



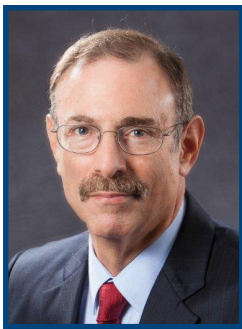
THE FLORIDA BAR ALTERNATIVE DISPUTE RESOLUTION SECTION

News & Tips

Volume III, No. 1 • Fall 2014

Michael Lax, Chair • Bob Hoyle, Chair-elect

Chair's Message



Michael H. Lax

Happy New Year! I know it's not January, but it's a new year for the ADR Section of The Florida Bar. The section had a great working meeting in Orlando during The Florida Bar's annual convention. I am very excited to share with you the new members elected to the executive council, as well as plans for the ADR Section and its members for this New Year!

However, the first order of business is for the executive council and the entire section to extend a most sincere gratitude to Karen Evans, immediate past Chair of the ADR Section. Without Karen's inexhaustible energy and efforts, this section would not have seen such growth and progress. At the end of her tenure as Chair, the section had grown to over 1,000 members. Further, without her friendship and guidance, I don't believe that I would be sitting in the Chair position. Again, Karen, thank you!

At the annual meeting held on June 26, 2014, section members in attendance nominated and the council elected many new members to the executive council. On behalf of the section, I welcome these members to the executive council: Lori Adelson, Robert A. Cole, Michelle Jernigan, Lawrence Kolin, Mindy Miller, Alexander "Sandy" Myers,

Pamela Perry, and Meah Tell.

Additionally, committees were established which will be planning and executing section activities, events and programs intended to benefit section members. The committees are Recruitment & Rebranding, CLE, Website, Newsletter and Legislation. The council is excited about creating and implementing a website designed to provide information and services to the section members. The CLE committee plans to set up programs with other Florida Bar sections which will not only benefit members of the ADR section, but all members of The Florida Bar. I invite every member of the ADR section to provide input as to what you believe the section should be doing on your behalf.

In order to move ahead, I understand that the section must reflect the needs and desires of the membership. I invite you to participate at any stage of this New Year. If you have any interest in serving on one of the committees, please email me your contact information.

My contact information is below and feel free to contact me at any time. I will endeavor to respond to every email sent to me.

Again, Happy New Year and I hope that this year proves to be one that we can all be very proud of.

Michael H. Lax, Chair
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Ten Cornerstones For Effective Mediation Advocacy

By A. Michelle Jernigan and Bruce A. Blitman

Attorneys, as advocates for their clients, must pay attention as closely to every detail pertaining to the mediation process as they would to each element of trial preparation. Everything the attorneys and their clients do – or do not do – at mediation is being carefully watched by the other parties. Everything counts.

For many years, disputing parties had their cases adjudicated through the civilized warfare of trials; however, over the last 25 years, lawyers have spent considerably less time in the courtroom and much more time in the conference room.¹ This reduction in courtroom time has helped attorneys to reduce their clients' transaction costs, maximize net returns, and minimize risk and potential exposure by settling disputes at mediation.

This shift from trial to mediation began in 1987, when Florida enacted some of the most comprehensive Alternative Dispute Resolution (ADR) legislation in the country, enabling trial courts to order parties to enter into mediation.² With this seismic change in the way lawyers conduct their business, there is a corresponding need for attorneys to hone their skills as advocates in the mediation process. This article, authored by two longtime mediators, highlights ten qualities commonly possessed by attorneys who are successful advocates in the mediation process and simultaneously identifies ten ways attorneys can unknowingly sabotage the same process.

1. LAWYER PREPARATION: "Don't Wing It"

There is a strong correlation between lawyer preparedness and obtaining a positive outcome at mediation. Lawyers need to fully understand the facts of their case and the applicable law in order to be able to explain the strengths and weaknesses of their clients' positions and to understand how the trier of fact might view the evidence. Attorneys and their clients should engage in a risk assessment of their cases, taking into account their best-case scenario, their worst-case scenario and their most probable scenario. Sometimes a "decision tree" analysis can help them evaluate the risks associated with a summary judgment, winning or losing on various theories of liability, and ranges of possibilities on damages.

Before coming to mediation, lawyers should explore all available options for settlement with their clients, and the options should be ranked according to what the clients most desire. Advantages and disadvantages should be thoroughly discussed and evaluated with the clients and a strategy for negotiating should begin to evolve.

It is important for counsel to discuss and understand their clients' tolerance for risk; otherwise, how will attorneys know

if their clients are able to withstand the crucible of mediation, let alone trial? Attorneys may want to "roundtable" a case with other experienced counsel and obtain their input on an appropriate settlement value, or seek suggestions on the best approach to negotiating in a particular case.

The presentation of the case in the initial joint session is a unique opportunity for the lawyers to "sell" their evaluations of the case to the other side. This might be the first time the clients have actually seen their attorneys in action, so it is a great opportunity for the lawyers to impress their clients as well as the other parties in the case. They should take advantage of this time and beat their best, committing the amount of time and preparation this opportunity requires. Preparation for the presentation should be approached with careful thought and deliberation. All documents needed to prove clients' cases should be available at the mediation conference. Lawyers should know important details about their clients' lives and families: their ages, marital status, occupations, financial circumstances, and their emotional and psychological dispositions.

Many court orders referring cases to mediation require attorneys to prepare summaries.³ The resulting mediation summaries provide an excellent opportunity for attorneys to prepare themselves and their clients for the mediation, and help to educate the mediator about the case. They are an excellent way for attorneys to impress their own clients with their skill and legal acumen. Some attorneys choose to share their mediation summaries with opposing counsel;

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Lani Fraser, Tallahassee Program Administrator
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however, many lawyers prefer to use the mediation summary to provide confidential information to the mediator. In any case, care should be exercised to follow the disclosure requirements set forth in the court's order of referral to mediation.

Mediation summaries are especially helpful when they succinctly identify the agreed-upon facts of the case, highlight the important facts in dispute, identify the legal issues and the parties' positions with respect to the legal issues, and provide the mediator with some historical background and context on the parties, the litigation and the current status of the case. Listing the status of ongoing settlement discussions, if any, and the goals, interests, and needs of the respective parties will also help the mediator navigate the mediation process. Summary judgment motions or orders may prove helpful when a legal question could dispose of the litigation. Copies of pertinent documents and pleadings can also provide the mediator with useful information about the case, but will rarely give the mediator full insight into the real nature of the dispute.

In the early days of mediation, it was quite common for lawyers and their clients to prepare for the mediation conference during the car ride to the mediation or on the subsequent elevator ride. Not surprisingly, this is not the ideal way to prepare for a process that has come to replace the proverbial “courthouse steps” when cases were settled moments before trial. Mediation is an extremely important event in a client's case. It bears repeating: Lawyers and clients should prepare accordingly.

2. CLIENT PREPARATION: Don't Let Them “Wing It” Either

Mark Twain once said, “I spend a week preparing for an impromptu speech.” While it is not necessary to set aside an entire week to ready a client for mediation, client preparation is vital to success. Attorneys should set aside at least one hour to inform their clients of the goal of mediation and provide them with some details about the process.⁴ The clients' interests, needs, motivations, concerns, and objectives need to be ascertained and any unreasonable and unrealistic expectations need to be dispelled.

Time should be spent redefining “winning” in the mediation context so that the clients understand that, in mediation, the goal is to obtain an acceptable settlement that is reasonable when compared to the probable outcomes and risks associated with an adjudicated decision by a judge or jury. Attorneys should advise their clients of the range of possible outcomes at trial and explore with them the possible settlement outcomes, eliminating undesirable ones and developing strategies to reach the desired results.

Attorneys sometimes forget to explain to their clients that they can be active participants in the mediation process. Before mediation, careful consideration should be given to whether clients will speak during a joint session in which all of the parties and their counsel are present. Before

mediation, there should always be a cost-benefit assessment by counsel and clients to determine whether clients should speak.

The essential question becomes: “Is there more to be gained than lost by having my client make a brief presentation?” With the right client in the right setting, this can be very effective. However, with the wrong client in the wrong setting, this can have disastrous consequences and seriously damage the possibility of reaching a mediated settlement. If a client is going to speak, his lawyer should discuss with him the specific information that should be revealed and the matters that should not be shared. Attorneys must carefully and honestly assess their clients' presentation styles and demeanors in determining whether they should speak during joint sessions. After all, only about seven percent of communication is verbal. Most communication is conveyed through body language and tone.⁵

Similarly, it is imperative that attorneys carefully review with their clients how they are to dress for the mediation process. Reasonable minds can and do differ, especially when it comes to something as personal as fashion, style, and taste. Demonstrate what is appropriate and what is not. Clients with allegedly serious back and neck injuries, unable to wear high heels because of those injuries, should not arrive at mediation wearing six inch stiletto heels. Parties alleging serious economic and financial hardship should not attend mediations adorned from head to toe in expensive jewelry. Attorneys should monitor their clients. The impression they make will be a lasting one.

3. SELECTING THE RIGHT CLIENT REPRESENTATIVE: “When in Doubt, Show Up”

When representing an entity or a group of parties, attorneys need to consider who is the best “face” for that entity or group. The client representative must have full decision-making authority, which is specifically defined in Rule 1.720(b)(1), Florida Rules of Civil Procedure, as the “party or its representative having full authority to settle without further consultation.”⁶ The rule provides additional guidance to insurance carriers for any insured party in subsection (b)(3) which requires that the representative have “full authority to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.” Subsection (c) further defines full authority as it pertains to a party representative. In order to fully comply with the rule, the party representative must be the “final decision maker with respect to all issues presented by the case” and have the “legal capacity” to execute a binding settlement agreement on behalf of the party. Subsection (e) sets forth the procedure to be followed prior to mediation, requiring parties to file with the court and serve all parties a written notice identifying the person or persons who are attending the mediation as party representative or insurance carrier representative.

Once this legal mandate is satisfied, discretionary considerations should be evaluated. What type of demeanors

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do the designated representatives have? How will they be received? What presentation skills do they have? Do they have a history – good or bad – with the opposing parties, counsel, or their representatives? Are they good negotiators? Will they be able to forge a connection with the opposing parties, counsel, or their representatives? Would they be the right people to deliver an apology? Do these representatives have excellent “people skills”? Do they have the unique ability to tell the people to “get lost” in such a way that the opposing parties will look forward to the trip? Frequently, how the message is communicated is more important than the substance of the message itself. Attorneys need to bring client representatives who will enhance their negotiation posture, be productive in discussions, and favorably represent the face of the client.

4. SELECTING A MEDIATOR WHO “FITS THE FUSS”: Different Horses for Different Courses, Different Strokes for Different Folks

The mediation community continues to debate whether a mediator’s knowledge of the subject matter of the dispute should be an important factor in selecting a mediator. Attorneys, the primary consumers of mediation services in Florida, consider content knowledge to be one of the determining factors in mediator selection. Often, one of the first questions asked by an attorney or legal assistant inquiring about a mediator is: “What type of cases does he/she handle?” or “Has he/she ever mediated in this area of the law?” Lawyers are frequently specialists who may feel more comfortable working with a mediator who has some knowledge of the counsel’s area of expertise.

Another important factor in selecting a mediator is the mediator’s “process” expertise: How well does the mediator facilitate communications and negotiations between the parties and their counsel? Is the mediator effective in helping the parties safely navigate toward resolution and away from impasse? Is the mediator patient, persistent, polite, and persevering? While effective trial lawyers need a “killer instinct,” effective mediators require a “deal instinct” to help the participants reach resolution. Can the mediator assist the parties in pulling a deal out of the chaos that was created by their litigation? An effective mediator should be able to command the respect of all the mediation participants, maintain control over the process, encourage and promote party empowerment, clarify settlement options, and guide parties toward a mutually acceptable resolution. Ultimately, resolution is up to the parties. Even the best mediators cannot bring about resolution when the parties desire an adjudicated outcome.

When selecting a mediator, it is important to inquire about the mediator’s background, experience and ability to obtain “closure.” Many advocates define a successful mediation as one that ends in a settlement and will seek a mediator who has the ability to bring about resolution. The value of a mediator’s reputation cannot be understated. Attorneys should

believe that they and their clients are in the capable hands of a professional mediator who is competent and trustworthy and will respect the confidentiality of the mediation process. An effective mediator will have sufficient analytical ability to understand the legal issues in the case, and will help the parties and their counsel carefully evaluate the case – its strengths, weaknesses, and potential exposures to risk. An experienced mediator also will have the ability to help the parties generate the momentum needed to engage in the negotiating process and have the staying power to bring those negotiations to a point of closure.

Two other characteristics – style and personality – should also be considered when selecting a mediator. The mediator’s “style” may be facilitative, evaluative or transformative. Professor Leonard Riskin, Chesterfield Smith Professor of Law at the University of Florida, distinguishes among the evaluative, facilitative and transformative styles as follows:

- “The mediator who **evaluates** assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement – based on law, industry practice or technology – and that she is qualified to give such guidance by virtue of her training, experience, and objectivity.

- The mediator who **facilitates** assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can create better solutions than a mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.”⁷

- “Transformative mediation is based on the values of ‘empowerment’ of each of the parties as much as possible, and ‘recognition’ by each of the parties of the other parties’ needs, interests, values, and points of view. The potential for transformative mediation is that any or all parties or their relationships may be transformed during the mediation. Transformative mediators meet with parties together, since only they can give each other ‘recognition.’ ”⁸

Other scholars have challenged these characterizations, contending that, by definition, mediation involves consensual decision making through a facilitative process.⁹

Finally, counsel should carefully consider whether a mediator’s personality will “fit” with those of the parties and their attorneys. The mediator should be able to earn the trust and respect of the participants. The mediator should be sensitive to the interests and needs of all of the participants, while at the same time maintaining an aura of neutrality and freedom from bias. The mediator should also be able to exercise toughness and maintain control over the process and participants. Like a skilled referee in a boxing match, the mediator must ensure that the parties abide by the rules of the mediation process, remind them when they stray from those rules, and allow them to “fight” (i.e., negotiate) for themselves. The mediator should be a

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person who is able to establish a working relationship and rapport with all of the parties, while guiding them along the road to resolution. Parties need to feel comfortable with the mediator so they can speak openly and honestly, and feel safe when they need to vent their feelings and emotions.

Through her words and actions, a mediator should convey to the participants that they possess the confidence and skill to assist the parties in exploring the many avenues for resolving a conflict.¹⁰

5. ATTORNEY DECORUM: “You Can’t Always Get What You Want”

Don’t slam doors or burn bridges. Remember that negotiation involves consensus building, and consensus building requires cooperation. It is extremely difficult to obtain concessions from someone when you have just fired upon him with both guns blazing. The goal should be to persuade, not attack, the other side. One extremely valuable tactic employed by effective mediation advocates is to establish trust and build rapport with the other participants. This process should begin at the very outset of the dispute, and continue thereafter. Aspire to be courteous and civil to everyone involved in the process. Adversaries may eventually become allies, as they may need to recommend to their supervisors that a settlement proposal is reasonable and deserving of consideration.

During opening statements, when everyone is sitting together in the mediation conference, lawyers should use language that is informative and measured, rather than incendiary and hostile. Their goal should be to persuade the opposing counsel and representatives to listen to what they have to say. They should provide a reasoned analysis of their clients’ positions and enlighten everyone with their wisdom and expertise. This is also an opportunity for mediation advocates to carefully listen to the legal theories advanced by the opposing parties and their counsel. This information can help them and their clients understand the other parties’ perspective on the case. This is also a tremendous opportunity to illustrate to clients that there truly is “another side” to the dispute, and the dispute will be decided by a judge or jury if the parties cannot resolve it themselves.

Attorneys should encourage clients to remain flexible in their negotiating positions. Always remember, in successful mediations, parties and their counsel may disagree, but they do so agreeably.

6. MANAGING CLIENT EXPECTATIONS: “What Do You Really Want?”

As all seasoned mediation advocates know, proper management of client expectations begins at the start of the attorney-client relationship. Once an attorney begins to understand the basic facts of the case and analyzes the applicable legal theories, it’s time to begin a preliminary assessment of the case. It may be necessary to conduct

some discovery and investigation before reaching any final conclusions. While some exploratory discovery is a necessity, confirmatory discovery may be overkill and should be avoided in certain instances.

Throughout the management of a case, counsel should repeatedly advise the clients of the strengths and weaknesses of the case and explain what a realistic adjudicated outcome might be. Attorneys also must explore with their clients what their true interests and needs are, rather than focusing on their legal rights and positions. A discharged employee may prefer reinstatement and an apology, rather than money. The interests, needs, motivations, concerns and reasons for each client are unique. There is no one right solution to each client’s problem, and an attorney should help each client to understand what is actually wanted and needed as an acceptable resolution to each dispute.

Attorneys need to explain thoroughly to their clients that the lawyers’ role in mediation will differ from their role in litigation. Lawyers who fail to take the time to do this will find their clients are disappointed with their performances at mediation – that they were “too soft” or weak in their presentations. Lawyers should emphasize to their clients that certain outcomes that cannot be obtained through a trial can be achieved through mediation. This explanation should encourage the clients to be engaged and invested in the mediation process.

Attorneys also should educate their clients with respect to the natural ebb and flow of mediation negotiations. While process is important, a successful outcome may be the ultimate goal. Where one starts is not nearly as important as where one ends up. During the negotiation phase of the mediation, it is important for the lawyers to advise their clients of the strategies they are employing and the possible responses from their negotiating partners in the other conference rooms. Lawyers should work with mediators to establish objective criteria that support the parties’ negotiating positions and proposals. Clients will need ongoing encouragement and reassurance throughout the negotiating process. Attorneys can model patience, professionalism, and calm for their clients, keeping them focused and on task. Patience truly is a virtue in helping clients to obtain what they want and deserve.

7. APPROPRIATE TIME TO MEDIATE: “Set the Meeting for the Right Amount of Time and the Right Time of Day”

In successful mediations, parties and their counsel respect each other’s valuable time. When they choose to mediate, they prioritize the case and give it their undivided time and attention. They do not want any of the participants in the process to feel rushed or pressured (although this can sometimes be an effective negotiating strategy). An attorney who schedules a mediation conference at 1:00 p.m., knowing he has important depositions or court hearings to attend at 3:00 p.m., may do a great disservice to his clients and the mediation process. Effective mediation advocates will schedule their mediation conferences at times when they

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and their clients are at their emotional and physical peak. If they know that they or their clients are not “morning people,” they will not schedule mediations early in the day. Similarly, if they know clients must pick up children from school in the afternoon, mediations will be scheduled so that ample time is allowed for these important responsibilities. An anxious parent preoccupied with leaving a child stranded at school may be too distracted to fully concentrate during the mediation process. Similarly, effective mediation advocates also will allow for some extra time to get from morning motion calendars to mediation sessions, as these hearings will not always end precisely on time. Through the years, mediations have unraveled before they even started because some participants felt disrespected as a result of delays.

8. DOING THE DANCE: “Mediation Is Assisted Negotiation”

In a successful mediation, the parties and their counsel are effective negotiators. They know what they want out of the case and develop a strategy to accomplish their objectives. They understand that the mediation process is a negotiation involving a series of “give and take” steps. When the parties are engaged in this “dance” of negotiation, they recognize these steps are part of the etiquette or protocol of the process, in which one party is expected to make a “demand” and the other party is expected to respond with an “offer.” While this may not happen in every case, frequently it does. The dance of negotiation will consist of a series of demands and counteroffers. Experienced negotiators understand this and prepare accordingly. They know where they want to begin and where they would like to end up, and they develop a flexible strategy for getting to this destination.

9. MINDING YOUR P’S AND Q’S: “Attack the Problem, Not the People”

Effective mediation advocates focus on finding solutions to their shared problems. Screaming at the other party may let off steam, but it is not conducive to joint problem-solving. Effective advocates are courteous and tactful. They are also polite, patient, persistent and positive in their approach to negotiating. They recognize it is important to treat the other parties with dignity and respect. Effective advocates understand that the other participants should be treated as allies, rather than enemies. Negotiating partners can persuade others within their organizations to accept their settlement proposals. As allies, they can sell the deal. If these parties are treated as hostile enemies, they also have the ability to sink any proposed deal. Effective advocates are prepared to explain, document and justify to their negotiating partners the reasons why they should accept their proposals.

David Frost said: “Diplomacy is the art of letting somebody else have your way.”¹¹

Isaac Goldberg stated: “Diplomacy is to do and say the

nastiest things in the nicest ways.”¹²

Famed humorist Will Rogers remarked: “Diplomacy is the art of saying ‘nice doggie’ until you can find a rock.”¹³

These are all wonderful words of advice by which to live and negotiate. By being tactful, courteous, considerate and respectful, effective advocates are able to get others to listen to what they have to say, which is the first step on the road to resolution.

10. CLOSING THE DEAL: “Handshakes Are Nice, but Put it in Writing.”

In a successful mediation, the parties and their counsel exercise patience and self-control. They understand that in many cases it will take time to settle a dispute. In cases that are emotionally charged or technically complex (almost all), it may take several hours to unravel and identify numerous issues and areas that have taken years to litigate. By patiently working through these issues calmly and carefully, parties frequently are able to resolve their differences. In a successful mediation, the case is resolved only when the parties and their counsel are ready to settle.

Effective advocates understand there are no rules that prohibit them from settling their disputes tomorrow, next week or some months after the initial mediation. They can use the initial mediation session as an opportunity to begin a dialogue. They develop a positive exchange of communication during that session and build upon this initial rapport. They can establish a framework for future negotiations that may result in resolution. Enlightened negotiators view mediation as an ongoing process, not a one-time event. At the conclusion of a session, they do not issue threats or ultimatums, or storm out of the conference room indignantly. Rather, they politely shake hands and encourage future conversations.

When they do reach resolution, effective advocates take a moment to celebrate the success of this achievement and then get down to the important business of memorializing the terms and conditions of the parties’ agreement. They fully understand that a mediated settlement agreement must be memorialized (in Florida) in order to be binding and enforceable.¹⁴ The drafting process can often be slow, laborious and tedious, but effective advocates understand that they must take as much time as necessary to spell out clearly what has been agreed by the parties and their counsel. Increasingly, effective mediation advocates are taking their laptop computers with them to mediation conferences in order to use boilerplate settlement agreements and releases as templates that can be modified to meet the specific needs, terms, and conditions of the parties’ mediated settlement agreements.

In construction, cornerstones support the foundations upon which the tallest skyscrapers are built. Similarly, the cornerstones described in this article will support attorneys’ advocacy during the mediation process and help them and their clients to build satisfying mediation experiences, often yielding satisfying resolutions.

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Endnotes

- 1 In 2012 the Florida Bar published the findings of its Special Committee to Study the Decline of Jury Trials. Those findings revealed that while the number of federal civil dispositions almost doubled from 1962 to 2002, the number of cases resolved by jury trials declined from 11.8 percent to 1.8 percent. While the number of Florida Circuit court civil dispositions more than doubled between the 1986-'87 and 2009-'10 fiscal years, the number of cases resolved by jury trials declined from 1.6 percent to 0.2 percent. Gary Blankenship, *Panel Fears the Declining Number of Jury Trials may Undermine Public Confidence*, The Florida Bar News (Jan. 15, 2012).
- 2 See §44.102, Fla. Stat. (1987).
- 3 State court judges in Florida develop and use their own orders referring parties to mediation. Some circuits have standard orders that all the judges in that circuit utilize. Many of these state court orders direct the parties to submit a mediation summary to the mediator. The Federal District Court (Middle District of Florida) Case Management Order contains a paragraph requiring parties to submit mediation summaries to the mediator at least 10 days prior to the mediation.
- 4 There are a number of videos available to educate a client about the mediation process that may be accessed by contacting the American Arbitration Association, CPR Institute for Dispute Resolution and the Florida Dispute Resolution Center.
- 5 Mehrabian, A., 1972. *Nonverbal Communication*. New Brunswick, Georgia: Aldine Transaction.
- 6 The Florida Rules of Civil Procedure apply to cases which have been filed in Florida's state courts. Federal court cases that are referred to mediation are governed by the Federal Rules of Civil Procedure and local

rules adopted by the applicable federal districts in Florida – the Southern, Middle and Northern. Federal Case Management and Scheduling Orders referring cases to mediation often contain provisions defining full settlement authority and calling for the imposition of sanctions if parties attend mediation without the full authority to settle. Suffice it to say that lawyers representing parties in federal court need to be familiar with any rules governing the mediation process in federal court.

- 7 Carole J. Brown, *Facilitative Mediation: The Classic Approach Retains its Appeal* (Dec. 2002), <http://www.mediate.com/articles/brownc.cfm>.
- 8 Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation* (Sept. 2000), <http://www.mediate.com/articles/zumeta.cfm>.
- 9 Joseph B. Stulberg, *Facilitative versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 Fla. St. U. L. Rev. 985 (Summer 1997).
- 10 While the scope of this article does not permit sufficient analysis of all of the mediator “style” considerations, at times it may be more appropriate to consider a mediator’s gender, as well as cultural or ethnic background. For instance, a female mediator may be better received in a civil case involving a rape. A mediator with a Protestant faith may be more appealing in a lawsuit against a Protestant church.
- 11 St. Peter, A., 2010. *The Greatest Quotations of All Time*. Bloomington, Indiana: Xlibris Corporation.
- 12 Applewhite, A., Evans, T. & Frothing, A., 2003. *And I Quote : Definitive Collection of Quotes, Sayings, and Jokes for the Contemporary Speech-maker*. New York: Thomas Dunne Books.
- 13 Dougherty, B. & Cohl, H. A., 2009. *The Friars Club Encyclopedia of Jokes*. New York: Black Dog & Leventhal.
- 14 See Rule 1.730 (b) Fla. R. Civ. P.

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ADR Section Case and Comment!

By Perry S. Itkin, Esquire, Fort Lauderdale

WATCH YOUR LANGUAGE!

Agile Assurance Group Limited, et al v. Palmer, 2014 WL 2151971 [Fla. 2nd DCA 2014]

The parties' employment agreement states that an action arising from the employment agreement "may be instituted exclusively in the courts of Makati City" in the Philippines. [Emphasis added.]

Palmer was terminated and sued Agile Assurance in Hillsborough County, Florida. Agile Assurance moved to dismiss for improper venue, arguing that the case had to be brought in Makati City. The court denied the motion, ruling that the forum selection clause was permissive, rather than mandatory, relying in part on the rule of construction against the drafter.

The drafting problem in this case is that the relevant language contains both permissive ["may"] and mandatory ["exclusive"] language in its use of the phrase "may be instituted exclusively."

Generally, the use of the word *may* deems relevant language permissive and, on the other hand, forum selection clauses which state or clearly indicate that any litigation must or shall be initiated in a specified forum are mandatory.

The 2nd DCA cited the 5th DCA case of *Travel Express Inv. Inc. v. AT&T Corp.*, 14 So.3d 1224 (Fla. 5th DCA 2009) which held that the term "the exclusive jurisdiction" 'contains words of exclusivity and that such a clause is mandatory, not permissive.'

The 2nd DCA:

In this case, we must choose to either read may as the mandatory shall and effectuate the word exclusively or read the term exclusively at the expense of may. The former gives meaning to both words, because while may is usually permissive, it is not always read so. . . . Thus, reading the language to be mandatory gives effect to both terms.

On the other hand, reading the phrase to be permissive does not give meaning to all the terms in the same way. If we read the term permissively, exclusively has lost its meaning for it means, as relevant here, only "sole."

Thus, we are compelled to interpret the phrase to be exclusive which renders the forum-selection clause mandatory rather than permissive.

Also, the court held that the trial judge erred in applying the rule of construction against the drafter because reliance on that principle was precluded by the terms of the contract.

[COMMENT: If this were a mediated settlement

agreement, the ambiguity created in the language may have been obviated by the mediator complying with Rule 10.420(c) of the *Rules for Certified and Court-Appointed Mediators* and having a discussion with the parties and counsel:

(c) Closure. The mediator shall cause the terms of any agreement reached to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement.]

WATCH YOUR LANGUAGE! PART II – PARTY MISCONDUCT DURING MEDIATION – HMM!

Benes v. A.B. Data, Ltd. [C.A. 7th Circuit, No. 13-1166, July 26, 2013]

After working at A.B. Data for four months, Benes charged the firm with sex discrimination. The EEOC arranged for mediation in which, after an initial joint session, the parties caucused. During the caucusing, Benes, on receiving a settlement proposal that he thought was too low, stormed into the room occupied by his employer's representatives and said loudly: "You can take your proposal and shove it up your ass and fire me and I'll see you in court." Benes then stalked out, leaving the employer's representatives shaken.

[COMMENT: Be careful what you ask for!] Within an hour A.B. Data accepted **part** of Benes' counterproposal – it fired him! Thereafter he replied with the current litigation under 42 U.S.C. 2000e-3(a), the anti-retaliation provision of Title VII of the Civil Rights Act of 1964. This section bans only retaliation "because [a person] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter". The court concluded that his claim of sex discrimination had been abandoned.

A magistrate judge granted A.B. Data's motion for summary judgment and determined that Benes had been fired for misconduct during the mediation, not for making or supporting a charge of discrimination nor as retaliation.

It was Benes who sabotaged the mediation session by barging into the other side's room. Put to one side what he said there. Mediation would be less useful, and serious claims of discrimination therefore would be harder to vindicate, if people could with impunity ignore the structure established by the mediator. Allowing a sanction against a person who by misconduct wrecks a mediation will promote the goals of section

continued, next page

CASE AND COMMENT *from previous page*

2000e-3(a). Benes has not cited any case holding that misconduct during a mediation must be ignored. . . . We cannot see why misconduct during mediation should be consequence free. Judges do not supervise mediation, which makes it all the more important that transgressions be dealt with in some other fashion.

Title VII covers investigation and litigation in the same breath. Since section 2000e-3(a) does not create a privilege to misbehave in court, **it does not create a privilege to misbehave in mediation.** [Emphasis added.] The judgment of the district court therefore is **AFFIRMED.**

[COMMENT: What about confidentiality of mediation communications if this mediation had occurred in Florida? One thought might be that Benes having sued for retaliation

may have waived his mediation privilege. Take a look at the Mediation Confidentiality and Privilege Act, F.S. 44.405(6):

A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation.]

What do you think?

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Perry S. Itkin, Esquire
Dispute Resolution, Inc.
2200 NE 33rd Avenue, Suite 8G
Fort Lauderdale, FL 33305
954.567.9746

Email: PerryItkin@MediationTrainingCenter.com

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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.

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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.

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8221001 Item Number

Rev. 02/13



THE
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CLE

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

A.I.M. Mediation: Advocacy Impasse & Marketing

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Recorded at:

Annual Florida Bar Convention • Boca Raton Resort & Club • Boca Raton, FL

Course No. 1597R

2:00 p.m. – 3:00 p.m.

Perry Itkin, Fort Lauderdale

The Fallacy of Impasse

Style: Interactive

1. Define the elements of impasse.
2. Identify why impasse occurs.
3. Debunk negotiation myths.
4. Identify threats to effective ethical problem solving and creativity.
5. Develop tools for overcoming impasse in mediation, i.e. use of pre-mediation conference attorney contact; use of control theory; lateral thinking; blind bidding; attribution bias; malevolent utility function.
6. Review and discuss the Standards of Conduct for Certified and Court-appointed Mediators applicable to properly influencing parties while honoring party self-determination.

3:00 p.m. – 4:00 p.m.

John J. Upchurch, Daytona Beach

Mediation Advocacy - What Works and What Doesn't

The goal of mediation is to manage or resolve a problem that has escalated into litigation. At some point litigation takes on an ugly and seemingly independent life of its own. Mediation is an opportunity to put the conflict into a broader and healthier context. This presentation will focus upon the attitudes, skills and approaches that subtly convert the exercise to realizing the other side is really a partner in resolving a dispute. Both parties have an interest in avoiding the commitment of years to lawyers, costs, anger and uncertainty. We will focus on appropriate mediation objectives, preparedness and communication skills; assessment of external factors; influence of outside relationships; case analytics; and developing habits of thinking that will provide a template for effective mediation advocacy.

4:00 p.m. – 5:00 p.m.

Rodney Romano, West Palm Beach

Marketing Your Mediation Practice Ethically

Style: Interactive Lecture/Case study

Material covered – The presentation will consist of a number of marketing techniques beginning with self/skills/product evaluation, market identification and then covering the effective and cost efficient marketing techniques. Applicable ethics opinions will be discussed.

Q&A period will be reserved at the end of the formal presentation.

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The Florida Bar Continuing Legal Education Committee, the Alternative Dispute Resolution Section, the Appellate Practice Section, the Business Law Section and the Real Property, Probate & Trust Law Section present

Recent Developments in Arbitration – The Revised Florida Arbitration Code and Recent Supreme Court Decisions

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Webcast Only Presentation:

Monday, November 18, 2013 • 1:00 p.m. – 3:15 p.m. EST

Webcast
Only

Course No. 1755R

In 2013, the Florida Legislature amended the Florida Arbitration Code when it enacted the Revised Uniform Arbitration Act approved by the National Commission on Uniform State Laws and the American Bar Association. Now called the Revised Florida Arbitration Code, Florida has substantially rewritten the statutes governing arbitration. During the amendment process, the United States Supreme Court has decided cases dealing with arbitration under the Federal Arbitration Act, which would preempt the Revised Florida Arbitration Code. This CLE addresses the substantive changes to Florida statutes dealing with arbitration and the decisional law recently handed down by the high court.

Panelists include Jon Polenberg, Gerald Cope, Karen Evans, Michael Higer, Larry Leiby and Donna Greenspan Solomon.

1:00 p.m. – 2:10 p.m.

New Arbitration Code

2:10 p.m. – 3:15 p.m.

Recent Developments in Arbitration

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