Alternative ADR
Dispute Resolution Section
of The Florida Bar

THE COMMON GROUND

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ANA CRISTINA MALDONADO & NATALIE PASKIEWICZ, CO-EDITORS

MESSAGE FROM THE 2023-2024 CHAIR

Christy L. Foley, Esq.

Section Members: Thank you for reading this issue of The Common Ground. I'm confident you'll find this issue to be filled with thoughtful and innovative perspectives on alternative dispute resolution. Our section members who wrote these articles are dedicated to the profession – and truly care about improving the work we're all doing.

Our section is quite fortunate to have so many members who are passionate about ADR. As a matter of fact, this summer our section members drafted two comments regarding proposed rule changes that would impact arbitration and mediation practices in Florida as well as hosted a fun retreat in Orlando!

This October for Mediation Week, section members held Mediation Mixers throughout the state to encourage camaraderie and promote section membership.

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And, in February, we'll be hosting an Arbitration Advocacy Institute to help both trial lawyers and arbitrators learn effective techniques that can be implemented during the arbitration process. Plus, our section has a robust CLE schedule that's filled with webinars as well as live programs that cover trending issues in the ADR community.

It's my hope that you'll enjoy the programs the Executive Council has planned – and that you'll get involved in the section's events this year.

I'd love to see you, read something you've written, or work with you on a committee, so please don't hesitate to get involved in the section!

Sincerely,

Christy L. Foley
2023-2024 ADR Section Chair

Alternative ADR
Dispute Resolution Section
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Commercial Mediation

by Lawrence H. Kolin
Upchurch Watson White & Max, Maitland

PART ONE – PRACTICAL TIPS ON COMMERCIAL MEDIATION

INTRODUCTION. Mediating commercial litigation cases presents unique and different challenges than typical personal injury cases with which most litigators are familiar. These matters can involve multiple parties, subtle but critical conflicts, and often turn on much more than just money. The paramount interests may center on goodwill, market share, pressures from competition or a host of other economic influences. “It isn’t personal; it’s just business!” is the theme. Pain and suffering does not apply and reputation may be everything. The dynamics of this area are explored below in the first part and the next part will discuss the nuances of commercial mediations.

CONVENING THE PARTIES. It almost goes without saying that trial lawyers should be prepared to try every case, even though statistics tell us most cases settle short of trial. Just as with tort cases, effectively presenting issues in business cases depends on preparation, which can often mean the difference between success and failure in resolving cases through mediation. The first obstacle is getting the proper parties to the table.

In many cases, commercial litigation parties are ordered to mediation or are otherwise obligated by contract to mediate before arbitrating or litigating. Mediators might remind them of advantages in mediating commercial disputes, which include: confidentiality, resolution at reduced expense, removal of uncertainty as to outcome, and lessened disruption of business. Likewise, the need to preserve ongoing business relationships or concern about establishing an adverse industry precedent may be considered. Further, saving time and avoiding protracted litigation and any appeals should prove attractive to parties.

SHOULD THEY NEED CONVINCING. Decision makers in business usually understand the expense and aggravation of litigation. They have companies to run and far better ways to use financial and human resources than lawsuits. Through mediation, they are able to explore the opposition’s interests, concerns, motivations, and goals. Commercial mediators, much like those in other types of cases are adept at finding common ground to identify possible resolutions. Along the way, lawyers will participate in evaluating the case, assessing legal positions, and handicapping potential litigation outcomes—all of which may be challenged by a commercial mediator. As counsel and the parties gain confidence in the selection of a mediator with commercial experience, they may be in more of a mindset to resolve the dispute.

APPEARANCE PLANNING. Recent changes Rule 1.720 of the Florida Rules of Civil Procedure pertain to the requirements for the appearance of a party or a party’s representative at a mediation conference. Amendments were made in response to the broad use of remote attendance using electronic communications arising with the pandemic, enabling necessary alternative dispute resolution to continue, while improving access to mediation.

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This rule change requires physical presence of a party at mediation unless otherwise stipulated in writing or excused by court order. A representative of an insurance carrier for any insured party who is not outside counsel is deemed to appear if that person has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

Additionally, ten days prior to appearing at a mediation conference, a certificate shall be filed with the court and served (though mediators are rarely copied), identifying the person or persons who will be attending the mediation conference as a party representative or as an insurance carrier representative. Mediators are not empowered to police this certification of attendance and given the last-minute nature of the way things transpire in litigation today, it has been a struggle for accuracy with some lawyers and litigants in identifying the ultimate attendees.

Regardless, it is crucial to have everyone with a say on the final settlement decision present at the mediation to hear the points made and experience the process. If a spouse, business partner, or family member (sometimes all of the above) is going to help make the decision, they need to attend.

A deal struck after a full day of bargaining may evaporate if the need to confer with a missing decision maker suddenly arises.

This must be balanced with attendees that are simply yes-men to the litigant or lawyer that can lead to an inability to perceive valid points about the weaknesses of a particular claim.

PREPARATION. Success in commercial mediation is dependent upon adequate preparation of counsel and client. A lawyer should know the important facts of the case—both good and bad. Counsel should be educated in the law applicable both to the claims and defenses, including the latest case law. Mediators, though equipped to do so at the outset, expect the lawyers to have prepared the clients by describing the mediation process and discussing patterns of negotiation. Honest assessment of the strengths and

weaknesses of the parties' positions, the likely result of litigation, and the potential expense, will allow proper evaluation of whether a settlement makes sense.

Mediators often assess the ability of advocates using the quality of mediation submissions as evidence of readiness for trial and skill of the lawyer. Failing to submit a requested summary in confidence or merely sending a large PDF of documents misses an opportunity to frame the issues and inform the mediator of the nuances in advance of the conference. Candid submissions are better than shared ones that repeat advocacy already apparent in the court file. Of course, key pleadings, evidence, admissions, deposition excerpts, photos, and videos, are appropriate. Determining the presence and status of any commercial insurance coverage is helpful to know as well. Finally, whether the parties have or plan to engage in E-Discovery of electronically stored information subject to production in the dispute, which cost may overshadow the amount in controversy.

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PART TWO – NUANCES IN COMMERCIAL MEDIATION

RELATIONSHIPS. Most disputes result from the breakdown of a relationship. Commercial mediators are often able to ascertain the root of that breakdown. Just as in family law cases, there are underlying relationship issues and while it is conventional wisdom to try and separate the personal from the business issues, it is often the interpersonal that needs to be overcome to get to a satisfactory resolution.

Demeanor is also important to the process and greeting adversaries without hostility goes a long way toward getting the ball rolling. Although parties through their counsel do present positions persuasively, it is best to avoid emotionally charged language or theatrics. For commercial litigation, the atmosphere at mediation should be more like negotiating a complex business deal than making closing arguments. Competitors may even end up becoming partners at the end.

Businesspeople typically view the financial aspects of a case in dollars and cents. However, commercial mediators often succeed by exploring creative, global, nonmonetary resolutions in cases that may seem to pursue only monetary claims. Parties might even agree to continue doing business on new, mutually acceptable terms. It is common for parties in intellectual property cases to enter into win-win licenses or royalties, or agreements not to challenge the validity of such rights in the future.

STRATEGY. Determining opening postures for a joint session based on the result a business client seeks can be dangerous. While probably the first opportunity in the mediation to convey to the opponent they face a formidable adversary capable of litigating the case to conclusion, there are benefits to both parties acting sensibly at the outset of a commercial mediation. Whether clients say anything during the joint session should really be decided in advance. A sophisticated and well-prepared party may

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appear reasonable, convincing, and even speak better about a particular point than counsel. A sharp mediator will encourage the parties to save nothing for trial. It is also important to acknowledge weaknesses where they exist and explain why anticipated weaknesses might not really exist. Reasonableness and willingness to listen must prevail if a mutually acceptable outcome is to be had from the process.

The goal on both sides of a commercial mediation is to generate movement, albeit sometimes through incremental changes in position, toward a settlement. Tracking the progress of the negotiations in terms of time and money can be useful, but there is an overemphasis on midpoints that often sabotages what otherwise might be a good deal, despite where it appears the settlement is heading. Skilled mediators make regular pulse checks and remind clients that negotiation takes time. They are always working in one room or the other, continuing the process, and getting decision makers to consider the next move. As the mediation progresses, creative solutions can arise as information and documents are authorized for sharing with the other side. Additionally, in some commercial mediations, there may be a point where the lawyers acquiesce to the two principals meeting by themselves, reaching a deal without them.

MULTI-PARTY CASES. Commercial cases can have many participants. Not visiting those participants frequently during the session can lead to frustration and aggravation directed towards the process and even the neutral. Crucial to maintaining the trust of the parties during negotiations is the feeling that they are having their position heard and transmitted to the others involved in negotiations. Though some litigants may have deeper pockets or are alleged to be more at fault, the smaller players deserve attention as well. After all, they are in a lawsuit and have appeared to help themselves extricate from it, just like the rest of the parties seeking finality.

IMPASSE. Of course, there are many effective strategies to break an impasse, but they have become overused and gimmicky. The bracket, the mediator's proposal or silver bullet have all been seen. Creativity is case specific and recognizing the old adage that a good settlement is probably one with which neither party is delighted, but that both parties can accept (even for very different reasons) is still a good rule of thumb. Value in a case can be affected by many factors beyond the merits, such as the expense and disruption of litigating all the way to trial, insurance coverage, personal exposure of a party's representative, reputation concerns, publicity, reported settlement of similar cases, and attorney experience. Adjournment may be appropriate, depending on momentum, and leaves some hope that another day spent resolving the remaining issues will lead to a successful conclusion.

MEDIATED SETTLEMENT AGREEMENT. Because it is essential to get the settlement terms in writing before the mediation session is over, unless authorized representatives sign before everyone leaves, each party is potentially subject to buyer's remorse regarding the negotiated self-determined agreement. To avoid this, it is suggested counsel draft desired settlement agreement language before mediation that can be tweaked to reflect the deal that is ultimately reached. This could save hours of back-and-forth mediator babysitting, as well as the expense of over-lawyering what is usually non-essential language in the days that follow the conference. Commercial agreements tend to be lengthier and more complex, but material terms essential to the settlement are usually not that different from the average civil case and are, of course, governed by contract law. Because many settlements are now circulated through Docusign, AdobeSign and the like, having a flexible framework available in Word to readily adapt the final agreement from is a good practice.

Lawrence H. Kolin, Esq., is a Federal and Supreme Court of Florida Certified Circuit-Civil and Appellate Mediator and Qualified Arbitrator in Orlando. He is an Emeritus Member of the ADR Section Executive Council.

Lawrence has helped reach resolutions in thousands of complex multi-party cases since 2001. He serves as a Graduate Faculty Scholar at UCF and authors OrlandoMediator.blogspot.com.

Mediation Week 2023

In case you missed it, The American Bar Association recognizes the third week in October as Mediation Week to educate the public about mediation. ADR Section members hosted Mediation Mixers at various locations to highlight Mediation Week, provide information about section membership, and encourage networking and camaraderie among fellow mediators.

In addition, Florida Supreme Court Chief Justice Carlos G. Muñiz signed a proclamation to extend greetings and best wishes to all who observed Mediation Week, October 15–21, 2023. Read the full proclamation here.

Special thanks to the section members and special guests who joined us at these events and to the Mediation Mixer hosts:

- Orlando: ADR Section Chair Christy Foley
- Tampa: Chris Shulman, Kathy McLeroy, and Natalie Paskiewicz
- Palm Beach County: Damary Stokes, Ana Cristina Maldonado, and Shari Elessar
- Miami-Dade: Megan Moschell and Patrick Russell

Here are some nice photos from the events (Tampa photo credit: Brenda Shulman).



















Best Practices for Private Dispute Resolution Under Section 44.104, Florida's Voluntary Arbitration Statute

by Leslie King O'Neal, JAMS, Miami
and Patricia H. Thompson, JAMS, Miami

Section 44.104 of the Florida Statutes empowers the parties in most civil proceedings to resolve their disputes by "voluntary trial resolution" or statutory arbitration rather than conventional litigation. However, because the statute is relatively unknown in Florida, and is almost silent as to how to administer these cases, the following best practices are recommended based on the experiences of JAMS neutrals in Florida and California (where similar proceedings are widely used).

The benefits of a well-run voluntary proceeding. When these types of cases are effectively managed, the benefits of resolving litigation by "hired" judges or arbitrators include the following:

- The ability to choose a neutral with skills and experience particularly suited for a given case
- Immediate access to hearings for motion practice and prompt resolution of discovery disputes
- Increased party control of procedures and rules
- The ability to schedule pretrial and evidentiary hearings when and where convenient for the parties, at dates certain, with hybrid or virtual options
- Cost and time savings
- In the case of the arbitration option, the statutory limit on appellate rights provides the brevity and finality many parties prefer to litigation

How to select and contract with a private neutral. The first and most important challenges for the parties are agreeing on the qualifications and negotiating the retention of the arbitrator(s) or trial resolution judge.

Because these neutrals have more inherent authority and discretion and less appellate review than in formal litigation, parties should consider neutrals with significant subject matter knowledge and proven skill in managing voluntary dispute resolution proceedings. Counsel should investigate a proposed neutral's prior legal and alternative dispute resolution (ADR) experience, reported decisions and legal writing. They should consider jointly interviewing candidates to inquire about their background, uncover any potential biases and review any procedural challenges their specific case may present.

Choosing a neutral who is associated with an administrative organization, such as JAMS, prevents ex parte communications between the parties and the neutral.

This allows the parties to avoid the embarrassment of negotiating billing rates with the neutral, engaging in fee collection discussions or involving the neutral in administrative details.

If the parties' chosen neutral is not affiliated with an ADR provider, then the proceeding will be ad hoc; that is, directly managed by the neutral. In this case, the parties must begin by negotiating the neutral's contract. This should be carefully drafted to describe the scope of the neutral's duties; how fees and expenses are to be charged, allocated and paid; and the consequences of nonpayment.

Judicial initiation of the process. Once the parties have agreed to a voluntary trial resolution judge or arbitrator(s), Section 44.104, augmented by Rule 1.830 of the Florida Rules of Civil Procedure, requires the parties to file an agreed motion, either in a pending judicial action or as an initial court filing, to appoint the neutral(s) and submit the dispute to binding arbitration or voluntary trial resolution. The motion should include a copy of the parties' agreement requesting judicial appointment of the voluntary judge or arbitrator(s) and outlining any initial procedures or rules the parties want the court to

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require or authorize. If the parties agree, the court will have no discretion and must submit the dispute to voluntary resolution. The appointed neutral(s) will take control of the case when the order is entered. Although voluntary trials are not truly private, in that the parties will continue to file motions, orders and other court records with the clerk of the court, the neutral(s) will make every ruling through entry of final decision.

Expediting the process. A newly appointed judge or arbitrator usually sets a case management conference to discuss with the parties how the matter will proceed, including the rules and procedures they will follow.

One of the benefits of these voluntary proceedings is the ability of the parties and the neutral to expedite the process and reduce costs by tailoring the rules to meet the needs of their dispute. As Miami JAMS neutral Judge John Thornton (Ret.) explains, parties may agree to modify certain rules and waive their rights under others. They may shorten the proceeding or modify evidentiary hearings in various ways. They may agree to use a witness's affidavit for direct testimony, provided the witness is available for cross-examination and rebuttal. They may stipulate to the admissibility of most exhibits and agree to forego, limit or expedite otherwise unduly expensive and often unproductive motion practice and discovery. They may agree to bifurcate or reorder the resolution of issues in order to address those that need to be decided before others.

Hearing locale and details. These cases could be tried in many locations, including the local courthouse. Section 44.104(5) provides that the clerk of the court should "handle … these matters in all respects as if they were civil actions." Some judicial circuits have administrative orders specifically governing the assignment of courtrooms for these cases.

However, it is common to hold these hearings and trials in more convenient locations, where the parties can leave their files and work whenever and for as long as they wish, rather than carting files, supplies and exhibits to and from the courthouse. For example, JAMS has comfortable suites designed for such purposes, as do many law firms. Additionally, counsel, clients and witnesses often prefer to conduct these hearings virtually so they can work from their own offices when not "in court."

Greater party control and flexibility in dispute resolution. Parties may avoid crowded dockets and get to trial quickly, at a location of their choosing, before a specially selected neutral who will give their case the attention it needs. They also may preserve certain appellate rights, determine the applicability of the rules of evidence and obtain the discovery they need. Regardless of whether parties prefer arbitration or litigation, they may tailor the management of these cases to best resolve their disputes.

Disclaimer: The content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney.

Leslie King O'Neal is a JAMS arbitrator, mediator and neutral evaluator with over 40 years' experience handling construction and complex commercial litigation matters in private practice, as in-house counsel for an ENR top 25 commercial general contractor and as an alternative dispute resolution professional.

Patricia H. Thompson, Esq., FCIArb, is a JAMS arbitrator and mediator concentrating on construction and surety claims, employment discrimination, wage and noncompete disputes, fidelity and business insurance coverage analysis, and other complex commercial disputes. She brings nearly five decades of trial, arbitration and appellate experience to her ADR practice.

Are you getting the most from your Member Benefits?

Practice Resources

Mediation Skills and Climate Change: Navigating Eco-Anxiety and Inspiring Action

by Ana Cristina Maldonado,
Upchurch Watson White & Max, West Palm Beach

In this article, I want to share a set of experiences that have led me to make a connection between my mediation skills and climate change. My journey began in April of this year while teaching a mediation certification class. What started as an ordinary day was quickly overshadowed by an extreme rain and flooding event that struck Fort Lauderdale. Not a hurricane. Not a tropical storm. Not a king tide. Rain. The Director of the 17th Judicial Circuit ADR Department was in my class, getting phone calls from her employees: "I can't leave my building. Everything is under water and only the tops of the cars on the street are visible." Two people I know had homes damaged in the floods; one had to be rescued from her house in the middle of the night. The Broward courts and downtown Fort Lauderdale shut down entirely.

During that flood, I had an epiphany about how climate change affects not only our environment but also our legal institutions: courts, lawyers, and litigants. As the summer unfolded, more distressing headlines: July 4, 2023—hottest day on earth in 100,000 years. Florida's coastal waters reached 101 degrees Farenheit. The coral reefs are dying. The north Atlantic current is collapsing. We are experiencing the sixth mass extinction. The fourteenth homeowner's insurance company leaves Florida.

These events and headlines were overwhelming and terrifying. Those feelings—being overwhelmed and terrified—are recognizable as symptoms of amygdala hijack, an activated survival instinct that left me frozen, feeling unable even to fight or flee.

I began searching for a way to engage more effectively with this complex issue, to turn fear and paralysis into constructive action. That's when I discovered two terms: "eco-anxiety" and "eco-grief."

- "eco-anxiety: extreme worry about current and future harm to the environment caused by human activity and climate change."
- "eco-grief: psychological response to loss caused by environmental destruction or climate change."

These terms helped me reframe and label my previously nameless mental health challenge. We all experience climate-related disasters (either in person or as witnesses through the media) but our feelings of powerlessness often lead us to push them aside, believing the problem is too vast to solve.

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Mediation Skills and Climate Change: Navigating Eco-Anxiety and Inspiring Action

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In the language of conflict resolution strategies, we hope to avoid the danger by not moving. Perhaps it will pass us by and go away. Perhaps it will solve itself. Perhaps someone else will fix it. It only takes the cooler breezes of autumn to put the hot summer aside as a past memory, no longer dangerous.

Our daily lives are consumed by the urgency of work, family, and immediate concerns. The unrelenting cycle of crises, combined with compassion fatigue, leaves us paralyzed and powerless. In the language of mediation, we lose our capacity for self-determination on the bigger issue.

Yet, as mediators, we are agents of hope, experts in breaking impasses and inspiring change. We listen, reframe, and engage people in hard conversations and problem-solving. We help them envision alternative futures.

In the realm of conflict resolution, "ripeness" refers to a window of opportunity for resolution. The best time to address climate change was twenty years ago, but the second-best time is now. As things stand, substantial efforts are required to reduce carbon emissions by 2030 to avert catastrophic consequences.

Dr. Katharine Hayhoe, a climate scientist and educator, has said: “The most important thing we can do to fight climate change is to talk about it.” As I've had my own "climate awakening," I've begun to make individual changes in my life, to learn more, and to connect with others in this endeavor.

In the face of eco-anxiety and eco-grief, it's imperative that we channel our emotions into action. Climate change is no longer a distant threat; it's here and now. Avoidance will not help us. This threat will shape the world we leave to future generations. It will fuel conflict after conflict. As mediators, we hold a unique set of skills that can empower us to be agents of change, bridging the gap between despair and hope.

Some resources:

- TED Talk: The most important thing you can do to fight climate change: talk about it, Dr. Katharine Hayhoe
- Drawdown: The Most Comprehensive Plan Ever Proposed to Reverse Global Warming, by Paul Hawken. (2017)
- Florida’s CLEO Institute
- “ABA will receive United Nations Human Rights Prize for environmental advocacy” by Amanda Robert. July 20, 2023
- 2023 Law Firm Climate Accountability Scorecard, Law Students for Climate Accountability.
- “Judge sides with young activists in first-of-its-kind climate change trial in Montana” Associated Press. Aug. 14, 2023

Ana Cristina Maldonado is a mediator and arbitrator with Upchurch Watson White and Max as well as a mediation trainer. She is Chair-Elect of the ADR Section and Co-Editor of The Common Ground.

FLORIDA PASSES TORT REFORM: WHAT YOU NEED TO KNOW

by Joanne I. Nachio, Kimberly Kanoff Berman, and Alan C. Nash,
Marshall Dennehey, Fort Lauderdale

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On March 24, 2023, Florida Governor Ron DeSantis signed House Bill 837, "Civil Remedies," into law. HB 837 contains sweeping tort reform that will uproot the landscape of Florida civil litigation. The changes apply to causes of action accruing after the effective date—March 24, 2023. Prior to the bill becoming law, plaintiffs' firms, anticipating this monumental change, filed approximately 100,000 lawsuits. These filings represent approximately 77% of the total cases filed since January 1, 2023.[1] Below is a brief summary of the changes and the potential impact the new law brings.

NEW MODIFIED COMPARATIVE NEGLIGENCE STANDARD

HB 837 changes Florida's standard from "pure" comparative negligence to "modified" comparative negligence. This aligns Florida with a majority of the other states who have already adopted a "modified" comparative negligence standard. This new standard does not apply in medical negligence actions.

Previously, a plaintiff was entitled to recover a percentage of damages proportionate to the degree of fault of the defendant. Under "modified" comparative negligence, if a plaintiff is more negligent than the defendant, the plaintiff cannot recover.

This new standard will likely reduce the number of cases brought in which the plaintiff was the predominant cause of his or her own harm.

TWO-YEAR STATUTE OF LIMITATIONS FOR GENERAL NEGLIGENCE CLAIMS

HB 837 amends section 95.11, Florida Statutes, which sets forth the statutes of limitations for various causes of action. The bill now reduces the statute of limitations for general negligence from four years to two years.

This may encourage plaintiffs to file suit earlier as plaintiffs and their counsel will prepare their cause of action and evaluate the validity of their claims at an earlier juncture. This will also increase the ability to obtain evidence closer to the time of the alleged incident.

Where liability is contested, plaintiffs may be deterred from filing suit sooner. The two-year statute of limitations could also be used as leverage to effectuate earlier settlement and resolution of claims, especially pre-suit.

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ADMISSIBILITY OF EVIDENCE IN PAST AND FUTURE MEDICAL EXPENSES

HB 837 changes the evidence that plaintiffs can introduce to establish past and future medical expenses. Previously, with the exception of services paid by Medicare or Medicaid, plaintiffs were permitted to board the full amount of medical bills charged for services rendered. This was without evidence of any adjustments or reductions and was prior to a post-verdict setoff for adjustments by private insurance. If plaintiffs had Medicare or Medicaid, only the amounts actually paid by Medicare or Medicaid were admissible as evidence of past medical expenses.

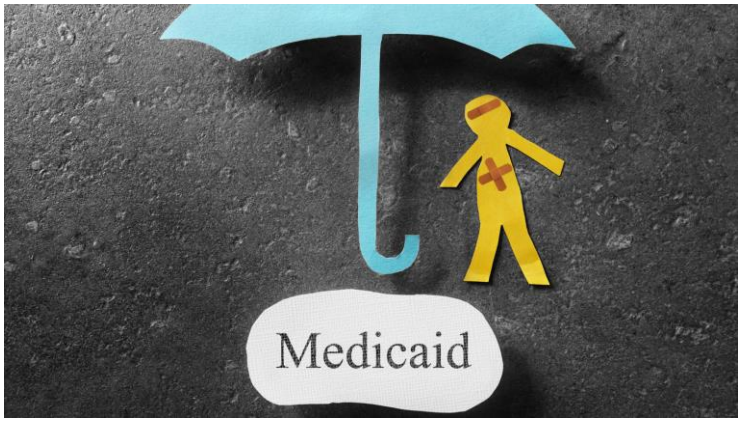
Now, the evidence offered to prove the amount of damages for past medical bills that have been satisfied is limited to the evidence of the amount actually paid, regardless of the source of payment. For unpaid past medical bills, admissible evidence will depend whether the plaintiff has health care coverage, Medicare, or Medicaid:

- If plaintiff has health care coverage but obtains treatment under letter of protection or does not submit charges, evidence of amount that health care coverage would have paid to satisfy charges, plus plaintiff's share of medical expenses, is admissible. Evidence of reasonable amounts that were billed to plaintiff for medically-necessary treatment or services is also admissible.
- If plaintiff does not have insurance, or has Medicare or Medicaid, evidence of 120 percent of Medicare reimbursement rate in effect is admissible.
- If there is no applicable Medicare rate, evidence admissible is 170 percent of applicable state Medicaid rate.

Damages that may be recovered may not include any amount in excess of the evidence of medical treatment and services expenses admitted. Further, it cannot exceed the sum of amounts actually paid, amounts necessary to satisfy charges due and owing, and the amounts necessary for reasonable and necessary future medical treatment and services.

For future medical bills, the "usual and customary" amount also depends on whether the plaintiff has health care coverage:

- If plaintiff has health care coverage other than Medicare or Medicaid, evidence of amount that could be satisfied if charges were submitted, in addition to portion of medical expenses under insurance contract, is admissible.
- If plaintiff does not have insurance, or has Medicare or Medicaid, evidence of 120 percent of Medicare reimbursement rate in effect is admissible.
- If there is no applicable Medicare rate, evidence admissible is 170 percent of applicable state Medicaid rate.



LETTERS OF PROTECTION AND REFERRALS MUST BE DISCLOSED

If a plaintiff treats under a letter of protection, the letter of protection must be disclosed, as must all

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bills for medical expenses, which must be itemized and coded. Whether the plaintiff was referred for treatment under the letter of protection must also be disclosed, along with who referred the plaintiff. If the plaintiff is referred for treatment under a letter of protection by their attorney, disclosure of the referral is permitted, notwithstanding the attorney-client privilege, as the financial relationship between the law firm and the medical provider is relevant to the issue of bias of the testifying medical provider. This new law overturns the Florida Supreme Court's decision in Worley v. Central Florida Young Men's Christian Ass'n, Inc., 228 So. 2d 18 (Fla. 2017).

BAD FAITH – NEW DUTY OF INSUREDS AND IMPACT ON DAMAGES

Now, in every bad faith action in Florida, the insured, claimant, and/or their representative have a duty to act in good faith in providing information, making demands, setting deadlines, and attempting to settle the claim. The trier of fact may consider whether the insured, claimant and/or their representative acted in good faith and may reasonably reduce the amount of damages awarded. Mere negligence remains insufficient to bring a claim for bad faith against an insurer.

BAD FAITH – CHANGES TO 90-DAY PERIOD, ADMISSIBILITY, AND STATUTE OF LIMITATIONS

No bad faith action can lie if an insurer tenders the lesser of the policy limits or the amount demanded by the plaintiff within 90 days after receiving actual notice of the claim and sufficient evidence supporting the claim. It is not bad faith if the insurer does not tender, and the existence of the 90 days is inadmissible in any action seeking bad faith. Should the insurer not tender, the statute of limitations is extended for an additional 90 days.

BAD FAITH – WHEN INSURER IS NOT LIABLE FOR FAILURE TO PAY POLICY LIMITS FOR MULTIPLE CLAIMS EXCEEDING LIMITS

If multiple claims arising out of a single occurrence exceed the policy limits, the insurer is not liable beyond the policy limits for failure to pay any or all of the policy limits within 90 days if:

- The insurer files an interpleader to determine rights of claims, and if found in excess of policy limits, claimants are entitled to a prorated share; or
- The insurer makes full policy limits available at binding arbitration, in which claimants are entitled to a pro rata share of policy limits as determined by the arbitrator, who must also consider comparative fault and the likely outcome of trial. If a claim is resolved by the arbitrator, a general release must be executed by the claimant to the insured party whose claim is resolved.

NEGLIGENT SECURITY – NEW PRESUMPTION AGAINST LIABILITY AND CONSIDERATION OF FAULT OF ALL PARTIES

In a negligent security action against the owner or operator of real property by a person lawfully on the property who was harmed by the criminal act of a third party, the trier of fact is now required to consider the fault of all persons who contributed to the injury or death, including the criminal actor. Moreover, the owner or operator of the property cannot be held negligent for damages to a third party attempting to commit, or engaged in committing, any criminal act on the property.

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HB 837 also creates a presumption against negligent security liability for the owner or operator of a "multifamily residential property" if the burden of proof is met to demonstrate "substantial compliance" with crime assessments, crime and safety training for employees, and safety and security measures which include:

- Security camera system at points of exit and entry that maintains the video retrievable for 30 days;
- A lighted parking lot from dusk to dawn;
- Lighting in common areas, porches, walkways, and laundry rooms from dusk to dawn;
- A deadbolt measuring at least one inch in every door; Locking devices on every window and sliding door;
- Locked gates at pool fence areas; and
- A peephole or viewer on door that does not have a window or window next to the door.

CONTINGENCY FEE MULTIPLIER – NEW LODESTAR FEE PRESUMPTION

Previously, Florida case law allowed for courts to consider and award contingency fee multipliers to attorneys' fees, based on factors which included but were not limited to: the relevant market if contingency fee multipliers were required to obtain competent counsel; whether the attorney mitigated the risk of nonpayment; the amount involved, the results obtained, the type of fee arrangement between the attorney and client; and likelihood of success at the outset of the action.

HB 837 now changes the ability to obtain a contingency fee multiplier by creating a "strong presumption" that the "lodestar" fee, the number of hours which would have reasonably been spent by an attorney and multiplying that number by a reasonable hourly rate, is sufficient and reasonable. This can only be overcome in rare and exceptional circumstances in which evidence has been presented that competent counsel could otherwise not have been retained.

ONE-WAY ATTORNEYS' FEES – LIMITED APPLICABILITY

Previously, "one-way attorneys' fees" applied in situations in which an insured prevailed in an action against an insurer. One-way attorneys' fees in insurance cases now only apply to declaratory judgment actions for the determination of insurance coverage against an insurer after a denial of coverage of a claim, which does not include a defense under a reservation of rights. If a declaratory judgment is granted in favor of the insured against the insurer, the court shall award reasonable attorneys' fees, which are limited to those incurred in the action.

Further, section 768.79, Florida Statutes, also known as the "offer of judgment" or "proposal for judgment" statute, will apply to any civil action involving an insurance contract.

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[1] Ron Hurtibise, Civil Case Filings Surge Before DeSantis Signed Sweeping Lawsuit Reform Bill, SUN-SENTINEL, (March 24, 2023, 6:55 p.m)

Joanne I. Nachio is an associate in the Casualty Department in Marshall Dennehey's Fort Lauderdale office. She practices in the areas of general and premises liability, product liability, public entity and civil rights, automotive liability, and appellate advocacy and post-trial practice. She may be reached at JINachio@mdwcg.com.

Kimberly Kanoff Berman is a shareholder in Marshall Dennehey's Appellate Advocacy and Post Trial Practice Group in the firm's Fort Lauderdale office. Board Certified in Appellate Practice by The Florida Bar, Kimberly litigates appeals and provides litigation support in Florida's state and federal trial and appellate courts across a wide variety of subject matters. She may be reached at KKBerman@mdwcg.com.

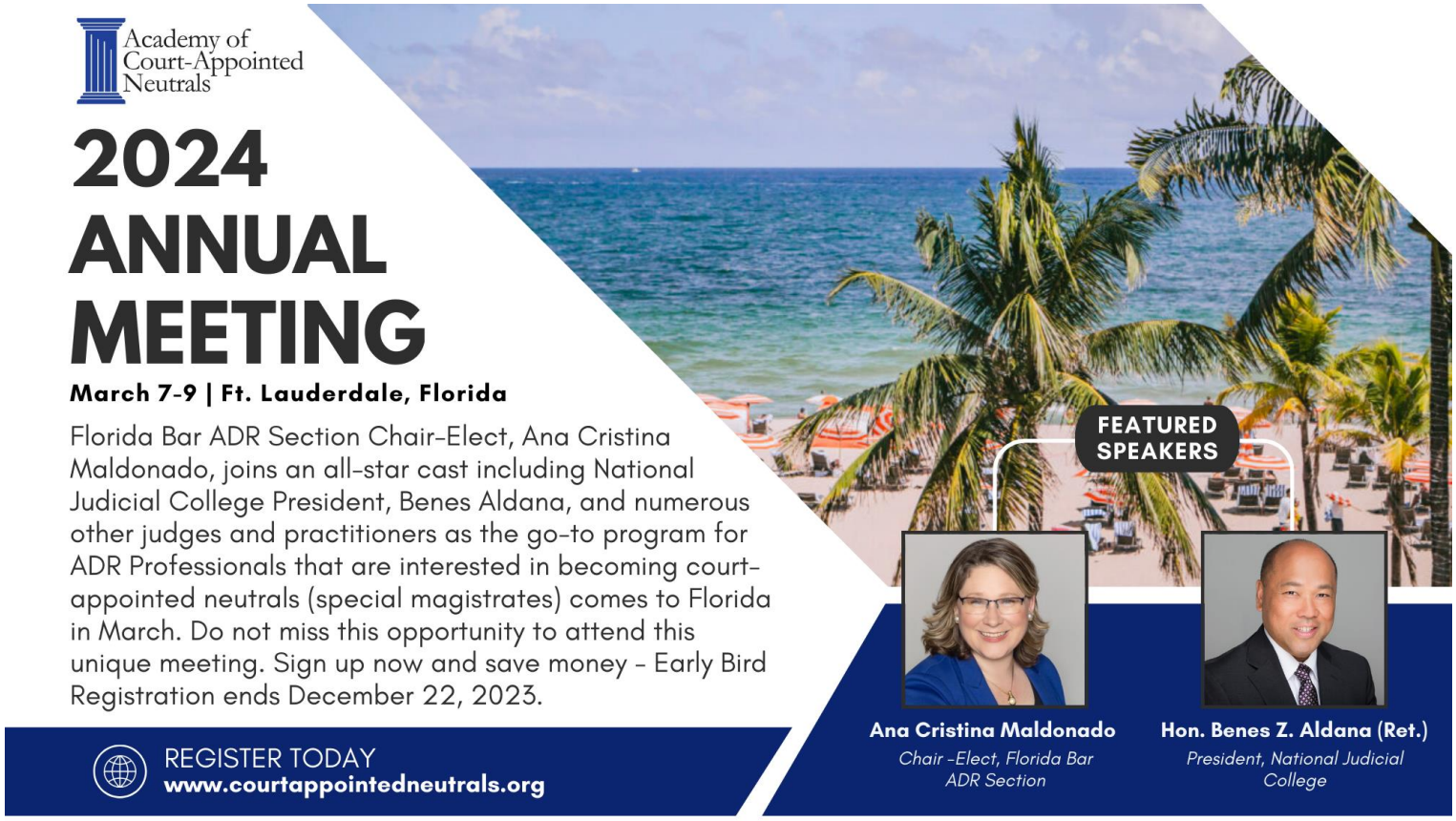
Alan Carroll (A.C.) Nash is a shareholder and supervisor of casualty litigation in the Fort Lauderdale office of Marshall Dennehey. He focuses his practice on the defense of claims made and suits brought against insureds and businesses in product, automobile, commercial, liquor liability, construction and premises liability matters. He may be reached at ACNash@mdwcg.com.

Special Forums Planned for The Florida Bar YLD

The ADR Section is hosting forums next spring that are geared toward Florida Bar Young Lawyers Division members. We hope to generate interest in the ADR Section's monthly forums for mediators and arbitrators—and hopefully recruit some YLD members to join the section. Please share the information with young lawyers who might be interested.

Everything you ever wanted to know about Mediation but were afraid to ask.
Friday, March 1, 2024 @ 12 noon Mediation Forum
Join Zoom Meeting: https://us02web.zoom.us/j/6234095288
Meeting ID: 623 409 5288
One tap mobile: +13052241968,,6234095288# US

Everything you ever wanted to know about Arbitration but were afraid to ask.
Tuesday, March 12, 2024 @ 12 noon Arbitration Forum
https://us02web.zoom.us/j/84258131703?pwd=YXhBQVRqZDV0YzN5QjdjZENPa0xLdz09
Meeting ID: 842 5813 1703
One tap mobile: +13052241968,,84258131703# US



2023 Section Retreat and CLE

Here are some nice photos from the ADR Section's Annual Retreat in September at the Margaritaville Resort Orlando. Chair Christy Foley planned a fun itinerary that included a Friday dinner, Saturday breakfast, a three-hour CLE, an Executive Council meeting, and an escape room adventure.

Thank you to everyone who joined us—and special thanks to Karen Evans-Putney, Ido Alexander, Damary Stokes, and Patrick Russell for presenting our "Advanced Tips & Tricks for Handling Employment Law, Construction Law, and Family Law Mediations" CLE on Saturday.

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CLE … and More CLE

Business of Mediation: Making it Work (Chris Shulman) Starting at **$50. Credits**: 1 CLE; 1 Technology CLE; 1 Business Litigation. This program will offer tips and lessons learned by a full-time neutral about the business-related aspects of operating a mediation back-office, as well as some of the customer-facing processes and forms that are vital to success. Downloadable Audio Online Seminar (On-Demand)

Employment Dispute Resolution: The Case for Mediation (Lori Adelson) Starting at **$65. Credits**: 1 CLE; 1 Labor and Employment. Adding Mediation to your options for resolving Employment and Workplace disputes will provide benefit for both clients and their lawyer. Learn ways to maximize the process and satisfy both parties and the attorneys for an optimal outcome conflicts. Downloadable Audio Online Seminar (On-Demand)

Mediation: Holding the Calm, the Secret to Resolving Conflict, Defusing Tension, and Reducing Anxiety and Stress (Patrick Russell) Starting at **$50. Credits**: 1 CLE; 1 Mental Health and Wellness. Learn how to approach every situation to prevent explosions, disarm conflicts, settle cases, and reduce drama at mediation. Downloadable Audio Online Seminar (On-Demand)

Raise Your Visibility and Raise Your Caseload (Louiza Tarassova) Starting at **$50. Credits**: 1 CLE; 1 Technology CLE. Step into a presence on social media. Geared towards law firms, and other small businesses, this lawyer discusses easy, quick, and inexpensive ways to become visible on the internet. Downloadable Audio Online Seminar (On-Demand)

Cyborg Mediators: Applying Artificial Intelligence (AI) and Decision Science Technology in Mediation (Robert Bergman) Starting at **$70. Credits**: 1.5 CLE; 1.5 Technology CLE. Can mediation be more effective with the application of technology? Downloadable Audio Online Seminar (On-Demand)

How to Avoid a Fee Dispute - And Happily Get Paid! (Mari Frank) Starting at **$50. Credits**: 1 CLE; 1 of which can be used towards Ethics. A joint presentation of the ADR and Solo & Small Firm Sections. An analysis of Florida's Attorney Ethical Rules as they relate to billing and collecting fees. Downloadable Audio Online Seminar (On-Demand)

Florida Lawyers Helpline
833-FL1-WELL

ADR Section's Monthly Forums

Arbitrator's Forums: Calling all members of The Florida Bar who handle arbitration—or anyone who's interested in learning more about arbitration in Florida. Please join us the ADR Section's Arbitration Committee for Arbitrator's Forums on the second Tuesday of each month.

The Zoom credentials are the same for each Forum.

- Join the Zoom Meeting here
- Meeting ID: 817 1009 4208
- Passcode: 567343

The ADR Section's Arbitration Committee introduced the forum to create a community of better arbitration neutrals in our state. Join your fellow Florida neutrals on Zoom to discuss what works, what puzzles you, and what might improve your practice. Questions? Contact ADR Section Arbitration Committee Chair Patricia H. Thompson, FCIArb, at 305-794-4345 cell, 305-371-5267 office or pthompson@jamsadr.com for more information.

What: TFB ADR Section's Arbitrator's Forum
When: Second Tuesday of each month
Time: 8–9 AM

Mediator's Forums: Join your fellow Florida mediators for monthly Mediator's Forums on Zoom to facilitate the exchange of ideas between fellow mediators. We offer a welcoming environment where our state's community of mediators can explore the nuances of our shared interests in ADR topics, share ideas along a broad spectrum of mediators, ask questions, and learn about our craft. "First Fridays" each month, 8–9 AM.

The Zoom credentials are the same for each Forum.

- Join the Zoom Meeting here
- Meeting ID: 623 409 5288
- One tap mobile: +13052241968,,6234095288# US

December 1: Brackets (John Salmon and Chris Magee)
January 5: War Stories (John Salmon and Chris Magee)
February 2: Mediator's Proposal (Greg Holder)
March 1 with The Florida Bar YLD: Everything you ever wanted to know as a young lawyer about mediation but were afraid to ask (Shari Elessar, Moderator)

April 5: Openings (Shari Elessar)
May 3 and **June 7:** TBA

NEW: CLE Series on Non-Binding Arbitration Hosted by the ADR and Trial Lawyers Sections of The Florida Bar

We are pleased to announce an upcoming four-part CLE series* on non-binding arbitration hosted by the Alternative Dispute Resolution and Trial Lawyers Sections of The Florida Bar.

The first program is **December 13, 12–1 PM: (8187) Professionalism, Preparation, and Effective Representation of Clients in Non-Binding Arbitration.** The presenters are Jeffrey Adelman, Leonore Greller, and Meah Rothman Tell.

Description: More and more cases are being referred by the courts to mandatory non-binding arbitration. This presentation will focus on arbitration advocates' professionalism, preparation, and effective representation of clients in non-binding arbitration. These advocacy "tips" are designed to assist attorneys in navigating the non-binding arbitration process to best represent their clients while maintaining their professionalism throughout the process.

Course number 8187 is approved for 1 CLE; 1 Civil Trial certification credit. Section members $65. REGISTER

January 22, 2024, 10–11:30 AM: (8190) Nonbinding Arbitration Hearings: Learn How or Get Left Behind! The presenters are Christopher M. Shulman, and Rodney G. Romano.

Description: Courts are increasingly sending Circuit and County Civil matters to nonbinding arbitration under Fla. Stat. § 44.103 and Fla. R. Civ. P. 1.820. Yet relatively few attorneys have much, if any, experience representing clients in this forum. This presentation is intended to orient counsel to process, showing: (a) a short pre-hearing conference with the arbitrator; (b) a nonbinding arbitration hearing itself; and (c) a glimpse into the arbitrator's deliberations and award.

Course number 8190 is approved for 2 CLE; 2 Civil Trial certification credits. Section members $65. REGISTER

* Information will be available soon about the additional programs, which will take place in 2024.

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of The Florida Bar

- CLE/CME discounts
- MEAC opinion summaries
- Mentoring Academy for Attorney-Mediators
- Networking events
- Great publications
- Arbitration Advocacy Institute
- Mediation Mixers
- Free monthly forums for Arbitrators & Mediators

The Florida Bar ADR Section is THE place for Mediators and Arbitrators!

FlaBarADR.com/membership

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 Ana Cristina Maldonado and Natalie Paskiewicz are soliciting articles for the Spring 2024 edition of The Common Ground. Please contact them at acmaldonado@uww-adr.com and natalie@pazmediation.com. Interested in advertising? Click here for information.

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