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.

Members of the ADR Section,

Welcome to the Spring 2024 Edition of The Common Ground! Our editors, Natalie Paskiewicz and Ana Cristina Maldonado, along with the various authors of each article, have put together an excellent publication for you to read. I know that you will learn a lot about the latest developments in our field when you read this edition.

As many of you know, the Alternative Dispute Resolution ("ADR") Section has already had a busy start to 2024. In February, the Section hosted its biennial Arbitration Advocacy Institute. The Institute, which was organized by Deborah Mastin, Meah Tell, and Shari Elessar, provided trial lawyers and arbitrators with wonderful tips for cultivating their arbitration skills and preparing for the intricacies of arbitration.

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Additionally, in March, the Section collaborated with the Young Lawyers Division ("YLD") to encourage new lawyers to learn about dispute resolution. Together, the ADR Section and YLD hosted a free mediation forum and free arbitration forum, empowering young attorneys and promoting their use of alternative methods of conflict resolution.

Moreover, in line with our commitment to fostering inclusivity, the Justice, Equity, Diversity, and Inclusion Committee hosted an enlightening event titled "The Power of Choice: Mediator Shortlists and Arbitrator Panels" at Nova Southeastern University's Shepard Broad College of Law in March. This event explored the transformative potential of diverse perspectives in shaping mediator shortlists and arbitrator panels, amplifying the voices of underrepresented communities and advocating for fairness in dispute resolution.

This Spring and Summer, the Section will continue hosting impactful CLEs and other events for its members. I hope you take the time this year to delve into the Section's transformative initiatives, get involved Section events, and even potentially write an article for our Fall-Winter 2024 "Common Ground" publication!

Sincerely,

Christy L. Foley
2023-2024 ADR Section Chair

ADR Section members now have a new FREE benefit: a listserv to communicate with other ADR professionals! You can subscribe and manage your listserv preferences at groups.io/g/FlaBarADR. Your subscription will be approved when your ADR Section membership is confirmed. Please adhere to the rules—they're for the good of the group.

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The Impact of Words

by Hadas Stagman
SF Divorce Mediations
Palm Beach, Broward, Miami-Dade, Martin Counties

During the last nine years that I have exclusively practiced divorce mediations, I've come to easily recognize words that can trigger positive and negative emotions. A single word or phrase can mean the difference between an adversarial, obstinate stance and dialogue that is productive and promotes progress. Following is a look at positive and negative words and how they can be constructive or destructive to the mediation process.

Need vs. Want. Needs are the necessities to live and function, such as food, clothing, shelter, transportation, medical care and education. Wants are non-essentials that may improve or perpetuate a certain lifestyle, such as luxury cars and vacation homes. I find that explaining the difference between needs and wants is essential when the parties are stuck on their position. With the understanding that every couple has a unique financial and family situation in the moment and in the future, keeping the parties focused on their needs vs. wants provides clarity throughout the negotiation process.

Ours vs. Mine. When a couple has children together, the children should naturally be referred to as "ours." A party who says "my daughter" or "my son" is devaluing the other parent's importance in the child's life. Consciously or not, that parent is insinuating that the other parent is insignificant to the co-parenting relationship. Understandably, this scenario often results in the other parent becoming defensive and possessive. The use of "mine" when referring to material possessions can also cause friction but is not always as offensive as when used to refer to children. Regardless of how it is being said, in mediation it is of the utmost importance to reinforce the use of ours vs. mine.

Relax. Telling someone to relax, even when said with good intentions, almost always has the opposite effect. "Relaxing on command is physiologically impossible if 'the body is already too acutely stressed to turn it around,' " says Wendy Mendes, a professor of emotion at the University of California, San Francisco and a researcher on stress. "While the body responds rapidly to stress, returning to a relaxed state can take 20 to 60 minutes," she says.[1] When one or both parties are so stressed or anxious that they are creating a roadblock, I find it most effective to call for a break. Upon returning to the table, I give each person the opportunity to voice the specifics of what has caused their distress, so a productive discussion can ensue.

Think/Suggest vs. Know/Insist. When someone makes a suggestion or says they "think XYZ," they are showing flexibility and a willingness to consider other ideas. On the other hand, when a party makes a statement including the words "I know" or "I insist," they are basically saying they are the authority and that the issue at hand is non-negotiable. If the insistent party is not willing to budge, I ask them to explain why they feel so strongly about getting exactly what they want. By dissecting the issue I am able to revisit needs versus wants and lead the way to an agreement or compromise.

[1] Relax.

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The Impact of Words

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Sorry. Saying sorry often doesn't have the intended effect – forgiveness. An apology that does not acknowledge responsibility for cause and effect, or remorse and regret for actions taken, may feel empty and placating. For someone to genuinely express that they are sorry, they need to take ownership of why what they did was bad, wrong or hurtful.

Fair vs. Unfair. In mediation, a sense of fairness is achieved when compromise results in an acceptable agreement or arrangement. When a party states that something is unfair, it usually means they feel they are not being heard or respected. To avoid this scenario I have the parties prioritize what is most important to them (separate from needs) and suggest that they let go of their lesser wants.

A Good Agreement. In my introduction at the start of each mediation, I tell the parties that in order to reach a "meeting of the minds" both sides need to be open-minded, flexible and willing to let go of some of the items that are not as important to them.

I've heard some people say that if everyone leaves mediation unhappy it's a good agreement. I disagree.

I strongly believe that if each person got some of the things that are most important to them, including both needs and wants, the mediation was a success. When both sides compromise and reach an agreement it is a win-win. After spending the last nine years exclusively practicing family mediations, following an 18-year career in litigation, my expertise in managing positive communication enables me to work through difficult conversations and overcome deadlocks, resulting in agreeable outcomes.

To learn more and catch up on my monthly newsletters, visit SFdivorcemediations.com.

Hadas Kohn Stagman has been a member of the Florida Bar since 1995. For the past nine years, Hadas has been a full-time mediator assisting attorneys and pro se individuals settle their family law disputes outside of the courtroom. To date, she has mediated over 2,500 cases. In 2018, Hadas was appointed by the Florida Supreme Court to the Mediator Ethics Advisory Committee (MEAC) for a 4-year term and in April 2021 was appointed Vice-Chair. Hadas is on the Executive Council of the Alternative Dispute Resolution Section of the Florida Bar and is a Volunteer Mediator on the Grievance Mediation & Fee Arbitration Committee of the Florida Bar.

Oral Settlement Agreements Reached in Mediation: Enforceable?

by Christina M. Magee[1]
Brevard Mediation Services, Indian Harbour Beach

This Case Note may become a continuing series that points out basic principles in mediation practice that may be hidden from view because of the factual or procedural circumstances.

What Occurred

A question arose about whether an oral agreement reached at mediation and reduced to writing after the mediation ended but never signed by one side could be enforced in a subsequent arbitration, thereby establishing a basis to dismiss the arbitration.

The relevant facts in the mediation included the following:

- The side refusing to sign when presented with a written settlement agreement after the mediation concluded was unrepresented;
- The matter involved a labor/employment dispute;
- The mediator was a Florida Supreme Court certified circuit civil mediator;
- The dispute was venued in the United States District Court; and
- The mediator reported to the Court that agreement had been reached in the matter.

The Respondent, advocating for enforcement of the oral agreement, argued that the parties had indeed reached a deal during the mediation conference and the written agreement was simply a representation of the Claimant's agreement to release claims in exchange for a sum certain. Respondent also indicated that during mediation Claimant was advised that Respondent would e-mail a written settlement agreement for Claimant's review and signature, which was done. Claimant did not sign the written agreement.

The Arbitrator hearing the matter concluded that the mediated settlement was unenforceable.

Discussion

Did the venue make a difference? Or put differently, is there an argument that the Florida Civil Procedure Rules applying to mediation, as well as Chapter 44 of the Florida Statutes (where the Mediation Confidentiality & Privilege Act is found), should not have any relevance to a United States District Court? The answer in this case is no.

The parties in the subject arbitration cited a single federal authority supporting the proposition that an unsigned settlement agreement could be enforced. *Miles v. Northwestern Mut Life Ins. Co.*, 677 F. Supp. 2d 1312 (M.D. Fla. 2009). In *Miles*, counsel exchanged emails regarding settlement, including one deemed an offer, and another, acceptance. Relying on Florida contract law, the court found an enforceable agreement, even though one of the parties ultimately decided against executing the resulting settlement agreement. Significantly, counsel's discussions in *Miles* did not take place in mediation – the distinguishing fact. With no other precedent to use as guidance, it makes sense for a United States District Court to consider Florida's well-established statutes, civil procedure rules and ethical rules related to mediation that have a bearing on this question.

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[1] The author wishes to thank Christopher Shulman, Rodney Romano, Fran Tetunic and John Salmon for identifying this question as well as providing their extensive expertise in considering its solution.

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A non-mediated settlement agreement and a settlement agreement facilitated by a Florida Supreme Court certified mediator are two very different types of agreements. The mediated agreement must comply with the statutory requirements of Chapter 44 as well as the Florida Rules of Civil Procedure that relate to mediation, specifically Fla. R. Civ. P. 1.730(b), requiring that where the mediation results in a mediated agreement, "it must be reduced to writing and signed by the parties and their counsel, if any."

Florida's Mediation Confidentiality & Privilege Act (Fl. Stat. Sec. 44.405 *et seq.*) ("MCPA") explicitly states:

> (4)(a) Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, . . .

The converse of this rule is that confidentiality does apply to mediated settlement agreements that are NOT in writing and oral mediated settlement agreements are privileged under the MCPA (assuming no other exceptions apply). *See e.g.*, *Cohen v. Cohen*, 609 So.2d 785 (Fla. 4th Dist. Ct. App. 1992) (oral settlement agreement reached during mediation inadmissible where never reduced to writing).

In *Gordon v. Royal Caribbean Cruises*, 641 So.2d. 515 (Fla. 3rd Dist. Ct. App. 1994), the court determined:

> In order for a settlement agreement reached during mediation to be binding, Fla.R.Civ.P. 1.730 clearly mandates that it be reduced to writing and executed both by the parties and their respective counsel, if any. Id.

Accordingly, in *Gordon*, the Third District Court of Appeal overturned the trial court's ruling setting an evidentiary hearing to address the purported settlement arising from the court-ordered mediation:

> Since it is clear that the parties hereto did not effectuate a settlement agreement in accordance with the dictates of Fla.R.Civ.P. 1.730(b), the confidentiality afforded to parties involved in mediation proceedings must remain inviolate. Id.

Similarly, *Parkland Condo. Ass'n, Inc. v. Henderson*, 350 So.3d 484, 486-7 (Fla. 2d Dist. Ct. App. 2022) followed the reasoning established in *Gordon* to determine an agreement signed by counsel after the mediation concluded but never executed by the parties was unenforceable:

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When parties reach a settlement agreement after mediation, however, Florida Rule of Civil Procedure 1.730(b) expressly provides: "If a partial or final agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any." Fla. R. Civ. P. 1.730(b) (2021) (emphases supplied in original). Thus, "a supposed settlement agreement resulting from mediation cannot be enforced absent the signatures of all parties.". . .

If the purported settlement agreement had not been reached in the context of court-ordered mediation, we would likely conclude that it was binding and enforceable: by February 7, 2022, both parties' attorneys appeared to have agreed on the essential terms and had indicated that their clients were on board; thereafter, the attorney for the party now disavowing any agreement had filed the agreement with the trial court, expressly representing that there was an agreement. But in light of rule 1.730(b), we are constrained to conclude that any settlement agreement is unenforceable because it resulted from mediation yet lacked the parties' signatures.

Florida's approach to mediated settlement agreements is also buttressed by the Rules for Certified and Court-Appointed Mediators. Rule 10.420(c), addressing the mediator's obligations at the mediation's conclusion, states:

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

Thus, to comply with the ethical obligations imposed on Florida Supreme Court Certified mediators, the Neutral must ensure that where the Neutral does not actually create a settlement agreement or release during a mediation session, the parties clearly understand who is responsible for creating these documents, and for causing any terms that the parties agree shall be a part of the settlement to be identified in writing and signed by all the parties and their counsel. *See also* MEAC 2015-005.

Oral mediated agreements are like chimeras or unicorns – under Florida law, they do not exist.

Best practices for mediators may dictate waiting for an executed release or settlement agreement or duly executed memorandum of settlement terms prior to reporting "Agreement" to a court.

Christina Magee, Esq., is a Florida Supreme Court Certified Circuit Civil, Appellate and County Mediator, and Qualified Arbitrator, and is on the AAA Arbitration and Mediation panel for Commercial and Employment matters. She is the founding principal for Brevard Mediation Services, LLC, established in 2011, and restricts her practice to mediation, arbitration and other forms of dispute resolution. She also appears on the roster of Mediators for the US District Court for the Middle District and Southern District of Florida. Ms. Magee is a member of the American College of Civil Trial Mediators, and a diplomate of the National Academy of Distinguished Neutrals. In addition to Chairing the ADR Section, she has served on the Executive Council for the ADR Section of the Florida Bar, where she received the ADR Legend award and proudly views the co-creation and establishment of the ADR Section of the Florida Bar's Mentoring Academy for Mediators as a crowning achievement. She is a primary circuit civil mediation trainer.

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The Power of Choice: Mediator Shortlists and Arbitrator Panels

by Ana Cristina Maldonado
Nova Southeastern University Shepard Broad College of Law, Davie

Florida's pool of 6,000 certified mediators and 4,000 qualified arbitrators are the private judicial system. You can't choose your judge. But you can choose your neutral. What is the aggregate impact of these choices on the field of dispute resolution?

Lawyers who represent clients in mediation have an informal short list of mediators. Those selecting arbitration panels have a similar list or review lists provided by an administrator. The lists are carefully curated for experience and ability. This is a routine and familiar process, which takes place quickly because most lawyers have too many other things to worry about.

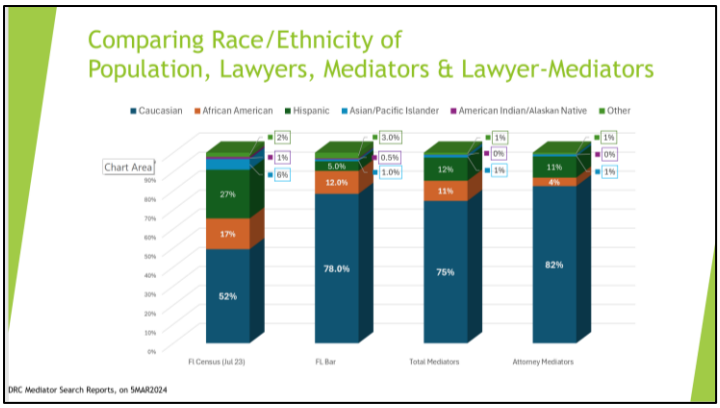
The CLE that took place on March 6th at Nova Southeastern University asked its participants to reflect on the process of choosing neutrals and how it contributes to a persistent lack of diversity in the field of dispute resolution.

After a warm welcome by Jose Roberto ("Beto") Juarez, the Dean of the Shepard Broad College of Law at Nova Southeastern University, Ana Cristina Maldonado, Chair-Elect of the ADR Section reminded people of the definitions behind the ubiquitous acronym:

> "Diversity is a rainforest and not a monoculture. And it is math—counting how many species and how many of each one. Inclusion is "a big tent."

We want to be intentional about looking around and seeing who is missing and bringing them in. Equity. Once in the tent, is there equal access to opportunity for everyone? Belonging. Are we all part of the same community?"

The first panel focused on Florida. Chris Shulman, Jeanne Charles and Dorsey Miller, III—co-authors of the Florida Bar Journal article "CHANGING THE FACE OF ADR: A CALL FOR GREATER DIVERSITY AMONG THE ADR PROFESSION" shared their findings and experiences in the field. The numbers clearly indicate that, in Florida, the population of lawyers and neutrals does not reflect the population of the state they serve.



Jeanne Charles and Dorsey Miller, III, shared personal experiences emphasizing the need for effectiveness and experience while highlighting the challenges that diverse neutrals face in creating, building, and sustaining their business.

Patricia Thompson of JAMS shared powerful evidence of how diverse arbitrator panels improve outcomes. Angela Romero Valedon discussed the initiatives undertaken by the AAA to recruit diverse neutrals and monitor their progress towards the goals. Kelly Overstreet Johnson, former president of the Florida Bar, tied it all together with a historic perspective of diversity efforts by the Bar and called attention to how initiatives that have contributed to progress on these issues are currently being cut back.

The second panel provided a national perspective. Ana Sambold, the first Latina Chair of the American Bar Association's Dispute Resolution Section, spoke about the ABA's Resolution 105, which called for

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efforts to increase in the supply of qualified and diverse neutrals and the rate at which they are selected to provide neutral services. She highlighted the efforts of the ABA, including the annual Profile of the Legal Profession report, and its development of directories of Women in Dispute Resolution and Diverse Neutrals in Dispute Resolution. Prof. Homer La Rue of Howard University School of Law and the Co-Founder of the Ray Corollary Initiative (RCI), spoke about the RCI's effort to carry over the 30% diversity metric from the Rooney Rule in the NFL and the Mansfield Rule in Big Law to the field of dispute resolution. He distinguished the metric from a quota, highlighting the need for a way to effectively measure and monitor progress over time on this important issue.

During the following Q&A session, lawyers were urged to be intentional in their selection going forward and to try someone new. Neutrals of color were urged to get trained and develop solid business plans. Participants were reminded that, despite the resistance to them, substantial research shows diverse panels often yield better results.

In conclusion, Moderator Ana Cristina Maldonado called on all who hire neutrals to reflect: **Think about the mediators and arbitrators you have worked with in the last 5-10 years. How diverse is this list and is there anything you can do to increase its diversity?**

View "The Power of Choice" video here.

Ana Cristina Maldonado is mediator, arbitrator and mediation trainer, and a member of the Mediator Ethics Advisory Committee (MEAC). Recently appointed as Director of Externships and Associate Professor at Nova Southeastern University's Shepard Broad College of Law, Cristina is Chair-Elect of the ADR Section of The Florida Bar.

Photos From "The Power of Choice: Mediator Shortlists and Arbitrator Panels"

Many thanks to the event's sponsors: Shulman ADR Law P.A., Miami Mediation Group LLC, Moritt Hock & Hamrock LLP, and particularly to JAMS for making the video recording possible.

Proposed Revisions to Rules Regarding Mediator Conflicts of Interest: A Major Paradigm Shift

By Meah Tell, Meah Rothman Tell, P.A., Tamarac

The Supreme Court Committee on Alternative Dispute Resolution Rules and Policy (ADRR&P) filed proposed changes to the Florida Supreme Court Rules for Certified and Court-Appointed Mediators, with the Florida Supreme Court in SC 2023-1537. Significant among the proposed changes were the revisions to Rule 10.340 (Conflicts of Interest). The proposed changes retain the concept that conflicts of interest which "clearly impair a mediator's impartiality" remain a bar to service as a mediator regardless of the parties' express agreement after disclosure to waive the conflict of interest. However, there are major revisions to what constitutes clear, non-waivable conflicts.

MAJOR CHANGES

Proposed Rule 10.340 (b) recognizes the parties' right to self-determination in the selection of their mediator. This embraces the philosophy of the Court in *Aurora Bank v. Cimbler*, 166 So.3d 921, 926 (Fla. 3d DCA 2015) that selection of the mediator by the parties is "critical" to the mediation process:

> "Self-determination is at the core of **mediation**. Fla. R. Med. 10.230(a), 10.310(a). **Mediation** is about the **parties**—not the jury, not the judge, not the **mediator**, not anyone else—determining the outcome of the case. Implicit in **mediation's** self-determination process is the ability of the parties to select a **mediator** who will facilitate the **mediation** process. *See* Fla. R. Civ. P. 1.720(j), committee notes ("The concept of self-determination in **mediation** ... contemplates the parties' free choice in ... those who are to participate."). The selection of the right **mediator** is critically important to the **mediation** process; indeed, if a party, for any reason, or no reason at all, is not comfortable with a particular **mediator**, the **mediation** process is susceptible to failure. (footnote deleted)"

In order to afford the parties the "critical" right to select their mediator, and limit "clear" conflicts of interest which denies the parties this right of self-determination, the ADRR&P proposal limited "clear conflicts of interest" to a narrow set of limited circumstances. This is a welcome change. Mining through sometimes contradictory and unclear Mediator Ethics Advisory Opinions, which have evolved over time, made it difficult for Mediators to determine when they had a "clear" conflict of interest that precluded them from mediating in spite of the parties' agreement.

The ADRR&P proposed Rule 10.340 (d) stated:

"A clear conflict of interest is **limited to the following circumstances:**

> 1) the mediator (or the mediator's spouse or domestic partner) is related by blood, adoption, or marriage to a person within the third degree of relationship to one of the mediation participants or a participant's spouse or domestic partner;
> 2) the mediator previously provided services (other than mediation services) for, or represented one or more of the mediation participants in, the matters at issue in the mediation; or
> 3) the mediator is currently providing services (other than mediation services) or representing one or more of the mediation participants. (emphasis supplied)"

The Executive Council of the ADR Section of the Florida Bar (the "ADR Section"), submitted the following revision to 10.340 (d)(2):

> "(2) the mediator previously provided services (other than mediation services) for, or represented one or more of the mediation participants in, the ~~matters~~ current case or dispute at issue in the mediation; or…"

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ADRR&P stated in their Response to the ADR Section's Comment, that ADRR&P's initial language had a "broader" scope than that proposed by the ADR Section, and that they supported the ADR Section's proposed revision:

> "The broader scope would require a mediator to decline serving as a mediator even if the potentially conflicting interests are not directly related to the case or dispute being mediated. For non-waivable conflicts of interest, a narrower scope may be preferable in order to ensure that parties have the widest latitude in selecting a mediator, while still ensuring mediator impartiality. Therefore, the Committee supports narrowing the scope through alternate language."

MAJOR PARADIGM SHIFT

Mediators will not have to comb through Mediator Ethics Advisory Opinions to determine if they have a "clear" non-waivable conflict of interest. They will have to analyze whether the conflict of interest falls under the limited factual circumstances set forth in Rule 10.340 (d). If it does not fall under 10.340 (d)(1) – (3), then it is a waivable conflict of interest, given ADRR&P's objective of narrowing the scope of clear conflicts of interest.

This new paradigm does not obviate the mediator's duty to make a full disclosure of any conflict of interest as soon as reasonably practicable, but the "limited circumstances" set forth in proposed Rule 10.340 (d) are much narrower than those found in prior MEAC Opinions. See for example, MEAC 2010-008 which stated that because the mediator had in the past represented defendant clients in litigation against them by a specific financial institution that was a party to the foreclosure mediation which the mediator was assigned to mediate, the mediator had a "clear conflict of interest" and was [forever] precluded from mediating any case involving the financial institution. In MEAC 2010-008 the mediator had not represented any parties to the mediation in the current case and there was no indication that the mediator's prior representation of the defendants in a different case involved the dispute at issue in the case to be mediated.

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Proposed Rule 10.340 (d) clarifies some conflict in the interpretation of prior MEAC Opinions. For example, it has been argued that MEAC 2015-003 does not preclude subsequent service as a mediator in the same case that was arbitrated by the neutral as arbitrator. Proposed Rule 10.340 (d) (2) makes it clear that having previously served as an arbitrator in a case, the neutral cannot subsequently mediate the same case.

CONCLUSION

The proposed Rule Changes to 10.340 (d) are welcome because they provide clarity, clear guidelines, and expand the ability of parties to select mediators of their choice after disclosure by the mediator of conflicts of interest. This is particularly important due to the burgeoning of lawsuits where skilled mediators who would otherwise be unable to mediate cases can now act as mediators to help resolve disputes after disclosure and agreement of the parties.

Meah Rothman Tell, Esq. graduated from Columbia Law School in 1976, and from the Columbia Business School in 1977. Meah has been an arbitrator since the mid 1980's. She is a past chair of the ADR Section of the Florida Bar, and a mediator/ arbitrator member of the American Arbitration Association commercial and employment panels, FINRA, and Demars and Associates panel of neutrals, among others. Meah served on the Florida Supreme Court Mediator Ethics Advisory Committee, the ADR Rules and Policy Committee, and the Mediation Training Review Board. She is a Past President of the Florida Association of Professional Mediators, and Past President of the Association of South Florida Mediators and Arbitrators. Meah Tell is trainer approved by the Florida Supreme Court to train Florida Supreme Court qualified trainers.

ADR Section's Monthly Forums

(Click the Images for Details)

Alternative ADR Dispute Resolution Section of The Florida Bar

May 3 8–9 AM

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Mediating the Homeowner's Insurance Crisis in Florida: An ADR Solution to a Systemic Problem?

by Nathan McCutcheon, a current 3L student at the University of Florida Levin College of Law, and an incoming associate with Dean, Ringers, Morgan, and Lawton P.A. in Orlando.

THE PROBLEM

Writing home insurance policies in Florida has been a risky proposition since the devastation caused by Hurricane Andrew in 1992. However, the situation has spiraled into an all-out crisis in recent years. In the most recent blow to the state's home insurance marketplace, Farmers announced in July 2023 that it would stop writing policies in Florida, leaving 100,000 policyholders scrambling to find a replacement carrier. Citizens Property Insurance Company, intended to serve as Florida's home insurer of last resort, now insures 1.4 million policies, and was recently forced to raise policy rates by over 11% to keep up with increased obligations.

While hurricanes and tropical storms are no strangers to Floridians, in recent years they have had an outsized impact on the state. Most notably, Hurricane Ian struck the state in 2022, causing an estimated $113 Billion in property damage. Of the people who did not lose their homes entirely, this storm alone left thousands of homeowners with roofs to be replaced and water damage to be remediated. To make matters worse, scientists suggest that climate change could lead to even stronger hurricane seasons in the future. With an estimated 65% of Florida's population living within coastal zones which are more susceptible to the effects of hurricanes, it is likely the losses experienced will continue to increase in the future.

Following a storm like Ian, state data shows that 541,078 claims were filed with insurers specifically for damages caused to residential properties that storm.[1] Of these claims, many will be denied coverage under the policy by the insurer, or the insurer will offer to pay the policyholder less than what the damages are worth. When a policyholder disputes the insurer's justification for refusing to pay a claim filed pursuant to the policy, the policyholder's recourse is often to file a lawsuit to recover the amount of their claim. The high volume of claims filed has resulted in an outsized number of lawsuits working their way through Florida's courts. Despite making up only 7% of the national home insurance market, Florida produces 75% of all litigation relating to homeowner's insurance disputes.[2]

Despite its prevalence, litigation is a poor mechanism for resolving claims disputes between insurance carriers and policyholders. First and foremost, it is a costly process. Larger insurers may find themselves facing hundreds of lawsuits in courts across the state. The legal expenses required to defend against all of these suits represent a tremendous cost to an insurer, on top of any damages the insurer may be forced to pay out at the conclusion of the litigation. The cost of legal representation is also an outsized burden for policyholders seeking to pursue these claims. It is unlikely that the average Floridian can afford to pay thousands of dollars in legal fees out of pocket, and the prospects of finding an attorney to take an insurance dispute case have likely been further diminished following the Legislature's recent withdrawal of the statutory attorney fees provision for these disputes. The time and expense of litigating insurance coverage disputes appears even more unreasonable when the average claim for wind, hail, or water damage is only valued at about $12,000.[3]

In addition to the resources it demands from parties, litigation carries with it other undesirable effects.

[1] OIR Hurricane Ian Information (accessed Oct. 30, 2023).

[2] Giulia Carbonaro, Florida's Insurance Crisis is About to Get Even Worse, NEWSWEEK (Oct 14, 2023, at 3:00 AM EDT).

[3] See Facts + Statistics: Homeowners and Renters Insurance, INSURANCE INFORMATION INSTITUTE.

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Mediating the Homeowner's Insurance Crisis in Florida: An ADR Solution to a Systemic Problem?

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Primarily, it risks damaging the insurance carrier's relationship with a client, or even their reputation with the broader public. Homeowners pay thousands of dollars in premiums on a yearly basis, with the expectation that their carrier will step in and compensate them if their home is damaged, and trust in the insurer is lost when the insurer does not pay for these damages. When the parties find themselves on opposite sides of the "v." as plaintiff and defendant in a resulting lawsuit, it helps to create (or reinforce) the idea that home insurance carriers and their policyholders are adversaries, contrary to the relational image that insurers attempt to create through their marketing efforts. Taking all of these factors into consideration, the outsized volume of homeowner's insurance litigation presents an additional burden to the health of Florida's insurance marketplace.

MEDIATION AS A SOLUTION?

Recognizing the downsides of litigation and the potential benefits of collaboration, many public and private institutions have created mediation programs which help to resolve disputes related to a wide variety of legal issues. While the main goal of mediation is generally not to take cases from a court's docket, court-sponsored mediation programs have been successful in relieving the strain imposed by legal crises, like the situation currently facing Florida's home insurance market. One noteworthy example is the mandatory ADR program implemented by the Federal District Court for the Eastern District of New York (E.D.N.Y.) in the wake of Hurricane Sandy.

In 2012, Hurricane Sandy struck New York, causing an estimated $19 billion worth of property damages. Thousands of homeowners soon filed claims with their insurers, and within a few years the E.D.N.Y. was inundated with over 2,000 lawsuits over these claims. As part of the court's effort to streamline this massive caseload, parties to Sandy-related insurance disputes were ordered to submit to either

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court-annexed arbitration or mediation within fourteen days of the exchange of discovery.[4] The mediation program referred parties to a mediator from a specially selected and trained panel of mediators, at a reduced rate of $600 for the first four hours of mediation, and $250 for each additional hour. Between 2014 and 2016, 658 cases participated in the mandatory mediation program. Of these cases, approximately 66% reached a settlement, and the average case that participated in mediation was closed within 380 days of being filed.[5] Overall, the program was successful in helping the majority of participants reach settlements in their cases, and the program played an important role in helping to alleviate the strain on the E.D.N.Y caused by the flood of disaster-related litigation.

Beyond simply streamlining the resolution of these disputes, the mediation program carried several other benefits. First, the subsidized rate of the mediation provided a much more affordable alternative to litigation, particularly valuable for claimants who were already suffering from lost or damaged property. Second, the opportunity to mediate provided parties with a chance to meet face-to-face and find common ground. The process of filing an insurance claim can be a complicated, bureaucratic process for claimants, and a small mistake at any point in this process can result in the denial of a claim. During mediation, the claimant has an opportunity to sit down with a representative of the insurer to discuss why their claim was denied. Even claimants who did not obtain compensation from their mediation reported a positive experience from their participation in mediation. Talking face-to-face with a representative of the insurer at least helped claimants get closure and move forward.

[4] Michelle Shaykevich, Proposing a Federal Post-Natural Disaster Mediation Program, 20 CARDOZO J. CONFLICT RESOL. 193, 204 (2018).
[5] Cheryl L. Pollak, Ramon E. Reyes Jr. & Robyn Weinstein, Hurricane Sandy: A Case Study of the Eastern District of New York's Effort to Address Mass Litigation Resulting from the Effects of Climate Change, 5 TEX. A&M J. PROP. L. 157, 179-80 (2019).

In Florida, the Department of Financial Services offers a statewide program which specifically provides for mediation of homeowners insurance disputes. In any dispute worth at least $500 after the policyholder's deductible is applied, the policyholder may request mediation of this dispute.[6] Unlike the program implemented by the E.D.N.Y following Hurricane Sandy, Florida's program is not mandatory, and is intended to be a pre-appraisal and pre-suit method of resolving these disputes. The fee to participate in this mediation is $350, which is to be paid by the insurer.

In response to the high volume of costly homeowner's insurance litigation currently moving through state courts, Florida's courts could explore making mediation mandatory for these disputes. By doing so, Florida can direct more disputes towards resolution before they become costly, drawn-out affairs. Providing more economically efficient resolution of these disputes can in turn help create a more favorable environment for those who engage with the state's homeowner's insurance market.

In addition to potentially increased efficiency, mandatory participation in mediation offers several benefits for both policyholders and insurers. First, a state-subsidized mediation program is significantly cheaper than litigation. Even if the current rate of $350 were increased to accommodate for greater usage of the mediation program, it would still be cheaper for insurers to pay this fee than it would be to retain an attorney to litigate the dispute, potentially all the way through a trial. This low cost takes on even greater importance in light of the Florida legislature's recent revocation of the provision for plaintiff attorney's fees in homeowner's insurance litigation. Without this provision, the courthouse doors have been closed to many homeowners who lack the financial ability to independently pay to litigate a dispute against their insurance carrier. By directing these homeowners to mediation, they retain at least one way to pursue the compensation they believe the insurer owes them.

[6] Mediation and Neutral Evaluation, MyFloridaCFO.com.

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Second, mediation gives the insurer an opportunity to work directly with the policyholder to resolve the dispute, and potentially find coverage for the policyholder's claim. Instead of communicating through attorneys with the goal of "winning" a lawsuit, mediation allows the parties to clearly express their positions to each other, leading to better understanding of the issues underlying the dispute. Within this framework, the parties can focus on determining whether the policyholder was entitled to coverage and compensation for their claim.

While mandatory mediation of homeowner's insurance disputes presents several benefits, implementing this system requires that enough qualified mediators are available to meet this increased demand. The benefits offered by mediation are much more pronounced when the mediator has the necessary experience and qualifications to address the specific type of dispute at issue. The current Florida mediation program refers disputes to a mediator from a panel of mediators who have undergone special training and met necessary requirements to be circuit court qualified. As of 2017, there were 3,216 such mediators working in Florida, though this roster would likely need to be expanded to meet the increased workload if every homeowner's insurance dispute were to go to mediation. Attracting these additional mediators could present a challenge, because at the reduced rate offered to parties under the program, they stand to make much less than they would in private practice. An attempt to require mediation in all homeowner's insurance disputes may require raising the mediation fee for parties or taking additional measures to address this deficiency.

Additionally, ensuring that both parties participate in the mediation in good faith remains a potential concern. Since the insurance carrier would almost always be the party with greater resources, and more likely to be able to afford to litigate a dispute, the risk is that certain insurers could decide to never settle in mediation and instead focus on winning any ensuing lawsuit. If one party is predisposed against settlement and is not willing to work with the other party towards that goal, that can make the mediation session entirely unproductive. This is an issue that could become especially pronounced if the state of Florida mandates mediation for an entire class of cases, rather than just making it available to those where the parties themselves were motivated to pursue mediation as a solution to their dispute.

However, insurers have several incentives to participate in mediation. First, mediation gives the insurer an opportunity to evaluate the policyholder's claim and position. If the insurer's representative talks with the policyholder at mediation and realizes that their claim should have been covered, the insurer can settle the matter quickly without paying to litigate the dispute. Insurers also have strong relational and reputational incentives to participate in good faith at mediation. The insurer can make a good impression on their policyholders if their representatives arrive at a mediation and clearly communicate that their goal is to help the policyholder find coverage. Even if there is no way to cover the policyholder's claim under the terms of the policy, walking the policyholder through the reasons why and demonstrating that they are trying to help can allow the insurer to maintain their image with the policyholder. Additionally, while mediations are not public proceedings, word-of-mouth from policyholders who are party to these mediations can be a powerful marketing tool. Insurers who actively and willingly engage with mediations will have a more favorable image with potential new policyholders than insurers who do not make an effort to settle. Both parties can secure more favorable outcomes by engaging with the process and making good faith attempts to reach a settlement of the dispute.

CONCLUSION

The homeowner's crisis affecting Florida is a complex issue that will take tremendous efforts to resolve. While mediating the disputes that arise between policyholders and insurers will not eliminate the strain on the state insurance market, it can help make the system more productive for all parties involved.

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