

# THE COMMON GROUND

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NATALIE PASKIEWICZ & ANA CRISTINA MALDONADO, CO-EDITORS



## MESSAGE FROM THE CHAIR

Oscar A. Sanchez, Esq.

Greetings and welcome to another edition of The Common Ground! As the Covid pandemic marches into another year, the ADR Section continues to be at the forefront of helping lawyers and neutrals grapple with this “new normal.”



Section members and leaders have been busy putting out programming for our members, including the recent “**Connecting the Dots**” event, which our section’s Law School Outreach Committee held for law professors, students and ADR professionals; the Health & Wellness CLE series, which was held in conjunction with the University of Miami School of Law; and the inaugural Arbitration Advocacy Institute, which helped lawyers who practice arbitration hone their advocacy skills.

In this coming year, we are looking forward to the second Mediation Academy for Certified Mediators, which brings together seasoned mediators with the leading mediators of Florida for a two-day

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## MESSAGE FROM THE CHAIR, CONTINUED

substance-packed workshop intended to increase the skill level of veteran mediators. Of course, the Section continues its trailblazing CLE programming for neutrals.

Please encourage your friends who practice as neutrals, as well as those who practice before neutrals, to join this great section and be on the leading edge of alternative dispute resolution in Florida!

Oscar A. Sanchez

2020-2021 ADR Section Chair  
[oscar@oasmediation.com](mailto:oscar@oasmediation.com)



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## Florida Supreme Court Declines to Adopt New Mediator Rules

By Lawrence Kolin, Esq.,  
Upchurch Watson White & Max Mediation Group, Maitland

Last month, the Supreme Court of Florida quietly rejected a multi-year effort at rules changes by its own ADR Rules & Policy Committee attempting to ensure that the mediation process operates in accordance with mediator rules and standards already adopted. The amendments submitted in this petition originated in 2017 as a Committee proposal that would have required all mediators of state court trial and appellate cases be Florida Supreme Court certified and thus subject to ethical standards and a disciplinary process. Mandatory certification was also supported by a majority of the Executive Council of The Alternative Dispute Resolution Section. The ADR Rules & Policy Committee filed a response to comments on proposed rule revisions, stating that the court has an obligation to ensure that the mediation process parties use operates in accordance with mediator rules and standards. The proposed revisions pertained to the practice and procedures of mediation in the court system and added requirements that those who mediate court-connected cases as part of the machinery of the judicial process must observe the existing rules of mediators, regardless of certification.

**Florida court mediators are not only required to be familiar with the statutes and rules governing mediation but are also obligated to follow court rules of procedure, administrative orders, local rules, and any other rules related to mediation in the court system.**

The ADR Rules & Policy Committee did not yield to criticism found in the comments filed and urged the court to proceed by adopting proposed amendments to Florida Rules of Civil Procedure 1.710 and 1.750; Florida Small Claims Rule 7.090; Florida Rule of Juvenile Procedure 8.290; Florida Rule of Appellate Procedure 9.700; Florida Family Law Rule of Procedure 12.741; and Florida Rules for Certified and Court-Appointed Mediators 10.200 and 10.700.

These amendments were put forth via the **court's** inherent authority under Article V, Section 2(a) of the Florida Constitution. The committee found it inconsistent and illogical to have one group of professionals in the court process who are subject to no ethical standards involving the vitally important mediation service they provide the public.



Mediation has been an integral part of the Florida court process for over thirty years and certified mediators are obligated to follow rules related to mediation in the court system. However, the Florida Supreme Court chose to leave existing rules in place, such that parties are still free to choose whomever they want (clergy, rabbi, spiritual advisor) to mediate their case without the beneficial boundaries of mediator ethics and a system of enforcement. While the committee made clear it does not believe the creation of an exempt group of compensated court professionals was the intent of the court for mediation in Florida, the court left it alone with only a dissent from Justice Polston emphasizing the need for instilling public confidence through principled ethical protections in mediation of pending state court cases. See Case Number: SC20-565 [here](#).

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[Lawrence Kolin, Esq.](#) is a mediator and arbitrator with Upchurch, Watson, White & Max in Maitland. He founded the ADR Committee of the Orange County Bar Association; he was twice elected to the Executive Council of The Florida Bar ADR Section and is now an Emeritus Member.

# “Connecting the Dots.” A Gathering of Florida's ADR Lawyers, Professors and Law students

By Lisa M. Tipton, APR—ADR Section Communications Consultant

The ADR Section’s Law School Liaison Committee has launched an exciting new project designed to convene conversations between ADR professionals and Florida law schools. Immediate Past Section Chair Kim Torres initiated the concept to foster ADR initiatives, create mentoring pathways for section members and law students, boost the conversation about “all things ADR,” and promote ADR Section membership.

Under the leadership of Law School Liaison Committee Chair Ana Cristina Maldonado, the first World Café-style gathering took place on February 24 via Zoom. Committee members Oscar Sanchez, Kim Torres, Fran Tetunic, John Salmon, Christy Foley, Hadas Stagman, Patrick Russell, and Shari Elessar reached out to the law schools in anticipation of the event to Florida law schools.

Feedback on “Connecting the Dots: A Gathering of Florida’s ADR Lawyers, Professors and Law Students” was extremely positive and the next event already is in the works. More than 60 people signed in during the evening, including professors and students from 10 of Florida’s 12 law schools and many ADR Section Executive Council and committee members.

According to Maldonado, no forum currently exists in which Florida’s ADR professors can interact with their in-state colleagues.

“Our goal was to create a Florida-wide ADR network by connecting law school ADR professors, law students and ADR practitioners,” Maldonado said. “We are blown away by the enthusiasm of the group and the potential for it to grow into a tremendous resource for the ADR community.”



Ana Cristina Maldonado

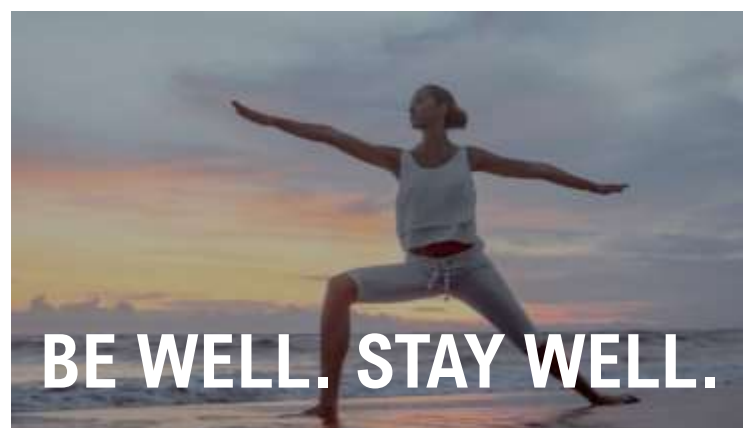


The evening began with introductions and then transitioned into nine breakout rooms to foster interaction and encourage networking. The round one question was, “What are you working on that is ADR-related that you are excited about?”

Continued, next page

The ADR Section’s Six-Part Health & Wellness CLE Series is available online 24/7 as downloadable seminars and podcasts.

[flabaradr.com/wellness-cle-series](http://flabaradr.com/wellness-cle-series)



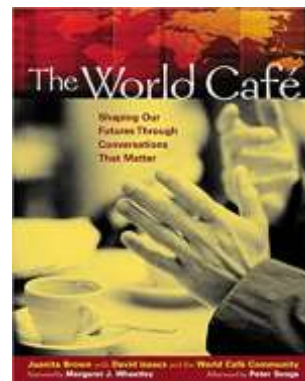
## Connecting the Dots: A Gathering of Florida's ADR Lawyers, Professors and Law Students

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Participants logged their answers and ideas in a shared Google Doc and reconvened to report their answers. The round two breakout rooms joined together different groups of participants tasked with answering two questions, “What can the ADR Section—and this group—do for law schools and students?” and “What do you envision for the future of this group?” After bringing everyone back together to discuss the findings, graphic recording artist Viola Clark revealed a visual narrative (see below) of the evening’s discoveries, a beautiful fusion of the ideas, concepts and creative energy shared by the participants.

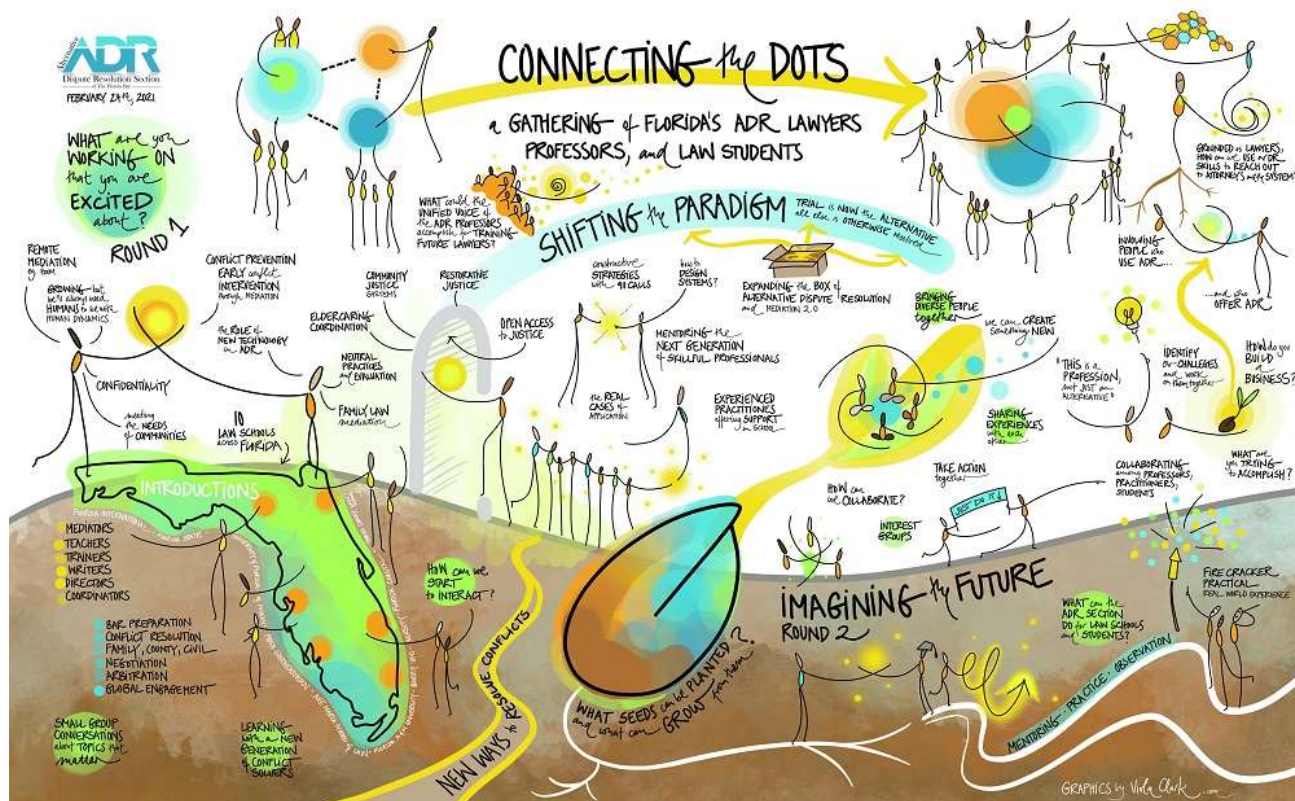
Maldonado said she chose the World Café format for “Connecting the Dots” because of its ability to allow for genuine conversations while capturing the collective wisdom of all the participants in an energized and intergenerational group.

“A tremendous amount of energy is created when you combine students who are new, motivated, and hungry for mentorship; people in the middle who are doing the hustle and balancing life and work and climbing the hill; and elder statesmen and women with all their experience to impart,” said Maldonado.



“The ADR Section is a perfect host for these conversations to incubate connections and innovations and help envision the future of ADR in our state.”

Plans are in the works to convene future conversations between the section, experienced practitioners and law schools. If you are interested in participating at any level in the “Connecting the Dots” project, please contact Ana Cristina Maldonado at [acmaldonado@uww-adr.com](mailto:acmaldonado@uww-adr.com).



Graphic Facilitation by Viola Clarke.  
Contact Viola at 218-940-1523, [violatschendel.com](http://violatschendel.com) or [hello@violaclark.com](mailto:hello@violaclark.com).



## How to Be Better at ... The Power of Health and Wellness

By Patrick Russell, Esq.  
Florida Supreme Court Certified Mediator  
Salmon & Dulberg, Miami

Everyone at some point wants to get better at something. For you, that might mean a sport, a hobby, a relationship, or work. There are endless sources of online guides, manuals, books, and seminars that dispense tips on almost any conceivable topic, including the main staples for building a better business, making friends, or losing weight. An analysis of the top ten non-fiction categories for print books on Amazon in November of 2017<sup>1</sup> revealed that self-help books were number two on that list. What is even more interesting is that six more categories on the top ten list for non-fiction were essentially “how-to” books as their topics covered health and fitness, cooking, business, parenting and relationships, education and teaching, and hobbies. That would make eight out of ten of the most popular non-fiction categories dedicated to self-help and “how-to” guides. That trend continues today and has compounded based on the sales numbers of self-help books that have grown by 11 percent per year from 2013 through 2019<sup>2</sup>. In terms of pure numbers, the unique titles for self-help books have increased from 30,897 in 2013 to 85,253 in 2019. What is the point of this?

### We are all looking for help on how to get better, and that desire is increasing.

Self-help books generally tackle topics from their unique perspective. The tips given are precise and are often a series of lists. Every book will have its unique twist on the formula, a new secret sauce, if you will, to get better. The advice for how to play better chess is generally going to be very different than how to nurture romantic relationships. The same can be said for how to be a better lawyer, negotiator, or even mediator. However, I would posit that one common thread connects every single self-help or “how-to” guide. All too often, this common

thread is just simply taken for granted when it is, in fact, far from that. What am I talking about? I am talking about your health and wellness.

### Health and wellness is your core state. Think about it. Literally, everything you do depends upon your health and wellness.

What are the chances of you being a better trial lawyer if you are sick? How will that appellate brief turn out when you have nausea, dizziness, and a migraine headache? Health and wellness not only includes your physical state but also your mental state. Are you going to have an amazing negotiation if you have uncontrollable anxiety or suffer from depression and apathy? Most likely not. We should also not forget that physical health and mental health are connected. Your physical health can directly impact your mental health and vice versa.

Notwithstanding how our health and wellness impacts everything we do; it is often placed on autopilot with the belief that all will be well. Try doing that with a plant or pet and tell me how that turns out.



<sup>1</sup> [10 Best Selling Non-Fiction Book Topics](#)

<sup>2</sup> [NPD: 'A Decade of Personal Exploration' Ahead in US Self-Help Books](#)

## How to Be Better at ... The Power of Health and Wellness

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Self-care is perhaps the most important task we should all prioritize but is often neglected. Neglect starts early when we all consider ourselves superhuman. Then, as we age and our responsibilities increase with work and family, the excuse is we no longer have time for self-care. As lawyers, we take it a step further as legal work begins to dominate our available time. The billable hour reigns supreme, as does our quest for perfection. Our self-esteem and professional image will not allow us to feel vulnerable, much less have to ask for help. Instead, we substitute coffee for lack of sleep, alcohol to take the edge off, consume vitamins and supplements instead of exercising, and ultimately bury ourselves in more work rather than deal with emotions, feelings, or mental health issues.

There is no magic pill or substitute for health and wellness. And there is nothing more important than your health and wellness. You only get one shot at this, one body and one mind. Ask yourself, are you here to be or to do? Are we human beings or human doers? Can we agree that one purpose for us on this planet is to be happy? I would suggest that you should be all you can be, here and now. Choose happiness. The time to be happy starts by taking inventory and responsibility for your health and wellness. You can be happy, healthy, well, and still have a legal career. By integrating self-care, both physically and mentally, you can make that happen. Self-care will take a slight change in perspective and priorities, but the payoff can be tremendous. If you want to continue to help others as a legal professional, you need to help yourself first.

**May is lawyer wellness month and is fast approaching.<sup>3</sup> Now would be a great time to get started and prioritizing your health and wellness.**

We all have gone through tremendous unsettling and unprecedented times with a worldwide pandemic, social upheaval, and political turmoil. There can be no doubt that the additional strains these recent events have had on us will only further compound any lingering issues with our health and wellness. Now is the time to make time to address health and wellness.

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<sup>3</sup> [May is Health and Wellness Month for Florida Lawyers](#)

Leading the way, the Alternative Dispute Resolution Section organized the first-ever, Health and Wellness CLE Series.



This critically acclaimed “Be Well. Stay Well.” program consists of six separate continuing legal education webinars that tackle health and wellness from different perspectives. Guiding each program is a panel of renowned experts who provide insight into health and wellness related to mindfulness, technology, psychology, ethics, social justice, career development, and happiness. These topics remain just as relevant today as they were when recorded in October. If you missed these programs, now would be a great time to catch up as we approach Lawyer Wellness Month. A brief description for each program is below:

[Mindfulness, Social Connection and Well-being: Resolving Inner Disputes and Reaching Resolution](#) Florida Bar Course 4166 originally presented Oct. 5, 2020, by University of Miami School of Law Dean of Students Janet Stearns, Joshua Rooks, PhD., Gilbert Squires, Esq., and Professor Scott Rogers, University of Miami School of Law Director of Programs and Training and of the Mindfulness in Law Program.

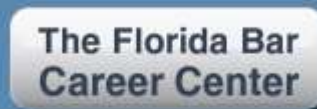
We live at a time of great disruption and social isolation, physically, emotionally, and economically. This session explores insights associated with the effect of isolation and feelings of disconnection—whether occasioned by COVID-19 or an aspect of the practice of law—and offers various practical approaches to wellbeing and healing. 1.0 General, 1.0 Mental Illness CLE credit. ADR Section members \$50; non-section members \$85.

[Balancing Wellness and Ever-Present Demands of Technology](#) Florida Bar Course 4167 originally presented Oct. 8, 2020, by Ilenia Sanchez-Bryson, Legal Services of Greater Miami.

An overview of the need to balance wellness with the demand to be “connected,” especially considering the impact of working from home during the pandemic.

# Are you getting the most from your Member Benefits?

## Practice Resources





## How to Be Better at ... The Power of Health and Wellness

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The course covers best practices for setting technological boundaries and leveraging technology tools to support balance and wellness. 1.0 General, 1.0 Mental Illness, 1.0 Technology CLE credit. ADR Section members \$50; non-section members \$85.

### [Changing the Paradigm: Reconciling Our Conflicts](#)

Course 4168 originally presented on Oct. 13, 2020, by Deborah Corbishley, Esq., Kenny Nachwalter, P.A. and University of Miami School of Law Professor and mediator Janet Seitlin.

An online discussion examining the conflicts between the left-brained realities of the legal system and the right-brained nature of human beings; how this conflict affects us, and how we can reconcile the two. 2.0 General, 2.0 Mental Illness CLE credit. ADR Section members \$100; non-section members \$135.



### [Ethical Considerations When Using Alternative Dispute Resolution to Bridge the Justice Gap](#)

Course 4169 originally presented on Oct. 21, 2020, by Jayme Cassidy of Legal Services of Greater Miami.

This program addresses practical and ethical issues that often arise when mediating a case with an indigent party and strategies for successfully handling them. Learn more about the impact that alternative dispute resolution can have on cases involving indigent clients and opportunities for pro bono mediation. 1.0 General CLE credit, all of which may be applied toward Ethics. ADR Section members \$50; non-section members \$85.

### [Navigating Lawyering and Life: A Roadmap](#)

(Course 4170, a recorded webinar that originally aired on Oct. 26, 2020, by Bruce Blitman, Esq., Business and Professional Development Coach Paula Black, Maia Aron, Esq., Mark Migdal & Hayden, and Karen Lapekas, Esq., Lapekas Law.

Yes, it is possible to be happy; have a thriving practice and the personal life you really want. Paula Black, the author of the new book “**A Lawyer’s Guide to Creating a Life, Not Just a Living,**” shares what it takes, and you will hear from two of the lawyers in her book: Karen Lapekas and Maia Aron share their personal stories of how their approach of mindfulness helped them achieve a life of their own making; a life they wanted and their courageous journey to make it happen, all the while taking care of themselves. You will learn the secrets that will lead you down the path to professional and personal fulfillment. You will learn how their approach of mindfulness helped them achieved a life of their own making; a life they wanted, and they found the courage to make it happen. 2.0 General CLE credits, 0.5 of which may be applied toward Ethics; 1.0 Mental Illness Awareness credit. ADR Section members \$100; non-section members \$135.

**Notwithstanding how our health and wellness impacts everything we do; it is often placed on autopilot with the belief that all will be well.**

### [Happiness For Lawyers Guaranteed ... Or Your Misery Back](#)

Course 4171 originally presented on Oct. 29, 2020, by Arielle Capuano, Esq., Levinson & Capuano, LLC, and Mark Eiglarsh, Esq.

An examination as to how to decrease stress and increase success as an attorney/neutral, including an analysis as to why attorneys are unhappy and how that manifests into various problems, as well as a discussion of some solutions and various exercises and practical tools the attorney/neutral can utilize in combating stress and increasing happiness and success. 1.0 General, 1.0 Mental Illness Awareness CLE credit. ADR Section members \$50; non-section members \$85.

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## How to Be Better at ... The Power of Health and Wellness

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So, if you want to get better at something, start with your health and wellness. Health and wellness for legal professionals is too critical to ignore or to put on autopilot. We have been trained to place the interests of our clients and our work ahead of ourselves. That training has been long worn as a badge of honor but should not come at the cost of harming ourselves. If you cannot help yourself, how can you help others? **Let's** make a conscious shift and commitment to help ourselves and do more for our health and wellness.

Additional health and wellness resources are available through The Florida Bar, the Alternative Dispute Resolution Section, and the Young Lawyers Division. Through the power of health and wellness, you can get better at almost literally anything. Be well. Stay well.

[Patrick Russell, Esq.](#) is a former trial partner and ethics counsel, who now mediates full-time with Salmon & Dulberg, where his mantra is to make every mediation a meaningful mediation, which is ethical, mindful, and strategic.



### Current Trends in Florida Arbitration Proceedings

(and post-award proceedings)

1 CLE Course Number 4007 Original Program Date: June 16, 2020  
Glenn Waldman, Karen Evans, Christina Magee

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# Tips From the Masters: Strategies in Mediation

Interviews and edits by  
[Shari Elessar](#) and [Ana Cristina Maldonado](#)



In a continuation of our conversation from the prior issue of The Common Ground, we asked our mediation experts several questions (specifically on moving the parties). Our panel included Christy L. Foley, Esq., Mark A. Greenberg, Esq., Peter J. Grilli, Esq., A. Michelle Jernigan, Esq. ("**Michelle Jernigan**"), Meah Tell, Esq. and Stanley Zamor.

**Editors' Note:** Every mediator on the panel was interviewed independently and, for the first "**best tip**" question (regarding approaching difficult discussions), each mediator gave a similar answer that pointed to active listening and understanding the emotions driving the negotiations. After the first question, the distinctive style of each mediator emerges, showing various ways to approach moving the parties in mediation.

**What do you do with people who are irate, distraught or cut off the other parties?**



*Christy Foley:* I am a cheerleader, but also a referee, and I expect the parties to run a clean game. I can recall a highly charged situation when I was a county volunteer. The parties were *pro se*.

One party was a member of the police force in Orange County and was able to come into the mediation with full uniform and with his weapon and everything. He was slightly higher up in the force. Everyone knew him. Security let him walk in, not knowing he was there for mediation. He was the defendant. He got very upset. He was yelling, stood up, leaned across the table with his finger in the face of the plaintiff. This particular officer was around 6'3" tall. I am 5'2" so here I am, unarmed and much smaller in size. I had to take control of the of situation, so I stood up. My voice was serious, monotone and commanding. "**Sir**, we need to sit down to continue this mediation. This is a business

meeting and we need to act as business professionals. I am in charge of this room, so if you **can't** behave in a professional manner, I will have to ask you to leave." It worked. He sat down. By doing something unexpected, it takes people a little bit off kilter. He may not have expected someone to stand up to him. I stayed in position and stayed calm. Knowing and showing you are in command of the room, and that you can handle the firmness helps. If anyone doubts that the mediator is in charge of the room, show them that you are not going to tolerate that. When I get serious I **don't** have to yell, **it's** a noticeable change in the tone of my voice. **It's** the "**mom**" voice. The best way is to stay calm, when they are not.



*Mark Greenberg:* Separate them. The mediation will continue more effectively in caucus if irate, distraught or out of control parties are separated.



*Peter Grilli:* It is usually the clients, not the lawyers, who can get out of control. If it is in a joint session, say, "**I'm** sorry, I can only hear one person at a time, I want to hear what you have to say."

By doing this, the mediator takes the blame off of the party, who is already upset, and puts it on themselves as their limitation.

**"A single conversation with a wise man is better than ten years of study."  
- Chinese Proverb**

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## Tips From the Masters

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*Peter Grilli:* If someone wants to cut off the conversation, move the parties into caucus, rather than remaining in joint session. And after separating them, engage in discussion to work through the emotions. There you can do your best to talk about your understanding, as well as express some sympathy, without jeopardizing neutrality. There is an old saying, “**What** is the difference between perception and reality? You can change reality.” Also try to make sure they understand why parties cannot do certain things. For example, someone going to a mediation as an employee might lose their job if they settle in a manner that is less desirable than the position they had anticipated before entering the mediation.



*Michelle Jernigan:* Separate them. I **don’t** let people interrupt each other—that is common courtesy. In my opening I explain that **it’s** my preference that you not interrupt one another because that gives each side the opportunity to present

the information in the manner in which they have prepared it. Let people know they can attack the problem but not the person. It is important to not be dismissive of emotion—you **don’t** shut it down, you acknowledge it. “**I** see how angry you are about this. Now we have an opportunity to move forward from this.” Then you are in executive-level function. You can label the emotion. “**I** can see how this has hurt you. I can see what a significant loss this has been. I can see how angry you are.” Sometimes they correct you – “**I** am not angry, I am frustrated.” By calling out the emotion, you help them shift from the emotional path to the cognitive path. Once they shift, you can speak to them in a more rational fashion.



*Meah Tell:* My opening statement emphasizes that we are engaged in a collaborative process, and I know that the lawyers will help me with this process. Having enlisted the assistance of the attorneys and the clients—to help me

explore alternatives—usually creates a more congenial environment from the beginning. Tell the parties that this will be a very professional process, but that if they hear disturbing things that they wish to respond to, to write them down and everyone will have an opportunity to respond or be heard. Then ask them to agree if that sounds like a good process to them. Try to keep the discussion organized and flowing and prevent interruptions. You can say things like, “**I** am sorry I cannot hear when everyone is talking at the same **time**,” and turn to the person who was cut off. Do not ignore the people who are feeling irate or distraught, but deal with this in caucus and try to validate their feelings.



*Stanley Zamor:* When someone has a burst of emotion, say thank you. Smile. Physically take notes: “**If** you **don’t** mind, I want to get down what you are saying.” That forces them to pause to wait for me to do that. Validate

their responses. “**The** most important thing is to have a joint session, and get everything out that we can use constructively.”

And reiterate the ground rules of respect and interruptions. Use various phrases like “**I** see that passion.” “**We** all need to hear this.” “**Mediation** creates opportunity.” “**Slow** down a little bit.” “**I’m** not going to shut you down and get you quiet.” “**You** are going to things hear you do not like.” “**You** will have the chance to respond.” “**Write** it down.” “**I** promise you will get the opportunity to respond in your own words.” “**Can** you do **that**?” “**I** like to call it what it is. We can go in separate rooms and you will have more time, but **let’s** get everything out so we can use it constructively, then we can separate.” “**Let’s** use this opportunity.”

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## Tips From the Masters

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**What are some effective techniques to cause parties to re-evaluate their positions when they appear to have reached an impasse?**

*Christy Foley:* Trial balloons. Use them as a last resort when they appear to have reached an impasse. Say to the parties (separately), “**This** is purely hypothetical, but if I could get them to x number, will you **stay?**” Watch to see if they answer immediately or pause. If they do not answer right away, they are giving me a non-verbal cue that they are willing to think about it, which (almost always) means they will accept it. Do the same with the other side. Then move to “**I** fought to get that; can we get to a **settlement?**”

*Mark Greenberg:* There are several useful techniques to change the dynamic of negotiations. Chris Voss, an FBI hostage negotiator, and author of *Never Split the Difference: Negotiating As If Your Life Depended On It* offers a lot of insight into defusing a hostile situation. One idea is to use open ended questions using “**How?**” and “**What?**” to which put the parties in the position of solving their own problems. Example, “**How** do you think I can get the other side to agree to **that?**” Sometimes simply acknowledging the feeling can reduce the tension. For example, you can use ‘**labeling**’ to identify negative and positive driving forces and dynamics, such as, “**It** seems like you feel you are being treated unfairly.” The party then feels understood, which is critical in the process. You can also use ‘**labeling**’ in lieu of denial, as a strategy to defuse negative emotions. For example, a listener will likely become defensive and respond negatively to: “**I** do not want to sound disrespectful, ...” However, when you ‘**label**’ (in lieu of denying it), you can often change the response to it, “**I** am sure this will be hard to hear ...”. Using an effective communication style, you can defuse tension, reset the tone of the conversation and open up the collaborative process.

**Editors’ Note:** Among many techniques, Chris Voss also recommends “mirroring,” which is a basic reinforcement technique in which you repeat the last three words said by the speaker to show active listening, often phrasing it back as a question.

*Peter Grilli:* Simultaneously invite them to be more objective, while validating their differences, by conceding that this is a hard case to evaluate. Let the parties know that, due to certain unknowns, it makes the range of reasonable settlement much broader. If you state it is a hard case, they can accept why the range is so broad. Then point out that what the case may be worth (before a judge or jury) may not objectively match what the client wants or needs. Remind them of the high risk involved in litigation when it is a hard case to evaluate. You do have to be diplomatic and careful not to put a wedge between the attorney and their client when you try to get the parties to re-evaluate their demands more objectively. You can do this by acknowledging to the client that their lawyer is doing a great job as their advocate, by fighting hard for one end of the range. But you emphasize it would also be perfectly logical and rational to accept the last number offered by the other side if it is in the range of a reasonable settlement.

*Michelle Jernigan:* One technique to help parties re-evaluate is simply to walk them through the risk analysis, such as risk of summary judgment, risk of directed verdict, risk at the trial and court level and risks at the appellate stage. Help them allocate what the risk is, and how that would affect the settlement dollars. Also, try to invite role reversal, by asking **plaintiff’s** counsel to pretend they are the defense lawyer, and think about how they might propose a reasonable settlement range from the other side (and vice versa) and get them into a range where the case may resolve. I am very big on reciprocity and asking pointed questions: “**If** they do x, will you do **y?**” “**What** can you give **them?**” “**What** exchange can you make **here?**” You need to encourage reciprocity in negotiation.

*Meah Tell:* **Attorney’s** fees play a major factor in most mediations and often drive settlements. **It’s** important to find out if there is a fee shifting statute, or a contract governing fees or if the lawyers agree that each party is going to have to pay their own fees. Whether or not you have discussed the fee issue in the joint session, address it in caucus if things seemed to get bogged down, and ask the lawyers what it will cost their clients to try the case.

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## Tips From the Masters

Continued from page 13

*Meah Tell:* Another way to avoid impasse in certain types of cases is to clarify the numbers and why the parties disagree on them—such as in first party property insurance cases. If the gap is not too large, try to help them evaluate how far apart they are. Tell parties not to be discouraged with the negotiating process if the numbers are widely divergent. Each party has their own way of negotiating, and the important thing is what the other **party's** bottom line is. You can even ask a lawyer to give their opinion of what they think the other side is looking for, particularly when the lawyers have spoken before the mediation. Make strategic decisions on whether to meet with the lawyers separately from their clients.



*Stanley Zamor:* Thank them. If you argue with them, they will often just shut down, so validate that there is no agreement. Then ask them to “**Hold** on one second –” and leave. Give them time, maybe five minutes. Then return and reiterate your opening statement: “**My** role is to empower you to explore opportunities, and maybe I **haven't** done it effectively.” Lift the blame off them by taking it on yourself as the mediator, while exploring for further possibilities: “**You've** presented me these options: 1, 2, 3. Our role is to expand beyond that – at least one more option. Let me try one last one. **We've** tried one, **we've** tried two, **we've** tried three. What else can you come up with? Let me go to the other side. I really want to help you guys. What **haven't** I **done?**” Give them mental homework. People respond to someone who is not just a number runner. Tell them “**I** see your line. But my job is to push it further. With all due respect, that is what my role is.”

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"Tips From the Masters" is a collection of interviews with experienced Florida mediators who share insights and advice about various aspects of mediation. Learn pro tips from some of Florida's top mediators. The column will appear in each issue of The Common Ground.

Do you have any favorite mediation tips or juicy war stories? Would you like to be interviewed for the “**Tips** from the **Masters**” column? Email [Cristina Maldonado](#) and [Shari Elessar](#) and let us know you are interested.

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## The Masters

[Christy L. Foley, Esq.](#) is a Florida Supreme Court certified circuit civil and county court mediator. She has been mediating since 2009, focusing on business law, employment law, insurance law, construction law, real estate law, technology law, and landlord/tenant law.

[Mark A. Greenberg, Esq.](#) brings over two decades of trial experience to his civil mediation practice. He has represented defendants and plaintiffs and has a rare combination of first-party coverage and third-party personal injury experience.

[Peter J. Grilli, Esq.](#) has been mediating since 1993 and has mediated more than 5,500 cases, including civil litigation in federal and state courts.

[A. Michelle Jernigan, Esq.](#) has mediated thousands of cases throughout Florida since launching her mediation career in 1987.

[Stanley Zamor](#) is a Florida Supreme Court Certified Circuit, County and Family Mediator, Primary Trainer and Qualified Arbitrator.

## ON-DEMAND AND PODCAST CLE & CME

Recently Added to The Florida Bar InReach Catalog

[Mediation Preparation for Attorneys: The ABC's To Your Client's Best Mediation.](#) This 50-minute webinar covers tips and advice for attorneys preparing to represent their clients at mediation. In addition to suggesting best practices in terms of the mechanics of getting ready for a mediation session, the presenter will discuss other attorneys should take into consideration including, but not limited to, intangible aspects such as managing **clients'** expectations and energy, and the **attorneys'** psyche. 1 CLE.

[Navigating Lawyering and Life: A Roadmap.](#) You will learn the secrets that will lead you down the path to professional and personal fulfillment. You will learn how their approach of mindfulness helped them achieved a life of their own making; a life they wanted and they found the courage to make it happen. 2 CLE; 1 Mental Illness Awareness; 0.5 of which can be used towards Ethics.

[Ethical Considerations When Using Alternative Dispute Resolution to Bridge The Justice Gap.](#) This program will address practical and ethical issues that often arise when mediating a case with an indigent party and strategies for successfully handling them. The impact that alternative dispute resolution can have on cases involving indigent clients. Discussion on opportunities for pro bono mediation. 1 CLE; 1 of which can be used towards Ethics.

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ON-DEMAND & PODCAST



# Arbitration Advocacy Institute

By Meah Tell and Shari Elessar



The Inaugural Arbitration Advocacy Institute—sponsored by the ADR Section of the Florida Bar, JAMS and Upchurch Watson White & Max and developed by Co-Chairs Meah Tell and Deborah Mastin—was a blockbuster event. Participants developed arbitration advocacy skills and learned tips and techniques in order to better represent clients at arbitration.

Twenty-three skilled arbitration professionals presented an exciting full-day webinar that began with John H. Rooney, Jr. discussing “**Drafting Enforceable Arbitration Clauses.**” This was followed by an informative discussion regarding how to handle arbitration proceedings administered by the American Arbitration Association (Dr. Rebecca Storrow), FINRA (Manly Ray), the American Health Lawyers Association (Geoff Drucker) and JAMS (Emily Cabrera). Glenn B. Waldman led a mock Initial Prehearing Scheduling Conference with Lida Rodriguez-Taseff representing the Claimant and Ken Waterway representing the Respondents.

To allow attendees to interact directly with mentors, participants went into one of nine virtual clinics in diverse arbitration practice areas: Construction Arbitration (Deborah Mastin), Employment Arbitration (Karen Evans and Leslie Langbein), Health Care (David Lichter and Louise Zeuli), Technology (Joel Levine), Commercial Arbitration (A.J. Horowitz and Meah Tell), Securities Arbitration (David Weintraub), Florida Bar Arbitration (Gary Salzman), Court-Connected Arbitration (Christopher Shulman) and International Arbitration (Gilbert K. Squires and Carlos F. Osorio).

Coming back into the webinar from the virtual clinics, there was a lunch and learn interactive discussion led by A. Michelle Jernigan and Lawrence Kolin, where presenters from the nine virtual clinics shared some of the teaching points from their virtual clinics with all of the conference attendees and answered questions.

Retired Judge Gill Freeman and Patricia Thompson discussed Discovery in Arbitration. They helped participants differentiate discovery rules under administered proceedings, the Federal Arbitration Act, and as might be detailed in the **parties’** agreement. They shared their perspectives on the limitations of discovery in arbitration proceedings. Clarissa Rodriguez then led a panel discussion with Kristin Paz, Omar Ibrahim and Katherine Sanoja on “**How Do you Know Your Arbitration is International?**” and Christina Magee and Meah Tell offered technology and professionalism CLEs in their well-received, “**Technology and Professionalism in Virtual Arbitrations: Challenges and Solutions.**” Helpful handouts for counsel and their clients and a model virtual arbitration hearing order were included in the conference Handouts by Christina and Meah.



MEDIATION  
GROUP



As a marvelous finale to a fantastic day, the participants were able to watch the role-play, presentation, “**Hot Tubbing Expert Witnesses**” (Concurrent Testimony). The presentation included Deborah Mastin as the Construction Arbitrator, with Melinda Gentile and Ben Patrick acting as counsel, and Michael **D’Onofrio** and Amanda Jo Amadon acting as the expert witnesses. Hot tubbing has grown as an effective way to present expert testimony, and the role-play showed exactly how this streamlined method can be utilized in an arbitration proceeding.

Special thanks go to the dedicated committee of the ADR Section of The Florida Bar, Lisa Tipton for marketing the Institute, and to Stefanie Svisco, Section Administrator, and Sheridan Hughes, Florida Bar Staff, for handling the technical logistics.



## TIME TO RENEW YOUR ADR SECTION ANNUAL MEMBERSHIP—WE NEED YOU!



Starting in April, Florida Bar members may pay their 2021-22 Florida Bar fees online by signing into their [member portals](#) and clicking the “Pay My Fees” button. Paying online is the quickest and easiest way to pay your annual fees and stay in compliance with Bar rules for trust accounting and pro bono reporting. Complete the required elements and click “Submit” to pay by credit card.

**ADR Section Membership Has its Benefits.** When you pay your annual fees, please remember to renew your ADR Section membership. In addition to being recognized as a dispute resolution professional within The Florida Bar, here are some great reasons to continue your section membership:

- The section hosts live audio webcasts, generally monthly, so that you can consistently get quality CLE credit on ADR-related topics, technology and ethics—and section members receive discounted registration.
- Most of our CLEs are also approved as CMEs, so you can earn dual credit.
- We encourage section members to submit ideas for CLE/CME seminars and to serve as presenters.
- Section membership enables you to stay informed of changes in the rules and procedures for ADR, with an opportunity to respond to requests for comments.
- We offer the opportunity to submit articles for publication in our biannual publication, The Common Ground.
- The section hosts a variety of networking events—virtual and/or in-person—throughout the year, such as networking socials online at conferences like The Florida Bar Annual Convention, The Florida Bar Winter Meeting, and the annual Dispute Resolution Conference.
- We host a Mentoring Academy for certified mediators, where attendees can learn and practice new techniques and receive live, immediate feedback to improve their skills.
- We host an Arbitration Advocacy Institute at which participants hone their arbitration advocacy skills and learn tips and techniques to better represent clients at arbitration.





The Common Ground 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.

Editors Natalie Paskiewicz and Ana Cristina Maldonado are soliciting articles for the Fall 2021 edition of The Common Ground. Please contact them at [natalie@pazmediation.com](mailto:natalie@pazmediation.com) and [acmaldonado@uvw-adr.com](mailto:acmaldonado@uvw-adr.com).

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