DCA 2014). Thus, while Rule 1.730 (b), Florida Rules of Civil Procedure sets forth specific requirements for mediated settlement agreements, most notably that they have to be in writing and signed by the parties and their attorneys, the “meeting of the minds” inquiry as it relates to the enforceability of a settlement agreement reached in mediation and a settlement agreement reached outside of mediation remains the same.

Since settlement agreements are governed by the law of contracts, courts must undergo a factual analysis to determine whether there has been an offer, an acceptance and a meeting of the minds as to the essential terms contained in the agreement. The definition of an “essential term” must be evaluated on a case-by-case basis. See Nichols v. Hartford Ins. Co. of the Midwest, 834 So. 2d 217, 219 (Fla. 1st DCA 2002). Uncertainty as to non-essential terms or small items will not preclude the enforcement of a settlement agreement. See In Re Rolsafe Intern, LLC, 477 B.R. 884, 903 (Bankr. M.D. 2012). The analysis of the question posed becomes: Does the release constitute an essential

term of the settlement such that the parties’ disagreement over the terms of the release would preclude enforcement of the settlement? If the answer is “yes”, then the settlement is not enforceable. If the answer is “no”, then the settlement is enforceable.

The best discussion regarding this issue is contained in the In Re Rolsafe Intern, LLC case, cited above. Two non-lawyers, Davis (a representative of a bank) and Kafka (a representative of a landlord), both of whom were parties in an adversary proceeding in bankruptcy court exchanged numerous emails regarding settlement. Ultimately the parties reached a settlement via phone and email. The bank repudiated the settlement on the basis that it did not include all the essential terms of the agreement, specifically the requirement of a release and a dismissal of the lawsuit, to which the bank did not agree. Further, the bank argued that the settlement agreement was conditioned upon the bank performing due diligence and convening a meeting of its credit committee. The adversary proceeding went to trial and the court found that a settlement had been reached between the bank and the landlord through their representatives, Davis and Kafka.

The court’s inquiry regarding the enforceability of the settlement agreement dealt with whether or not the parties had agreed on all the essential terms. While the bank contended that the offer made by Davis to Kafka was contingent on the bank’s due diligence, that fact was never communicated from Davis to Kafka in any of their discussions or emails. Having found the bank was bound by Davis’ actions, the court employed the objective test for determining whether or not there was a meeting of the minds: “The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties having meant the same thing but on their having said the same thing.” Blackhawk Heating & Plumbing Co. Inc. v. Data Lease Financial Corp., 302 So. 2d 404, 407 (Fla. 1974). Since there was no evidence at trial that the bank’s acceptance of Kafka’s offer was conditioned upon committee approval or due diligence, this challenge to the settlement failed.

Next the Court examined the bank’s contention that there was no agreement on the essential terms of the settlement because Kafka had mentioned a release and a dismissal in his email to Davis, and these documents had never been executed. The court noted that 1) Kafka had merely mentioned a release, 2) he did not set forth any specific language that was to be contained within the release and 3) he was relying on the bank to prepare the release. Under these circumstances, the court determined the release was not an essential term of the settlement. “Rather, the release was to serve as a procedural formality which would facilitate a final resolution to the litigation.” In Re Rolsafe Intern, LLC at 909. In its analysis the Court reviewed and distinguished a number of Florida cases, holding that a release does constitute an essential term of the settlement. In each of those cases, the parties either indicated that the settlement agreement was conditioned upon execution of

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the release, or disagreed on the language to be contained in the release, or disagreed on the scope of the release. See Cheverie v. Geisser, 783 So. 2d 1115 (Fla. 4th DCA 2001); Nichols v. Hartford Ins. Co. of the Midwest, 834 So. 2d 217 (Fla. 1st DCA 2002); Bateski By and Through Bateski v. Ranson, 658 So. 2d 630 (Fla. 2d DCA 1995); and Gaines v. Nortrust Realty Management, Inc., 422 So. 2d 1037 (Fla. 3rd DCA 1982).

A release was not found to be one of the essential terms of a settlement in a case where two attorneys orally agreed to settle a worker's compensation case. The court found that the sole terms of the agreement were payment of \$50,000 to the claimant and the statutory guideline attorney's fee. After the negotiations, the claimant received a "Settlement Agreement and General Release", and a "Release of All Claims and Affidavit", which he refused to execute. The Judge of Compensation Claims ("JCC") dismissed the Claimant's Petition for benefits and ordered the parties to exchange and execute the necessary paperwork to memorialize their oral settlement agreement. The Appellate Court affirmed the JCC's order, and remanded with instructions to the JCC to order the parties to redraft a written settlement agreement according to the limited scope of the parties' oral settlement agreement. Bonagura v. Home Depot, 991 So. 2d 902 (Fla. 1st DCA 2008).

In Calderon v. J.B. Nurseries, Inc., 933 So. 2d 553 (Fla. 1st DCA 2006), the appellate court affirmed the JCC's decision to enforce a settlement agreement entered into in mediation, despite the fact that the claimant later refused to sign releases. The appellate court reasoned that since the settlement agreement provided that the claimant was to execute "any releases E/C may require", appellant could not escape the binding effect of the settlement agreement by breaching his obligation to execute the release. The claimant's failure to execute the release rendered the settlement agreement voidable at the option of the employer and carrier, but it did not render the agreement void.

MEDIATOR'S RECOMMENDATION AND PRACTICE TIPS

Like most areas of practice, mediation has evolved over time. Twenty-five years ago, most mediators in Florida

were satisfied to hand-write settlement agreements at the mediation table. As time passed and legal consumers became more tech-savvy, the demand for typewritten settlement agreements increased. Many mediators have form settlement agreements on their computer systems to offer for use by parties and attorneys at the conclusion of the mediation. Sophisticated consumers of mediation services (corporations and insurance companies) now frequently bring releases to mediation and have them executed at the conclusion of mediation. Some plaintiffs' attorneys like the practice of executing the release at the conclusion of the mediation; others prefer to review the release in the setting of their own office, with their client, at their own pace.

The best way to ensure you will get a release executed is to bring it on a flash drive to the mediation. That way, any changes can be made while the parties are waiting to execute. However, this is not always possible given certain time constraints, the physical and mental condition of the parties at the end of the mediation and other unexpected logistics which may inhibit this practice. Additionally, certain settlement agreements lend themselves to a very carefully drafted release, not a one-size-fits-all release. Complicated commercial cases, cases involving ongoing business relationships, employment cases, and construction cases, to name a few, are simply not suited for quick drafting and on-site execution. In these situations, you have two options: Condition the settlement upon agreement to an acceptable release, or specifically spell out the elements in the settlement agreement that the release should contain. I have seen the second approach utilized frequently in the settlement of employment cases, where the parties will state that the release shall contain provisions such as a non-disparagement clause, a confidentiality clause, with or without liquidated damages, and a neutral letter of reference.

Rare is the day that a court will not enforce a settlement agreement reached in mediation. However, we know as lawyers that "IT DEPENDS" on the parties' intent. Since the "devil is in the details", it is critical to take the time at the conclusion of a mediation to capture the essential terms of the deal. On one occasion, a large commercial case I mediated on a Friday settled on a Saturday evening by telephone. The attorneys exchanged settlement documents and reached an agreement on every aspect of the settlement, except for the language contained in the release. After months of exchanging emails, the attorneys

called upon me to assist them in mediating the release by phone and email. After another month or two, we finally reached agreement on the release language. Perhaps one additional provision in a settlement agreement could be to re-engage the mediator to assist in resolving any dispute that might arise in carrying out the terms of the settlement itself. Just a thought!



Ethics Questions?
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“STRATEGIES FOR CASE PRESENTATION”

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The two most important aspects for developing a good presentation at a mediation are: (1) pre-mediation communication with the mediator; and (2) the development of a persuasive presentation that will inform but not inflame the opposing party. The goal is to get the case settled in the best way for your client, and not to make the other side leave the mediation.

Mediation Statement

- Prepare a brief and provide it to the mediator a week in advance of the mediation.
- Schedule a telephone conference with the mediator after submitting the brief to discuss the case and its presentation at the mediation.
- Often in mediation the merits of the case are not as important as such factors as closure, financial needs, and emotions.
- Consider preparing a brief for the mediator and the opposing party, and a second confidential brief solely for the mediator. The confidential brief can provide the mediator with additional information about the case and its relationships, significant issues, and your client's emotional investment.
- Consider the addition of graphics to your brief, both to educate the mediator and the opposing party, and to create the impression that you are fully prepared for both a mediation and a trial.

Communication with the Mediator

- It is important to advise the mediator beforehand as to your intention to use a visual presentation. The mediator needs to know how you intend to conduct your presentation at the conference, and voice an opinion as to the use and timing of the presentation. It may be a good idea to provide the mediator with an electronic brief that includes the visual presentation.

Create a Presentation that Persuades the Opposing Counsel and the Decision Maker

- Remember that the mediator is not a decision maker. The mediator is seeking information to present to the opposing party as to the strength of your case.
- Always keep in the mind that the idea of mediation is to use the facts and the evidence of the case to argue for you. The most persuasive force is your knowledge and presentation of the facts and evidence that supports your claims in a non-argumentative manner. You want to make a presentation that convinces the other side that you can put this case together and win.
- You want to present your case in a non-confrontational manner to the decision making authority on the other

side. Acknowledging the strengths and weaknesses of both sides of the case gives you more credibility with the other party and overall creates a better atmosphere for settlement.

- Acknowledge to the other side that you are not there to persuade them that you are right, nor are they going to persuade you that they are right. Emphasize that you are presenting the facts and the law that are favorable to your position, but also emphasize the total uncertainty and risk of litigation.
- Remember that you are negotiating, not litigating. Do not think that you are ethically representing your client by engaging in a “woofing” contest like a barking dog. You are not proving yourself to be a competent attorney by sabotaging the mediation process and putting both the mediator and opposing party on the defensive. Show some class.

Digital Organization of Files

- Bring a computer to the mediation that has all critical documents in electronic format. One important part of the mediation conference is the opportunity to evaluate the opposing party. You will create an impression of credibility and preparation if you have the documents and other evidence well organized and available on your laptop or tablet.

Prepare a Settlement Document in Advance

- There are numerous ethical and practical reasons to have a settlement document prepared and available at the mediation conference. Take the time to communicate with opposing counsel prior to the mediation and reach an agreement on the format and content of the settlement. Prior preparation of an agreement provides you with time to think through key points and ideas, and decreases the chance of missing an important element if the agreement is prepared in a rushed manner at the conclusion of the mediation.
- An important part of any settlement agreement can be a release document. The release must be part of the settlement agreement in order for the agreement to be valid. Again, consult with opposing counsel as to the form and content of release language prior to the mediation so that you have an agreed upon document. Otherwise, you may be committing malpractice.

In many ways proper and ethical preparation for mediation has several components that are identical to trial preparation. The two components that never change are providing a brief to the mediator and proper preparation for the conference. Modern technology has facilitated both of these facets of the process. Adequate and ethical representation of your client is no different for a mediation conference then it is for a trial. In both cases, you are held to a high standard so that the best interest of your clients can be served.

NEWS & NOTES



ADR Section Chair, Bob Hoyle, and Charles Castagna presented a seminar on Mediation and Advocacy for the ADR Committee of the Hillsborough County Bar Association. The seminar took place on February 18, 2016 and 16 attended.

Mediator Transitions to Arbitrator

The summary of the Majority Opinion in Mediator Ethics Advisory Opinion 2015-003 states that the Florida Rules for Certified and Court-Appointed Mediators “do not contain an ethical prohibition against a mediator serving as an arbitrator in a case the mediator previously mediated.” However, in order to arbitrate the case, the Mediator must ensure that the parties have a complete understanding of how the mediator’s role will change, and the parties must waive the conflict of interest and confidentiality of the mediation. The Majority also stated that once the mediator acted as the arbitrator, the mediator could no longer mediate the case.

Revised Florida Arbitration Code Reminder

Commencing July 1, 2016, all arbitration agreements, regardless of their date, will be governed by Chapter 682, Fla. Stat., known as the Revised Florida Arbitration Code. Presently, the statute does not apply to any arbitration that commenced, or any right that accrued, before July 1, 2013. It can be applied to arbitration agreements made before its effective date of July 1, 2013, if all parties agree. Otherwise, the law existing at the time of the arbitration agreement applies through June 30, 2016. See revised code here -- http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=0600-0699/0682/0682.html.

Appellate Mediation Sanctions

In an appeal from a final judgment, the 5th DCA entered an order referring the matter to appellate mediation. The order specifically stated that representatives of the parties with full settlement authority were required to attend the mediation in person, unless excused from attendance by the court. The order further stated that the failure to appear could result in the imposition of sanctions. At the commencement of the mediation, no representative appeared for appellant which also provided no certification of full authority to settle. Appellees objected to the absence of the representative and to the limited authority of the insurance company representative. The mediation proceeded without a waiver of objections, resulting in an impasse. Rule 9.720 of the Florida Rules of Appellate Procedure governs appellate mediation procedures and provides that if a party fails to appear at a duly noticed mediation conference without good cause, the court, upon motion of a party or upon its own motion, may impose sanctions. The 5th DCA rendered an interim opinion awarding sanctions, finding them appropriate for a party’s failure to appear at a court-ordered mediation, even though an insurance company representative was present. Sanctions in the present case included all fees charged by the mediator, all reasonable attorney’s fees and costs incurred in preparing for and attending the mediation, as well as the costs incurred in filing a motion for sanctions. The court reserved the right to impose additional sanctions, including dismissal of the appeal or the assessment of additional attorney’s fees and costs. See slip opinion here -- HDE v. Bee-Line, Case No. 5D15-2805 <http://www.5dca.org/Opinions/Opin2015/122815/5D15-2805.non-disp.op.pdf>.

LAWRENCE KOLIN, Upchurch Watson White & Max, Maitland

News & Notes, continued on next page

This year the following ADR Section Executive council members will be presenting at the annual Professional Mediators Institute Seminar (PMI) – Michelle Jernigan, Bob Hoyle, Lawrence Kolin. For further details regarding the seminar in August of 2016, please review the attached PMI flier, or visit www.PMI360.org.



Professional
Mediation
Institute



Workers'
Compensation
Institute

MEDIATORS, ADJUSTERS AND ATTORNEYS!!

MARK YOUR CALENDARS

2016 Professional Mediation Institute Seminar (PMI)
Sunday-Monday, August 21-22, 2016,
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PAID REGISTRATION INCLUDES:

Ability to obtain all your CME credits

Expert Presenters

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No additional charge to listen to breakouts
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and Apology in Mediation; Dealing with the Subpoena
to Testify; Overcoming Obstacles; Diversity; Winning
Negotiation Strategies for Adjusters and Attorneys &
Mediator Marketing**

Go to www.PMI360.org to Register and for more info.

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.

CLE Presentations are Rolling Along

by Kim W. Torres

The ADR section has been pleased to offer webinars on topics that are in the most sought-after areas required for recertification. Each presentation provides credit for CLEs and CMEs and is available for a fee to order for eighteen months after the original airing of the webinar. Currently, 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 Fougrouse, 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

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.) CLE credits are pre-approved while CME credits are self-reporting

The next webinar will be presented on June 9, 2016 on the difficult-to-find topic of **Appellate Mediation**. All four of the required CMEs for recertification will be available in one afternoon. The Honorable Judge Palmer of the 5th DCA will provide us with the historical development of Appellate Mediation. Other qualified court personnel and attorneys who are proficient in appellate law will provide us with insight into this specialized area of mediation.

We are excited to partner with The Florida Bar to provide our members with the opportunity to earn CLEs/CMEs in the area of Alternate Dispute Resolution.

At the **annual Florida Bar Convention** on June 16, 2016, the ADR section will once again present a **three-hour seminar** covering "Confidentiality and Privilege in Mediation" and "Arbitration from A to Z." Plan to join us as an esteemed panel of **Mediators and Qualified Arbitrators** share their expertise and bring us up-to-date on the latest trends and issues. Registration is available through the Florida Bar.

If you have any topics of interest that you would like to suggest for a webinar presentation, please contact Kim W. Torres, at Kim@TorresMediation.com.

