

FLORIDA MEDIATION BEST PRACTICES HANDBOOK

Dedicated to the litigants, lawyers, mediators and judges of the State of Florida.



SECOND EDITION

INTRODUCTION

Mediators and trial lawyers of the Hillsborough County Bar Association (HCBA) engaged in a historic collaboration to create the first *Florida Mediation Best Practices Handbook* to make mediation more efficient and productive. This collaboration occurred during a world-wide pandemic where jury trials came to a halt for over a year and judges and court administrators struggled to find a proper balance between public health and the right to a jury trial. Nearly all legal proceedings quickly transitioned to “virtual” events, including mediation. With civil jury trials suspended, the resulting backlog of over 1.5 million cases in Florida made mediation more critical than ever to protect the rights of litigants and preserve the continued administration of justice.

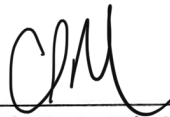
These unprecedented challenges have led to a need for more productive approaches to mediation. In response, mediators and trial lawyers of the HCBA created *the Florida Mediation Best Practices Handbook* for lawyers and mediators to become better partners with each other and their clients. A survey was circulated to collect the best ideas available, and over 200 lawyers, mediators, judges and legal assistants from across the country contributed their advice for improving mediation outcomes.

The survey was followed by the first ever “Mediator Litigator Forum” to discuss ways to improve the mediation process. Thereafter, a panel of six persons, three mediators and three trial lawyers, including a former judge, assembled the *Florida Mediation Best Practices Handbook*. When contested issues arose, they were resolved by a majority vote. The panel’s work was guided by the ethical rules and statutes of the State of Florida governing mediation. (Unless otherwise indicated, the term “Rule” applies to the Florida Rules for Certified and Court-Appointed Mediators.)

This project could not have been accomplished without significant cooperation. Thanks go out to the members of the panel for their outstanding commitment: Judge Martha Cook, Chad Moore, Harold Oehler, Cory Person, Tom Scarritt, and Dale Sisco. Many thanks to HCBA President Paige Greenlee and Executive Director John Kynes, and his staff, for their leadership and support. Special thanks also go out to Kim Joyner-Diaz, Greg Kehoe, Bobby Santos, Ellen Shulman, The Honorable Judge Rex M. Barbas and The Honorable Chief Judge Ronald Ficarrota, who provided insight during the creation of the Handbook. The greatest thanks, however, go to the more than 200 legal professionals who contributed their ideas to empower litigants to choose their own outcomes by resolving their disputes through mediation.

Our vision is that you will play a unique role in the development of the *Florida Mediation Best Practices Handbook*, which will continue to be updated with suggestions and insights which we hope you will continually share with us. Your suggestions may be submitted to the Chair of the HCBA Section for Mediation and Arbitration who will collect recommendations throughout the year for the Handbook’s periodic revision. In that way, the *Florida Mediation Best Practices Handbook* will continue to be a living document that we believe will provide the most

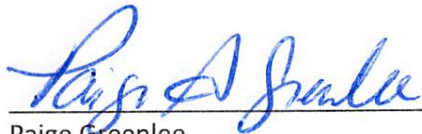
contemporary insights and benefits to mediators, lawyers and litigants throughout the State of Florida.¹



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September 10, 2021

¹The guidelines and suggestions contained in this Handbook are intended to be used and/or implemented in a manner consistent with the rules and statutes governing mediation. To the extent any of the guidelines contained herein are inconsistent with a rule or statute, the rule or statute is to be followed.

SECOND EDITION ACKNOWLEDGEMENTS

In the past, trial lawyers were defined by their skill in the courtroom. As over 90% of cases now settle prior to trial, and most of those cases settle during mediation, trial lawyers are now also defined by their skill at achieving their client's objectives in the mediation room. Trial lawyers and mediators came together to create the Florida Mediation Best Practices Handbook to collaboratively improve the mediation process and to provide each other the tools to practice *mediation advocacy*, as defined on these pages, at an elite level.

This partnership between trial lawyers and mediators, which began in Hillsborough County, Florida, expanded to the entire State of Florida in 2022. The Florida Bar's Trial Lawyers Section and Alternative Dispute Resolution (ADR) Section collaborated to host the first state-wide Litigator Mediator Forum at the 2022 Florida Bar Convention. The Florida Bar chose the Forum as its "Florida Bar President's Showcase" CLE for the Convention and trial lawyers and mediators from around the State came together to share their knowledge both live and virtually. Suggestions for improving the mediation process were collected from the live and online audience and shared with the editors of the Second Edition of the Handbook. After the Forum, the Trial and ADR Sections co-hosted a reception to continue the conversation between trial lawyers and mediators regarding how they may improve the mediation process together.

Viola Clark, a graphic facilitation artist, monitored the audience's ideas for improving mediation during the Forum and created a work of art depicting the ideas the audience shared. This work of art was commissioned to adorn the cover of the Second Edition. The art symbolizes the new state-wide partnership between trial lawyers and mediators to collaboratively improve the mediation process.

Special thanks to the staff members of the Florida Bar, the Executive Committees of the Trial Lawyers and ADR Sections and to the panel members of the Florida Bar's Forum: Tad David, Geddis Anderson, Mark McLaughlin, Shirin Vesely, Christy Foley, The Honorable Retired Judge Frederick J. Lauten and Harold Oehler. Cristina Maldonado, Kim Torres, Sheridan Hughes and Jennifer Dorminy were also instrumental in planning the Florida Bar's first state-wide Litigator Mediator Forum. Special thanks to all participants who participated in this historic meeting, including all Table Hosts and Table Recorders who collected the audience's recommendations. The Florida Dispute Resolution Center, especially Tad David and Kim Kosch, are invaluable partners in encouraging all mediation participants across the State to join this growing collaboration to improve mediation and raise awareness regarding the ethical responsibilities of the mediation process.

Special thanks to the Editors of the Second Edition: AnnMarie Davis, Erin Jackson, Anthony Palermo, Kim Joyner-Diaz, the Honorable Retired Judge Gregory P. Holder, and Harold Oehler. Also instrumental were the Trial and Litigation Section and the Mediation and Arbitration Section of the Hillsborough County Bar Association (HCBA) and the HCBA's staff, particularly Executive Director John Kynes, Monique Lawson, Derek Jardeleza as well as HCBA President Cory Person. The Editors thank ADR Section President Kathleen McLeroy and Amber Boles for authoring the E-Discovery supplement and the Marital and Family Law supplement, respectively.

The editors also thank former Florida Bar ADR Section President Bob Hoyle, Lynette Mancuso and Tammie Shirey Bellerose who also made significant contributions to the Second Edition.

Most importantly, thank you to the more than 400 trial lawyers, mediators, corporate counsel, judges, litigants, paralegals, legal assistants, adjusters, risk managers, etc., who contributed the ideas on these pages to help Florida trial lawyers and mediators mediate at the highest level for the benefit of their mutual clients. The purpose of this Handbook is to provide every person who relies on mediation an ongoing platform to share their ideas to improve the mediation process.



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I. MEDIATION BEST PRACTICES FOR THE MEDIATOR

A. PRE-MEDIATION

1. Scheduling

- Ensure that your website contains an up-to-date calendar, biography or resume, and rates and terms.
- Periodically review MEAC opinions regarding conflicts of interest. Disclose and resolve any potential conflict of interest immediately. (Rule 10.340)
- Decline an appointment, withdraw, or request appropriate assistance when a case is beyond your area of expertise or experience. (See Rule 10.640)
- Offer to file the Notice of Mediation² to save the scheduling party time. Serve all parties, including the individual scheduling the mediation. If you do not file the Notice of Mediation, confirm who will do so in writing.
- Promptly deliver the documents confirming the mediation and describing your rates and terms.³ Provide clear terms and instructions regarding any deposit, cancellation, postponement, fee split, payment terms, etc. (See Rule 10.380)
- In your correspondence accepting the assignment, courteously remind counsel to file a Certification of Authority as required by Rule 1.720(e) of the Florida Rules of Civil Procedure.
- Promptly respond to emails and telephone messages.
- Communicate to attorneys and legal staff in a courteous and professional manner. (Rule 10.350)
- Do not schedule more than one circuit court mediation during a morning and one in an afternoon. (See Rule 10.430)
- It is generally not advisable to state an end time for a mediation. (See Rule 10.430)

²See Attachment 1: “Notice of Mediation – In Person” and Attachment 2: “Notice of Virtual Mediation”

³See Attachment 3: “Mediation Confirmation Letter and Attachment 4: “Mediation Engagement, Confirmation and Disclosure Agreement.

- Be flexible and client friendly regarding rescheduling and cancellation fees.
- Virtual Mediations: The mediator should set up and control the virtual platform. Send invitations, including log-in instructions, as early as possible.

2. Preparing for Mediation

- Approach the mediation with the attitude that your role is to serve the participants. Be curious about the needs of the parties, besides the money, and help the parties find mutually beneficial solutions to fulfill those needs.
- Identify and understand the factual and legal issues involved and the applicable law.
- Read all materials submitted by the parties. Review the court file to learn the litigation history, pending motions and deadlines, whether a trial date is set and the identity of the judge. The court file will often provide insight into the intensity of the dispute, the relationship of counsel and the parties and the level of emotion in the case. If a party does not provide a mediation summary, request relevant pleadings, discovery responses, medical or damages summaries, etc.
- Call each party's counsel prior to mediation to discuss the case, the legal and factual issues, the personalities of the parties involved, each party's Best Alternative to a Negotiated Agreement (BATNA), Worst Alternative to a Negotiated Agreement (WATNA), Probable Alternative to a Negotiated Agreement (PATNA), prior negotiations, potential settlement options and obstacles to settlement. Discuss counsel's experience with the judge during the present case or prior cases.
- If the party is not represented by counsel, conduct the pre-mediation call with the pro se party. Special care must be taken to inform the pro se party about the process. Consider providing the pro se party a written explanation of the process.⁴
- Confirm with each counsel, or pro se party, that an individual with authority to settle the case will be present. This includes an adjuster if insurance is involved.
- If there are additional documents or other information which would be helpful during the mediation, request that counsel provide the information to the mediator and to the opposing party.

⁴See Attachment 10: The Mediation Process Explained.

- Take time before the mediation to analyze each party's position and interests. Consider the emotional state of each party and how that might impact their willingness to settle.
- If the value of the claim is at issue, ask the lawyers to provide verdicts from similar cases.
- Ask at least one counsel to prepare a draft settlement agreement prior to the mediation with blanks for the negotiated terms. This will serve as the blueprint for settlement, avoid the delay caused by drafting a document during the mediation, help prevent the omission of a material term and allow the parties to execute the settlement agreement before leaving the mediation.
- After speaking with counsel for each party, the mediator should develop and utilize an individualized mediation strategy for each party based on the unique interests, needs, circumstances and personalities involved.
- Become a student of negotiation techniques and cognitive biases. Study techniques to encourage cooperation among parties with different personalities and competing interests.⁵ (Rule 10.630)
- Virtual Mediations: Be well versed in the virtual platform's technology, security settings and the process for handling common problems such as a lost connection. (Rule 10.630 and Rule 10.640) Confirm how the parties will execute the settlement agreement prior to the mediation. (Rule 10.420 (c)) Offer technology to facilitate remote signing of documents such as Adobe or DocuSign and be skilled with utilizing the technology.

B. BEST PRACTICES THAT APPLY TO THE ENTIRE MEDIATION

- **Ethical Canon of Self-Determination:** Mediation is a process to facilitate agreement between disputing parties and assist them in voluntarily resolving their dispute. A parties' right to self-determination (a free and informed choice to agree or not agree) must be preserved during all phases of the mediation. (See Rule 10.310)
- A good mediator understands the law. A *great* mediator understands the people.
- Mediation is an "informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement." (See Rule 10.210). Since the goal of mediation is to reach an agreement with the opposing party, it is more like a transactional law event than an adversarial proceeding. Mediation should therefore be approached the same way that transactional lawyers achieve agreement between parties with competing

⁵See Attachment 11: Recommended Reading List.

interests: by focusing on areas of mutual benefit, not conflict, and helping the parties explore settlement options that satisfy the needs of both parties.

- The mediator's role includes, but is not limited to, assisting the parties in identifying issues, discussing the strengths and weaknesses of positions, fostering joint problem solving, exploring settlement alternatives, evaluating resolution options and drafting settlement proposals. (See Fla. Stat. §44.1011 (2) and Rule 10.220 and 10.370 and Committee Notes)
- A mediator must not substitute his/her judgment for the judgment of the parties or coerce a party to make a decision. The mediator must also not allow a participant to make a decision based on misrepresented facts made by anyone.
- Never be focused on one solution and abandon all others. The mediator may not impair the parties' right of self-determination in any way. (See Rule 10.310 and Committee Notes)
- Be a cheerleader and a referee. The mediator should maintain an optimistic, confident and accommodating attitude throughout the mediation. Always remain calm and reassuring. Never lose your patience or composure.
- Always be objective and be careful not to inadvertently give the impression that one side is favored over another. For instance, don't spend a disproportionate amount of time with one side during caucuses.
- Develop the habit of using curiosity over judgment to better understand the parties. Listen not only to what parties say, but what their body language is telling you.
- Use active listening to understand the goals of the parties and reframe the communication when necessary to promote understanding. (See Rule 10.300 and Rule 10.350)
- Humor is the WD-40 of mediation. Use it liberally when testing positions, use it to disarm a difficult individual or to relieve a stressful situation.
- Continuously involve the client representatives, and all participants, in the mediation process. Do not question the client, however, without permission from counsel.
- Ensure that all mediation participants are able to communicate in English or make arrangements for an interpreter or online translation service if the mediation is virtual.
- Be flexible and facilitate communication in the manner the parties wish to promote self-determination. (see Rule 10.310)

- Take the opportunity to build a personal relationship by speaking to the parties and attorneys when the opportunity arises before or during the mediation. This is particularly important during a virtual mediation where rapport is harder to establish.
- Make sure the rooms are sufficiently cool and have adequate WIFI and power outlets. Ensure that WIFI passwords are visible. Make sure that equipment necessary to edit and print the settlement agreement will be available even if the mediation extends past business hours. Provide coffee, soda, water, cookies, snacks, candy, etc. and confirm if there is a desire for lunch or dinner. The more comfortable the parties are, the longer they will work to resolve the dispute. Avoid providing the parties unequal accommodations.
- Treat every person during the mediation with civility and professionalism. Ensure that the parties are protected against hostile or unprofessional behavior. (See Rule 10.350) Ask the parties to speak up if they are not feeling well or if you need to take a break.
- Don't rush the parties through any portion of the mediation. Don't terminate the mediation due to the time of day or other commitments. This may be the only opportunity for the parties to mediate their case.
- Virtual Mediation: Host the virtual mediation and disable the recording function. Encourage all participants to be visible, if possible, while conferring with the mediator and the other party. Provide alternative communication options in case a connection is lost. For example, exchange telephone numbers or utilize a telephone conferencing system, if necessary.

C. JOINT CAUCUS AND OPENING STATEMENTS BY THE MEDIATOR AND PARTIES

- Assemble the parties for a joint session, including Opening Statements, to give the parties the opportunity to speak to each other and start building a working relationship to help them work towards a settlement. Set the tone from the start of the conference that mediation is a non-adversarial proceeding. Explain that compromise is very important in every successful mediation. When discussing confidentiality, explain that you will not share information with another party without the disclosing party's consent. (See Rule 10.360)
- Present the mediator's opening statement in an optimistic, calm and confident fashion.
- Keep the mediator's opening succinct. Don't rush through the opening, but include the mediator's background and familiarity with the type of case involved, neutrality, confidentiality, self-determination, certainty, cost

savings and explanation of the process. Specifically, explain that you as a mediator are neutral and solely focused on helping the parties reach a settlement. Explain that all communications during mediation are strictly confidential unless the law provides otherwise. (see Rule 10.420)

- Emphasize that during mediation the parties have the ability to decide their own outcome and that they will relinquish that power if they go to trial. Also point out that mediation allows parties to choose creative solutions not available at trial which can be implemented immediately and far less expensively than through litigation.
- During the mediator's opening, encourage the parties and their attorneys to communicate with each other.
- Explain that Plaintiff traditionally speaks first since Plaintiff filed the suit.
- Prior to the mediation, encourage the parties to give civil, non-adversarial opening statements. (See Rule 10.210).
- Encourage the parties to listen to the other side, even though they won't agree with everything they hear, so they are prepared for what will be argued at trial. Point out that most parties who settle continue to disagree on many issues but are still able to settle.
- Actively listen to the opening statements, and what the parties communicate in each caucus, and search for the answer to the questions: "*What are the priorities for each party?*" and "*What's really driving this dispute?*" Sometimes the answer is as simple as the need to be heard, validated or respected.
- Keep the discussions focused on relevant matters.
- Diffuse an argumentative opening statement by restating the party's position in a non-emotional fashion. (See Rule 10.410)
- If a party becomes adversarial during joint session, move the parties to separate caucus rooms immediately.
- Virtual Mediation: Ensure that each participant's name is included in the Zoom screen rather than a phone number, etc.

D. CAUCUSES

- Ask each side to describe a reasonable, positive outcome from their point of view and list priorities for settlement. Priorities should be periodically discussed as they may change during the mediation.

- Be the “Voice of Reality” for each party. A mediator should raise issues, discuss the strengths and weaknesses each party’s position and help the parties evaluate settlement options. (See Rule 10.370 and Committee Notes) Consider asking each side “How” and “What” questions to gently point out weaknesses, i.e. “What evidence will you use to support this point?”
- Acknowledge when a party appears nervous and assure them that no decisions will be made without their approval.
- The mediator should ask questions to determine each party’s unique needs and motivations for settlement beyond the money. Assist the parties in exploring settlement proposals that satisfy the needs of the parties.
- Allow the parties to guide the discussion regarding solutions rather than urging the parties to accept the solution the mediator feels is best. If the parties require assistance with formulating creative solutions, the mediator should endeavor to offer creative solutions, beyond the money, which satisfy the needs of the parties, while always preserving the parties’ right of self-determination.
- Mediators should not merely be number carriers but should be creative and affirmatively seek out alternative solutions from the parties that satisfy their interests. The mediator should also not merely engage in “meet in the middle” negotiations.
- When suggesting any potential solution or making a Mediator’s Proposal, the mediator must present the proposal in a manner that preserves the parties’ right of self-determination. For instance, the mediator should state “Have you considered...” rather than “You should consider...” (See MEAC Opinion 2020-006) Never suggest that there is only one option. (See Rule 10.370(c))
- Motivate movement by discussing each party’s BATNA, WATNA and PATNA. (See above). The mediator may discuss possible *outcomes* but must never predict how the case will be decided. (See Comments to Rule 10.370)
- Build trust by being empathetic and honest. (See Rule 10.350)
- Do not offer legal advice but encourage the parties to seek guidance of counsel. (See Rule 10.370(b))
- Keep the caucus discussions succinct and focused on the parties and their needs. Mediators should not waste time talking about themselves or sharing war stories.

- Build rapport with each attorney and individual attending the mediation by speaking to each person in a manner that makes them feel comfortable, heard and respected. Be sensitive to different levels of sophistication and experience. (see Rule 10.350 and 10.670) Speak to each individual in a manner that makes them feel comfortable based on their level of experience with the process.
- Identify the motivations and emotions behind each position and demonstrate that you understand by repeating, reframing and/or clarifying the party's position. Address not only the factual and legal issues but use empathy to address the parties' feelings as well.
- Inquire whether a non-party's interest will be impacted by any settlement. (See Rule 10.300)
- Determine through questioning, whether a party, party representative, counsel or other mediation participant, including a non-party attending or not attending the mediation, is impeding settlement and explore their reservations.
- Create momentum by obtaining agreement on small issues first.
- When a party suggests making a counter-productive offer, help the party think through the consequences of that offer before the offer is communicated.
- During long caucuses, check in with each side periodically to keep them informed and engaged.
- Preparation, patience and persistence are essential. The best mediators do not give up easily. Work with each party at their individual pace. Never demonstrate impatience by word or action.
- To avoid a potential impasse, have the attorneys go over the next steps in the litigation in detail with their client, and the potential cost of the litigation through trial.
- Once an impasse is imminent, invite the parties to propose a bracket or consider a Mediator's Proposal. (See MEAC Opinion 2020-006 for proper wording of a Mediator's Proposal) Only reveal each side's response to a Mediator's Proposal if the proposal is accepted by all parties. The Mediator's Proposal may also be effective after an impasse.
- No information obtained during a caucus may be revealed by the mediator without the consent of the disclosing party. (See Rule 10.360(b))
- At the end of each caucus, reiterate 1) the offer and any message to be delivered and 2) the information which may and may not be disclosed.

- Consider using a red pen or other distinctive means to distinguish information in your notes which may not to be disclosed to the other side.

E. CROSS CAUCUS

- A cross caucus is a private caucus exclusively between the mediator and the attorneys or between the mediator and the parties. The possibility of a cross caucus should be introduced during the mediator's opening and utilized only with the parties' permission.
- Do not overuse cross caucuses as this may alienate the excluded individuals. Cross caucuses are typically used towards the end of a mediation to negotiate a small number of issues or to negotiate the settlement agreement.

F. AFTER A SETTLEMENT IN PRINCIPLE OR AN IMPASSE IS REACHED

1. After a Settlement in Principle is Reached

- Consider maintaining templates of settlement agreements for common cases.⁶
- Encourage counsel and the parties to execute the final settlement agreement before leaving the mediation. As transactional lawyers know: "Time kills all deals."
- Establish clear conditions for the dismissal of the suit.
- Identify who is responsible for paying the mediation fee.
- Virtual Mediations: Be proficient with screensharing for real-time editing of the settlement agreement and consider having technology available, such as DocuSign or Adobe, to execute the agreement electronically.

2. After an Impasse

- Discuss the option of continuing the mediation, rather than declaring an impasse, when that appears to be beneficial.
- Consider asking the parties if they would entertain a Mediator's Proposal.
- Follow up with the parties periodically at no charge to see if a settlement dialogue can be rekindled. If settlement talks re-commence, offer to mediate again.

⁶See Attachment 5: "Settlement Agreement and Stipulation of Parties (Presuit Mediation)" and Attachment 6: "Settlement Agreement and Stipulation of Parties (Claim in Litigation).

G. POST MEDIATION

- Promptly file the Mediator’s Report⁷ with the court and send the parties a copy as well as the final billing statement and a signed W-9.
- If there is an impasse, follow up with counsel to attempt to re-initiate settlement discussions.
- Obtain a fully executed copy of the Settlement Agreement even if it is signed after the day of the mediation.

II. MEDIATION BEST PRACTICES FOR THE TRIAL LAWYER

A. PRE-MEDIATION

1. Scheduling

- Confirm the parties’ selection of the mediator.⁸ Identify who will be filing the Notice of Mediation.⁹
- Promptly respond to emails and phone calls and communicate with attorneys, legal staff and parties in a courteous and professional manner.
- Promptly advise the mediator where the case is pending, and provide the case number, so the mediator can locate the court file.
- File the Certification of Authority required by Fla.R.Civ.Pro. 1.720(e), identifying the party representative(s) and confirming that they have adequate authority. Serve the Certification on the parties and the mediator.
- Reserve sufficient time for the mediation. If uncertain about the amount of time needed, confer with opposing counsel and the mediator.
- Virtual Mediation: Provide name, positions and email addresses of all individuals who will need invitations from the mediator.

2. Preparing for the Mediation

- Approach the mediation as a transactional lawyer approaches a potential transaction. Be diplomatic and cooperative at all times. Ascertain the

⁷See Attachment 7: “Mediator’s Results Report” (State) and Attachment 8: Mediation Report (Federal)

⁸See Attachment 9: “Mediation Stipulation and Agreement.”

⁹See Attachment 1: “Notice of Mediation – In Person” and Attachment 2: “Notice of Virtual Mediation”

needs of the parties, beyond the money, and help the parties find mutually beneficial solutions that fulfill those needs.

- Periodically review the rules and statutes governing the mediation process to ensure that your expectations and strategies for mediation are compliant.
- Prepare for the mediation by identifying and understanding the factual and legal issues in dispute and the applicable law. Consider the emotional state of your client and the opposing party how that might impact their willingness to settle.
- Prepare a case evaluation and cost of litigation analysis. Defense counsel should share those documents with the client and adjuster, where applicable, before authority is determined.
- In personal injury cases, research bills and liens prior to mediation. Share this information with the mediator and the other side in advance.
- Confirm that the real decision maker will be involved in the mediation.
- Prepare a draft settlement agreement prior to the mediation with blanks for key terms.
- Meet with the client to prepare him or her for the mediation process and explain the mediator's role, if necessary. Set reasonable expectations and remind the client that compromise will be necessary. Prepare the client to keep an open mind and conduct themselves to engender trust and cooperation from the other side.
- During the client meeting, gather information about the client's current willingness to settle, the personalities involved on both sides, impediments to settlement, Best Alternative to a Negotiated Agreement (BATNA), Worst Alternative to a Negotiated Agreement (WATNA) and Probable Alternative to a Negotiated Agreement (PATNA) for *all* parties as well as creative settlement options.
- Ask your client what a good settlement looks like, what terms are essential (modify draft agreement if necessary), what circumstances may make settlement more desirable and whether there are any "deal breakers" which the other side may demand. Where applicable, ask the client if there is an ongoing relationship with the other side that may impact settlement.
- Review the draft settlement agreement with the client. Discuss the best and worst-case scenarios for trial and settlement, including costs. Consider sending the draft settlement agreement to opposing counsel for suggestions in advance of the mediation.
- Educate the client about the importance of allowing the other side to speak, without interruption, and to avoid argument, which is

counterproductive to reaching a settlement. Advise the client that disagreements will be dealt with diplomatically with the mediator's assistance.

- If the party representative is articulate and sympathetic, consider allowing him or her to speak, particularly where there is a relationship with the other side.
- If the client will speak during the mediation, practice with the client.
- If you don't have critical information necessary for meaningful settlement discussions, then request the information from opposing counsel before the mediation. The mediator may assist with making this request.
- Prepare a confidential mediation summary that briefly describes the case status, factual and legal issues in dispute, prior offers, impediments to settlement and a description of damages.
- If a legal issue is impeding settlement, attach case law or other authority to the mediation summary with the relevant sections highlighted.
- A less expensive alternative to a mediation summary is to send the mediator relevant pleadings, documents and a summary of prior offers. Condense what you send the mediator to the essential matters in dispute.
- Prior to the mediation, call the mediator to discuss the case, the parties, the issues, prior negotiations (demands, offers, proposals for settlement, etc.) and obstacles to settlement. Advise the mediator if there are emotional obstacles to settlement or hostility between the parties which must be dealt with before the parties may resolve the dispute. Inform the mediator if you need the mediator's assistance to help your client, or the opposing party, understand an issue.
- Attempt to resolve dispositive motions prior to mediation.
- If the value of the claim is at issue, provide the mediator verdicts from similar cases.
- Virtual Mediations: Confirm that each individual attending the mediation has acceptable equipment and knows how to use the technology. Confirm the security settings to be used when speaking to the mediator, such as enabling the waiting room and disabling the recording function.

B. BEST PRACTICES THAT APPLY TO THE ENTIRE MEDIATION

- **Ethical Canon of Self-Determination**: Mediation is a process to facilitate consensual agreement between parties engaged in a dispute to assist them in voluntarily resolving their dispute. A parties' right to self-determination (a free and informed choice to agree or not agree) must be preserved at all times. (See Rule 10.310 and Committee Notes).

- “The best general is the one who never fights.” -Sun Tzu, *The Art of War*. Resist the urge to argue during the mediation and instead build trust and cooperation from the other side by truly listening to their position. Try to discern the other side’s needs and create proposals that address those needs. Focus on areas of mutual interest and agreement rather than points of conflict. Consider allowing the mediator to raise contentious issues in private caucus. Every action you make should demonstrate that you and your client are at the mediation to cooperate with the other side to pursue a mutually beneficial resolution.
- Mediation is an “informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.” (See Rule 10.210). Since the goal of mediation is to reach an agreement with the opposing party, it is more like a transactional law event than an adversarial proceeding. Mediation should therefore be approached the same way that transactional lawyers achieve agreement between parties with competing interests: by focusing on areas of mutual benefit, not conflict, and making proposals that satisfy the needs of both parties.
- Use Mediation Advocacy instead of Trial Advocacy during the mediation.¹⁰ Mediation Advocacy is the skill of presenting a client’s position, needs and interests in a non-adversarial manner to persuade the other side to enter into an agreement with you by using active listening, empathy and problem solving instead of argument.
- The trial lawyer should avoid the temptation of “beating his chest” for the client. This may jeopardize the mediation by alienating the other side and frustrating the process. At the least, posturing for the client will make the mediation unnecessarily expensive and time consuming.
- Be certain of the accuracy of each statement made during the entire mediation process. (See Rule 4-4.1 of the Florida Rules of Professional Conduct and Rule 10.310(c)).
- Patience is one of the most important traits for mediation success. Be patient when listening to the other side and responding to offers.
- Treat every person during the mediation with civility and professionalism.

C. JOINT CAUCUS AND OPENING STATEMENTS OF COUNSEL

- The goal of opening statement is to earn the trust and respect of the other side and promote cooperation by demonstrating empathy and a sincere interest in resolving the issues while avoiding inflammatory and offensive

¹⁰See Attachment 10: Recommended Reading List.

statements. Remember that “people will forget what you said, but people will never forget how you made them feel.” -Maya Angelou

- Begin the Opening Statement with a story that explains the critical events from your client’s point of view and introduces a compelling theme. Conclude the Opening Statement by committing to work with the other side and the mediator to explore options to resolve the dispute.
- Utilize photographs, videos or key documents in your presentation. Utilize screen share to display these items during virtual mediation.
- Consider allowing the mediator to raise contentious or sensitive topics in private caucus to avoid creating conflict or embarrassing the other side.

D. CAUCUSES

- Engage the party representative in the caucus discussions and encourage them to suggest potential solutions.
- Parties often mirror the amount of movement made by the opposing party’s offers. Consider encouraging your client to make offers that demonstrate a sincere desire to resolve the dispute as this will create trust and credibility with the other party and generate greater movement and settlement momentum.
- When appropriate, send an explanation with your offer that provides a rational, objective basis for the settlement proposal.
- Consider requesting a joint discussion with the other party or parties to work through difficult settlement issues and impediments.
- To avoid a potential impasse, go over the next steps of the litigation in detail with your client, and the potential cost of the litigation through trial.
- If an impasse is imminent, consider proposing a bracket or asking the mediator to make a Mediator’s Proposal. The Mediator’s Proposal may also be effective after an impasse is reached.
- If raising a certain type of proposal will compromise a party’s negotiating position, consider asking the mediator to raise the proposal.
- At the end of each caucus, have the mediator repeat the offer and any message he will deliver as well as any information which will not be disclosed.

E. CROSS CAUCUS

- A cross caucus is a private caucus exclusively between the mediator and the attorneys or between the mediator and the client representatives. The

possibility of a cross caucus should be introduced during the mediator's opening and utilized only with the parties' permission.

- Use the cross caucus sparingly as excessive use may alienate the individuals excluded from the discussions.
- The cross caucus may be effectively used to resolve a small number of issues by a meeting between counsel or between party representatives. It is also useful to negotiate the terms of the settlement agreement. A joint caucus may alternatively be used where all parties and counsel are present.

F. AFTER A SETTLEMENT AGREEMENT IS REACHED OR AN IMPASSE IS DECLARED.

1. After a Settlement has been reached in principle

- To avoid buyer's remorse, urge the parties to execute the final settlement agreement and release(s) before leaving the mediation. As transactional lawyers know: "Time kills all deals."
- Establish clear conditions for the dismissal of the suit in the agreement and provide that the court will retain jurisdiction to enforce the Settlement Agreement.
- Ensure that the client is aware of the amount of their net recovery.
- Virtual Mediation: Have technology, such as DocuSign or Adobe, available to allow the parties to sign the agreement electronically. Confirm with counsel and the parties that they understand how to use this technology.

2. After an Impasse

- Consider continuing the mediation to a specific date, rather than declaring an impasse, if the impasse may be resolved by additional discovery, nonbinding arbitration or a ruling on an issue in dispute.
- Propose that the parties stipulate to non-binding arbitration if this may help clarify an issue or issues causing the impasse.
- Ask the mediator to periodically follow up with the parties to see if a settlement dialogue can be rekindled. If settlement talks re-commence, propose mediating again.

G. POST MEDIATION

- Consider serving a Proposal for Settlement with your last offer.
- Consider contacting the other party to discuss if further talks would be fruitful or enlist the mediator's assistance to do so.
- Set the case for trial.

ATTACHMENT "1"

NOTICE OF MEDIATION

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA
CIVIL DIVISION

Plaintiff

vs.

Case No:

Division:

Defendants,

_____ /

NOTICE OF MEDIATION

PLEASE BE ADVISED that this case has been scheduled for mediation to be held before

_____, Esquire on:

DATE & TIME: _____, _____, 20__, at ___ a.m./p.m.

LOCATION: _____

Respectfully Submitted,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed electronically with the Clerk of Court utilizing Florida Court's E-Filing Portal system and in compliance with Florida Rules of Judicial Administration 2.515 and 2.516(3) on _____, 20____, which will automatically transmit an electronic copy to:

Attorney

ATTACHMENT "2"
NOTICE OF VIRTUAL MEDIATION

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA
CIVIL DIVISION

Plaintiff

vs.

Case No:

Division:

Defendants,

_____ /

NOTICE OF VIRTUAL MEDIATION

PLEASE BE ADVISED that this case has been scheduled for mediation to be held before
_____, Esquire on:

DATE & TIME: _____, _____, 20__, at ___ a.m./p.m.

VIRTUAL MEDIATION INFORMATION: **Meeting link to be provided.**

Respectfully Submitted,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed electronically with the Clerk of Court utilizing Florida Court's E-Filing Portal system and in compliance with Florida Rules of Judicial Administration 2.515 and 2.516(3) on _____, 20__, which will automatically transmit an electronic copy to:

Attorney

ATTACHMENT "3"

MEDIATION CONFIRMATION LETTER
CASE NUMBER:

Attached please find the Mediation Engagement, Confirmation and Disclosure Agreement setting forth the terms and conditions of the above-referenced mediation as well as the policies of this office.

Please also refer to our website, _____, for additional information on our mediation practice, office procedures, logistics, and in particular, questions about our location and parking. The website includes an Intro to Mediation which can be shared with clients unfamiliar with the mediation process.

The mediation is scheduled for four (4) hours unless otherwise agreed to and confirmed in writing.

If scheduled at our facility, our address is _____. Our office is located in _____.

Please forward any mediation summary or any other records or reports that may be relevant to the issues of this case and helpful in my preparation for this mediation.

Thank you again for selecting me as your Mediator, and I look forward to working with you to resolve the issues between the parties.

Very truly yours,

ATTACHMENT "4"

MEDIATION ENGAGEMENT, CONFIRMATION AND DISCLOSURE AGREEMENT

CASE NUMBER:

This Agreement will confirm that a mediation conference in the above case has been scheduled for _____.

The conference will be held at _____, _____, _____, Florida _____. The Mediator will be _____, Esquire, Certified Florida Circuit Civil Mediator and Federal Court Mediator. The engagement for mediation services is with the understanding that this Agreement will control and govern the terms and conditions of the Mediation.

SCHEDULE

Mediations are reserved/scheduled in 4 hours slots for morning or afternoon sessions. If you wish to reserve more than 4 hours or all day please let us know, and confirm it in any Notice or other written confirmation of the mediation. Otherwise, we assume only 4 hours is reserved. This will help avoid scheduling conflicts.

FEES

Mediation time will be charged at the rate of \$_____ per hour (\$_____ per hour, per side for two party mediations). For "multiparty" mediations with three (3) sides, the rate is \$_____ per hour, per side, and mediations with four (4) or more sides will be billed at the rate of \$_____ per hour, to be divided evenly between the sides. "Sides" refers to parties with opposing positions in the mediation, i.e. co-defendants, represented by the same counsel, whose positions are not adverse constitute one "side." The term "Parties" herein refers to the named parties to the litigation as well as any interested parties voluntarily participating in the mediation process. The mediator is entitled to compensation for all time spent on the case including but not limited to preparation time, telephone conferences, attendance at the mediation conference, follow-up, collection efforts (including but not limited to attorney fees and costs), preparation of the parties' agreement and the Mediation Report to the Court. Travel time is billed at one half (1/2) of the hourly rate.

Parties agree to waive any part of a Court order inconsistent with the afore-mentioned hourly rates. Please note that these fees include reasonable and necessary expenses incurred by the mediator such as clerical, local telephone, local fax charges, postage costs, etc., but we reserve the right to charge for extraordinary expenses.

There is a three (3) hour minimum charge for all mediations, except if a full eight-hour day is reserved which will require a six (6) hour minimum charge, unless the mediator agrees to the

contrary in writing. The participating sides shall divide mediation fees equally, unless the parties agree to a different apportionment of costs in writing.

CANCELLATION POLICY

The mediator in this case has been engaged to conduct this mediation. As such, we are accepting this engagement to the exclusion of scheduling other work for the day and the time which has been reserved. Due to the difficulty of scheduling a new case when there is a cancellation, the time and expenses already incurred in scheduling and preparing for the cancelled conference, and the positive effect a scheduled conference can have in settlement negotiations, the following policies have been adopted:

In the event this mediation is cancelled within 48 hours of the scheduled mediation conference, there will be a three (3) hour minimum charge divided by all sides. Unless the parties in the case agree on who should pay the cancellation fee, all parties, through their attorneys, if any, shall be financially responsible for their share. All cancellations should communicate in writing, by email, with the agreement of all parties and counsel, if any, noted.

PAYMENT

Law firms and lawyers – not their clients – will be billed and are responsible for the Mediation bill. Payment is due within 10 days of the date of the bill and is not conditioned on settlement, receipt of settlement funds or payment by a client. Past due bills will accrue interest at the highest legal rate and will result in additional charges for time and fees spent on collection.

Pro se parties (those not represented by attorneys) must pre-pay a \$500 deposit or bring a check to the mediation.

APPLICABLE LAW, CONFIDENTIALITY & MEDIATOR IMMUNITY

Whether Mediation is pre-suit, Court ordered or voluntary, the Mediation Confidentiality and Privilege Act (§§44.401, et seq. Fla. Stat.), Fla. R. Civ. P. 1.700, et seq and/or Federal Rules of Civil Procedure, (and local rules of Court in the District which the case is venued) shall apply. All Mediation Communications are confidential. Mediators are immune from liability, including all forms of negligence, arising from performance of Mediation work. Mediators are immune from providing written, deposition or trial testimony relating in any way to any Mediation conducted by them.

ATTENDANCE & SETTLEMENT AUTHORITY

Mediators have no role in or responsibility for compliance with, enforcement of, or sanctions associated with Fla. R. Civ. P. 1.720, pertaining to Mediation appearance, attendance or settlement authority of any party, party representative, counsel of record, or insurance carrier representative.

ACCEPTANCE OF TERMS

IF YOU OBJECT TO ANY TERMS OF THIS LETTER, CONTACT ME IN WRITING, BY EMAIL, WITHIN 5 BUSINESS DAYS OF THE EMAIL CONVEYING THE LETTER. OTHERWISE, ALL TERMS SHALL BE DEEMED ACCEPTED BY THE RECIPIENTS OF THIS LETTER, THEIR CLIENTS AND ANYONE ATTENDING MEDIATION WITH THEM. COMMENCEMENT OF MEDIATION AND ENGAGEMENT OF THE MEDIATOR ARE WITH THE EXPRESS UNDERSTANDING AND AGREEMENT OF THESE TERMS.

Thank you again for engaging my mediation services. I look forward to working with you. Please let me know if you have any questions or need assistance.

ATTACHMENT "5"

SETTLEMENT AGREEMENT AND STIPULATION

(PRESUIT MEDIATION)

RESPONDENT/INSURED: _____

CLAIMANT: _____

CLAIM NUMBER: _____

DATE OF LOSS: _____

SETTLEMENT AGREEMENT AND STIPULATION OF PARTIES

Pursuant to the Mediation Conference held on the _____ day of _____, 20__, the parties have agreed to the following:

1. _____ shall pay to _____ the sum of \$_____ to be distributed

as follows:

2. Said Settlement sums to be paid within ____ days from the date of this stipulation.

3. The Claimant(s)/Releasor(s) shall execute and deliver General Releases, releasing any and all claims that they have or may have in the future against Releasees, arising out of the facts involved in the present dispute of the parties, namely:

_____.

4. Claimant(s) shall execute and deliver to Respondent(s)' undersigned attorney general releases and indemnification agreements which hold Respondent(s) and his/her/its insurance company(ies) harmless from any third-party liens or claims for which Claimant(s) is legally liable. Claimant(s) shall be responsible for satisfying any and all liens which might apply to these settlement proceeds.

5. Each party shall pay their own costs and fees. Mediation fees shall be paid equally by each side and are payable within ten (10) business days of the mediation.

6. The parties hereby stipulate that the mediation shall be governed as if it were court ordered and pursuant to Fla. Stat. §44.102 et seq, and F.R.C.P. 1.700 et seq as well as any administrative orders in effect from the date the mediator was selected. The parties and counsel also hereby agree that all matters raised in mediation shall remain privileged and confidential unless waived by all parties and the mediator or as otherwise required by law. Also, the parties and counsel further stipulate that the mediator shall be immune from testimony, deposition and liability, including all forms of negligence, whether a Court ordered or voluntary mediation.

THIS STIPULATION BECOMES BINDING UPON ITS EXECUTION BY THE PARTIES AND THEIR COUNSEL.

Counsel for Claimant: _____

Date: _____

_____, Claimant

Date: _____

Counsel for Respondent: _____

Date: _____

_____, Respondent

Date: _____

ATTACHMENT "6"
SETTLEMENT AGREEMENT AND STIPULATION OF PARTIES

(CLAIM IN LITIGATION)

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT IN AND FOR
_____ COUNTY, FLORIDA

CIVIL DIVISION

Plaintiff

vs.

Case No:

Division:

Defendants,

_____ /

SETTLEMENT AGREEMENT AND STIPULATION OF PARTIES

Pursuant to the Mediation Conference held on the _____ day of _____, _____,
the parties have agreed to abide by the following:

1. The Defendant(s) shall pay to the Plaintiff(s) the sum of \$_____, in full
settlement of the Plaintiff(s) cause(s) of action constituting this litigation.

The Defendant(s) shall pay said sum through the offices of Plaintiff's counsel of record within
____ days from the date of this stipulation.

2. The Plaintiff(s) shall voluntarily dismiss this litigation with prejudice and execute
and deliver to the Defendant(s) and his/her/its/their insurance company through the offices of the
Defendant's counsel of record, General Release(s) and Indemnification Agreement(s) holding the

Defendant(s) and his/her/its/their insurance company(ies) harmless from any third party liens or claims for which the Plaintiff(s) was/were able to legally collect and for which the Plaintiff(s) is/are legally liable only. Plaintiff(s) shall be responsible for satisfying and all liens which might apply to these settlement proceeds.

3. Each side shall pay their own costs and fees. Mediation costs will be shared equally between the sides and are payable within ten (10) business days of the mediation.

4. This settlement is contingent upon the clearing of funds and receipt by Defendant's counsel of record of the dismissals, releases and indemnifications required herein.

5. The parties hereby stipulate the mediation shall be governed as if it were court ordered and pursuant to Fla. Stat. §44.102 et seq, and F.R.C.P. 1.700 et seq as well as any administrative orders in effect from the date the mediator was selected. In Federal Court cases, the Local Rules 9.01 – 9.07 of the United States District Court for the Middle District of Florida shall apply. The parties and counsel also hereby agree that all matters raised in mediation shall remain privileged and confidential unless waived by all parties and the mediator or as otherwise required by law. Also, the parties and counsel further stipulate the mediator shall be immune from testimony, deposition and liability, including all forms of negligence, whether a Court ordered or voluntary mediation. (Note: Amend citation to federal local rules based on applicable jurisdiction).

THIS AGREEMENT SHALL BE FILED WHEN REQUIRED BY LAW OR WITH THE PARTIES' CONSENT. THIS STIPULATION BECOMES BINDING UPON ITS EXECUTION BY THE PARTIES AND THEIR COUNSEL. THIS STIPULATION, IF FILED, SHALL BE ENTERED AS A JUDGMENT OF THE COURT, OR THE COURT SHALL RETAIN JURISDICTION TO ENTER FINAL JUDGMENT OR ENTER AN ORDER DISMISSING THE CAUSE.

Counsel for Plaintiff: _____
Date: _____

Counsel for Defendant: _____
Date: _____

_____, Plaintiff
Date: _____

_____, Defendant
Date: _____

ATTACHMENT "7"

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA
CIVIL DIVISION

Plaintiff

vs.

Case No:

Division:

Defendants,

_____ /

MEDIATION RESULTS REPORT

A mediation conference was conducted on the ___ day of ____, 20__.

- PLAINTIFF/PETITIONER APPEARED, (_____))
 DEFENDANT/RESPONDENT APPEARED (_____))

PLAINTIFF'S ATTORNEY(S) FIRM:

DEFENDANT'S ATTORNEY(S) FIRM:

MEDIATOR: _____, **Certified Circuit Civil Mediator**

RESULTS: FULL SETTLEMENT
 PARTIAL SETTLEMENT
 NO SETTLEMENT
 CONTINUED (DATE) _____

LENGTH OF MEDIATION CONFERENCE: ___ hours

Respectfully submitted via EFile to the Clerk of the Court, with a copy to counsel for the parties
(via email only) this ___ day of _____ 20__.

_____, MEDIATOR

Florida Mediator Number
Address
Phone Number
Email

ATTACHMENT "8"
MEDIATION REPORT (FEDERAL)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
_____ DIVISION

Plaintiff(s),

-v-

Case No.

Defendant(s)

MEDIATION REPORT

In accordance with the Court's mediation order(s), a mediation conference was held on _____, 20____, and the results of that conference are indicated below:

(a) The following individuals, parties, corporate representatives, and/or claims professionals attended and participated in the mediation conference, and each party possessed the requisite authority:

- All individual parties and their respective trial counsel.
- Designated corporate representatives.
- Required claims professionals.

(b) The following individuals, parties, corporate representatives, and/or claims professionals failed to appear and/or participate as ordered:

MEDIATION REPORT

Page 1

(Attachment to Mediation Order) (Rev. 7/04)

(c) The outcome of the mediation conference is:

- The case has been completely settled. In accordance with Local Rule 9.06(b), lead counsel will promptly notify the Court of settlement in accordance with Local Rule 3.08 by the filing of a settlement agreement signed by the parties and the mediator within ten (10) days of the mediation conference.

- The case has been partially resolved and lead counsel has been instructed to file a joint stipulation regarding those claims which have been resolved within ten (10) days. The following issues remain for this Court to resolve:

- The conference was continued with the consent of all parties and counsel. The mediation conference will be held on a date certain not later than ten (10) days prior to the scheduled trial date. Any continuance beyond that time must be approved by the presiding Judge. Mediation Reports will be filed after additional conferences are complete.

- The parties have reached an impasse.

Done this _____ day of _____, 20____, in _____, Florida.

Signature of Mediator

Name of Mediator

Mailing Address

City

State

Zip

State Telephone Number

ATTACHMENT "9"

MEDIATION STIPULATION AND AGREEMENT

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, STATE OF FLORIDA
CIVIL DIVISION

CASE NO.:
DIVISION:

Plaintiff,

vs.

Defendant.

_____ /

MEDIATION STIPULATION AND AGREEMENT

The parties below, by and through its undersigned counsel, if any, hereby stipulate that all parties in this case agree to using the following mediator pursuant to the terms, conditions and policies set forth in the Mediation Engagement, Confirmation and Disclosure Agreement:

Name: _____, **Certified Circuit Court & Federal Mediator**
Address: _____
Phone: _____
Fax: _____

The parties and counsel also hereby stipulate that all matters raised in mediation shall remain privileged and confidential unless waived by all parties and the mediator or as otherwise provided by law. Also, the parties and counsel further stipulate the mediator shall be immune from testimony, deposition and liability, including all forms of negligence, whether a Court ordered or voluntary mediation.

Dated this _____ day of _____, 202_.

_____, Esquire
Counsel for Plaintiff

_____, Esquire
Counsel for Defendant

ATTACHMENT “10”

THE MEDIATION PROCESS EXPLAINED

The mediation process has been developed to allow parties in conflict to resolve their differences with a minimum of expense and in a manner that is frequently more efficient and far less expensive than a trial in a court of law. In mediation, a neutral third person, referred to as a mediator, encourages and facilitates the resolution of the dispute in an informal, non-adversarial manner.

The mediator is not a judge and has no power to command a settlement or make a decision on a winner or loser. His duty is to allow each party to present their case and then, through the use of mediation skills, allow the parties to reach a satisfactory settlement. The parties decide, with their counsel's advice whether a settlement is in their best interest. Mediation is an effective means of allowing the parties to control their destinies without relinquishing these decisions to a judge or jury. A mediation settlement provides the parties to a dispute with (1) a guaranteed result, (2) no risk of an adverse decision at a trial, and (3) closure of the matter.

If all parties to the dispute agree to a settlement, this agreement will be reduced to a written agreement, signed by all parties, their counsel and the mediator. **This is a binding contract.** If the parties cannot or do not agree to the terms of a settlement, they may either agree to a postponement or request the mediator to declare the mediation at impasse, meaning simply that the parties cannot agree to resolving the dispute through mediation.

COMMON QUESTIONS AND ANSWERS ABOUT MEDIATION

WHAT HAPPENS WHEN WE GET THERE? The parties will meet at an agreed upon location at which time the mediator will explain the basics of the procedure to all present. Each counsel for the parties has the right to present an opening statement about his/her client's position. A party also, should he or she wish, may address issues at this time. After opening statements, they may continue to meet as a group or, if more effective, they will break into separate groups referred to as "caucuses." The mediator will meet with each group privately and then may withdraw and meet with another caucus group. They may at some time rejoin as a group if beneficial to the mediation process. If the parties agree to a settlement, or if the mediation does not result in a settlement at the end of the mediation, they will meet as a group to sign the settlement agreement or to adjourn because an impasse was reached.

CAN I BE FORCED TO SETTLE MY CLAIM? Absolutely not. This is a voluntary process based upon your conclusion, with your counsel's advice, that settlement at mediation is in your best interest.

WHAT HAPPENS IF WE DO NOT SETTLE? The case continues on through the court system and a decision resolving the dispute may then be made by a judge or jury. You have lost none of your legal rights, but mediation does allow you to maintain control of your destiny. You will have limited control of the decision once it is submitted to a judge or jury.

IS EACH PARTY AUTHORIZED TO SETTLE? Prior to the commencement of the mediation each party, through counsel, represents that each has final decision-making authority to settle.

CAN ANYTHING I SAY BE HELD AGAINST ME IF WE DO NOT SETTLE? No, the basic premise of mediation is that it is a confidential, safe environment where the parties can explore

the possibility of settlement. Each party and counsel will agree to abide by these rules of strict confidentiality and there are penalties for violation.

WHAT RULES GOVERN THE MEDIATOR? There are many rules which govern the mediator but the principal rule is that the mediator must remain neutral to all parties. You may tell the mediator confidential information that will never be revealed to the other party or parties unless you specifically authorize such disclosure. At times it is invaluable that information be disclosed to the mediator, and with the concurrence of your counsel, be revealed to the other party in order to convince them that settlement is in their best interests. As stated before, nothing said within the context of a mediation is admissible in a subsequent court proceeding. All parties are bound by this rule of confidentiality. Further, the mediator is required to determine if there is a potential conflict of interest prior to the mediation. Under certain circumstances a mediator is prohibited from doing a mediation because the situation creates the appearance of a lack of impartiality.

IS A MEDIATION ADVERSARIAL? No. In order for a mediation to be successful the parties must have a collaborative attitude. They have a problem, and the problem is that there is a dispute that is on track to an expensive winner-take-all process. A successful mediation lets the parties use the power they have to craft a resolution that is mutually acceptable.

At a mediation, the parties must realize that neither side will convince the opponent that they are right and the opponent is wrong. The attorneys must address the issues, the facts and the problems in a manner that promotes positive negotiation, and be hard on the problem but easy on the people.

WHAT IS THE ROLE OF THE ATTORNEY? The attorney should prepare as if he is going to trial. His goal is to present to the decision-maker on the other side the facts in favor of his case such that the opponent recognizes the risk of trying the case and agrees to work toward a settlement.

ATTACHMENT “11”
RECOMMENDED READING LIST

SUGGESTED BOOKS

Fisher, R., Ury, W. and Patton, B., *Getting to Yes*, Penguin Books, 1991
Ury, W., *Getting Past No: Negotiating with Difficult People*, Bantam Books, 1991
Ury, W., *Getting Past No: Negotiating in Difficult Situations*, Bantam Books, 1993
Ury, W., *Getting to Peace: Transforming Conflict at Home, at Work and in the World*, Viking, NY, 1999 (Published as the “Third Side”)
Ury, W., *Getting to Yes with Yourself (And Other Worthy Opponents)*, Harper Collins, 2015

SUGGESTED LINKS

LINK TO HARVARD’S PROGRAM ON NEGOTIATION - <https://www.pon.harvard.edu/>

MASTER CLASS HARVARD PROGRAMS FOR 2021 -
<https://www.pon.harvard.edu/freemium/negotiation-master-class-spring-2021-program-guide/>

HARVARD NEGOTIATION PROJECT ARCHIVES -
https://www.pon.harvard.edu/category/research_projects/harvard-negotiation-project/

HARVARD NEGOTIATION TEACHING RESOURCE CENTER - tncr@law.harvard.edu

WILLIAM URY’S WEBSITE - <https://www.williamury.com/>

WILLIAM URY’S TED TALK “ABRAHAM’S WALK”
https://www.ted.com/talks/william_ury_the_walk_from_no_to_yes

WILLIAM URY’S TALK “THREE SIDES TO EVERY ARGUMENT” - <https://ideas.ted.com/there-are-three-sides-to-every-argument>

ATTACHMENT “12”

E-DISCOVERY MEDIATION

By Kathleen McLeroy, Carlton Fields

When resolving e-discovery disputes, the parties must weigh the relevance, proportionality, cost, and accessibility of information. By mediating e-discovery issues, litigants can limit the time and cost associated with seeking judicial intervention, control the cost of electronic discovery, maintain confidentiality, and avoid potential adverse results, such as sanctions. In the e-discovery arena, mediation can be used either to create a mediated e-discovery plan or to resolve underlying disputes regarding electronically stored information.

Who Should Participate? In addition to the decision makers for the respective parties and litigation counsel, e-discovery mediations should include IT personnel or other technical consultants who have knowledge of the parties’ electronically stored information systems.

Preparation for e-Discovery Mediation. Electronic information can take many forms, including active data, inactive data, metadata, deleted data, ghost data, legacy data, archived data, and back-up data. In advance of e-discovery mediation, it is imperative that counsel becomes familiar with the type of information stored and how it is stored, preserved, retrieved, and produced, as well as the cost of producing it. In addition, counsel should become familiar with the inventory of storage devices used by the client, the location and ownership of those devices, the client’s retention policies, and any automatic deletion procedures that may need suspending. Counsel should also become familiar with the client’s data mapping and systems mapping.

Mediation Statement. The parties should prepare a confidential mediation statement and deliver it to the mediator well in advance of the mediation. The mediation statement should include the following:

- the identity of the persons who will attend the mediation, including all IT representatives. If the IT representative is a hired consultant, include the scope and nature of the consultant's engagement;
- a candid discussion of potential issues, including potential spoliation issues, cost concerns, timing issues, and specific privilege concerns;
- a candid assessment of the technological capacity of both the litigant and counsel's law firm together with proposed solutions to any deficiencies;
- a disclosure of any e-discovery related depositions of corporate representatives including summary of relevant testimony and copies of relevant portions of the deposition transcripts; and
- if the specific purpose of the e-discovery mediation is to resolve disputes arising from discovery requests already propounded in the litigation, a summary of the specific disputes and copies of all pleadings related to the discovery requests.

Issues to be Addressed Through Mediation. Common e-discovery mediation issues include:

- the scope of reasonably accessible electronic data;
- the search parameters to be used to locate electronic data;
- the method of review to be employed;
- the data format for preservation and production;
- the time and manner of production;

- the procedures for handling inadvertently produced privileged information;
- the potential need for protective orders;
- the methodologies to evaluate compliance with any e-discovery plan or mediated e-discovery agreement; and
- the mechanism and protocol to enforce any mediated e-discovery plan or mediated e-discovery agreement.

The outcome of e-discovery mediation, e.g., an agreed e-discovery plan or an agreement resolving objections to propounded discovery requests, should be reduced to writing and signed by all parties and counsel according to the appropriate rules governing mediation in the jurisdiction of the litigation.

ATTACHMENT “13”

MARITAL AND FAMILY LAW MEDIATION

By Amber Boles, Amber Boles, PA

1. **JOINT MEETINGS AND CAUCUSES:** It is widespread practice for many Marital and Family mediators to not host joint sessions, but rather conduct opening statements in a private session with the Parties and their respective attorneys. Mediators should consider the following circumstances when deciding whether to conduct a joint session or segregate the Parties from the onset:
 - a. **Domestic Violence Injunctions:** In some family mediations a temporary or permanent Domestic Violence Injunction (“DVI”) may be in place, and the parties are prohibited from being in proximity of one another. Often times the Mediator is not made aware of the DVI prior to the mediation. Accordingly, out of an abundance of caution, the Mediator should inquire about the existence of a DVI and implement procedures, as necessary, to ensure neither Party intentionally or unintentionally violates the DVI.
 - b. **Mental/Physical Abuse:** Even in cases where a DVI is not in place, many family mediation participants have been subjected to abuse by the other party in some way including physically, mentally, financially, etc. Placing the victim in a room (virtual or otherwise) with their abuser often results in an irreparable breakdown of the process from the onset.
 - c. **General Acrimony:** Marital and Family mediations are often highly emotional, acrimonious conflicts. Placing the participants together is often emotionally triggering. The Marital and Family Mediator may find it easier to assist the parties in maintaining an emotionally effective mediation mindset by ensuring the parties do not have any contact with one another during the mediation setting.
2. **MAINTAINING CONFIDENTIALITY AT VIRTUAL FAMILY AND MARITAL MEDIATIONS:** Marital and Family mediation participants are often inclined to involve their significant others, and family members in the process, especially during virtual mediations. The Marital and Family Mediator should address the issues of the mediation privilege and confidentiality both in their Mediation Confirmation Letter, and in their opening statement, to ensure the participants maintain the confidentiality of the process.
 - a. **MEDIATION CONFIRMATION LETTER:** The Mediator should consider adding language to identify the rules governing privacy and confidentiality to their Mediation Confirmation correspondence. Sample language is as follows:

Privacy and Confidentiality. Only the mediation participants may be present during the mediation. Third parties (including, but not limited to, spouses, significant others, and family members) shall be expressly excluded from the mediation unless their attendance is agreed to by all parties in writing in advance of the mediation session. The presence of third parties that have not been mutually agreed upon may result in an immediate termination of the mediation session.

During the online mediation session, each participant will need a secure, private space where their conversation cannot be overheard. Mediation participants will be reminded at the beginning of the mediation that only participants may be in the private space and each participant will be asked to confirm the participants' conversation cannot be overheard by any third party. Please make advance accommodations for children so that they are not in the private space and do not interrupt the mediation.

The provisions of Florida Statute § 44.405 shall apply to online mediation, including but not limited to the following:

(1) Except as provided in this section, all mediation communications shall be privileged and confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. A violation of this section may be remedied as provided by § [44.406 of the](#) Florida Statutes. If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees.

(2) A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.

b. MEDIATOR'S OPENING STATEMENT: The Mediator should restate the rules governing the mediation privilege and confidentiality during the Mediator's opening statement, and during a virtual mediation request each participant to confirm they are alone, that no third parties are present, and that no third parties can listen in. If a third party is present, it is the Mediator's obligation to inform the other side, and seek approval. If the other side does not approve of the third party's presence, the Mediator should request the third party vacate the proceeding. If the third party is permitted to stay, he or she should be informed that the rules of mediation, in particular the mediation privilege and confidentiality, must be followed. Explain that if the case does not settle, the judge will not be told about the proposals exchanged during mediation.

c. ONGOING MONITORING: The Mediator should monitor the mediation process to ensure confidentiality is maintained throughout the mediation session. If the

Mediator has a good faith reason to believe a third party is present, the Mediator should consider requesting the participant to rotate their device so that the Mediator can see the entire room.

3. “CLIENT-ONLY CAUCUS” IMPASSE STRATEGY:

Contributed by Lynette Mancuso, Mancuso Mediation

If impasse is looming, consider asking the parties and their attorneys for their consent to have a caucus with only the clients. Assure them they won't be asked to make any agreements without first consulting with their respective attorneys. If they agree to the client-only caucus, follow these steps: (a) Thank them for their willingness to meet with you; (b) Ask them to think back to when they first started dating, and recall what it was they liked most, admired or respected about the other; (c) Ask them what is the one thing now they are most upset about regarding the other; (d) Ask them if they think they have the power to let go of that upset, forgive the other and move forward; and finally (e) Ask them: When? (Then, remain silent while they let that sink in, and hopefully start the forgiveness process to move toward resolution.)