



THE FLORIDA BAR ALTERNATIVE DISPUTE RESOLUTION SECTION

News & Tips

Volume II, No. 4 • Spring 2014

Karen Evans, Chair • Michael Lax, Chair-elect

Chair's Message



Karen Evans

Spring is here and ADR is in the air! During April 2014, the ABA Section of Dispute Resolution hosted its annual conference in sunny south Florida. Many ADR Section members spoke during the conference including, Janice Fleischer, Director, Florida Dispute Resolution Center, John Barkett, Francis Carter, Carol Cope, Joe Farina, Jr., Deborah Mastin, Juan Ramirez, and Ron Ravikoff. For those of you who fondly remember Sharon

Press, she also spoke at the ABA's conference. In other ADR news, Navigating the World of ADR was the topic for The Florida Bar's Labor & Employment Law Section's recent two-day conference at the Seminole Hard Rock. Speakers included ADR Section members Leslie Langbein, Gary Salzman and myself. The reviews were very good and if anyone is interested, the CLE course and materials can be purchased from The Florida Bar.

During the upcoming Florida Bar Convention, the ADR Section is planning a working meeting of all interested members on Wednesday, June 25, 2014, followed by the ADR Executive Council meeting on Thursday, June 26, 2014. During the working meeting, we'd like for all committee chairs to meet with their committee members to set their houses in order. The end result of the day should be committees each with their own chairperson, and a number of members working on defined projects with defined deadlines. As Malcolm Gladwell explained in his book *The Tipping Point*, "Economists often talk about the 80/20 Principal, which is the idea that in any situation roughly 80 percent of the "work" will be done by 20 percent of the participants." With almost 1,000 members in the ADR Section, we need 200 active members to get busy! Please call or e-mail Lani Fraser (lfraser@flabar.org), Chair-Elect Michael Lax (mhlax@laxpa.com) or myself (karenevans@litigationresolution.com) to get involved. Let's work together!

Karen Evans
Chair, 2013-14

THE FLORIDA BAR

24/7 Online &
Downloadable CLE

FLORIDABARCLE

For the Bar, By the Bar

www.floridabar.org/CLE

Contents:

How to Prepare to Mediate a Complex Commercial Case	3
Case and Comment.....	5
Membership Application.....	9
CLE Opportunities.....	11



ATTENTION ALL CIRCUIT CIVIL MEDIATORS

Want to obtain **ALL** your **CME Recertification Credits** in a **ONE-DAY** seminar?

Want **world class speakers** from around the country who mediate **high profile litigation**?

Want to **hear all the speakers** without having to choose between **multiple** breakouts?

Want **no cost** access to **recordings of breakouts** you missed or one's you liked?

Want a program **geared** to the **PI, Labor/Employment, Business and Multi-party litigation** mediator?

Want **lunch included in your registration fee**?

We hear you!

Location: Marriott World Center Hotel and Convention Center, Orlando

Date: Wednesday, August 20, 2014 8:30a.m. 4:45p.m.

Cost: \$250

Visit the PMI Website: <http://www.pmi360.com/>

[Registration](#)

[Program Agenda](#)

[PMI Newsletter](#)



How to Prepare to Mediate a Complex Commercial Case

By Francis L. Carter, Esq.



Francis Carter

Trial lawyers generally approach mediated commercial cases as money cases. The paradigm for settlement in a simple two party commercial case is: the parties meet with the mediator and engage initially in principled negotiation; the bargaining slowly devolves into an auction; and prodded and cajoled by the mediator, the parties agree on a settlement amount. The money case paradigm, often referred to

as positional bargaining, sets up a zero sum dynamic: whatever consideration one party wins is gained solely at the expense of the other. Approaching the simple commercial case as a money case, results in a settlement most of the time. Some commercial cases, however, are not simple, but complex, either because there are more than two parties, multiple claims, and intersecting and diverging interests, or because the payment of money alone simply does not satisfy the needs of all the parties, needs that must be met if all are to agree to a consensual settlement. How lawyers should approach mediation of complex commercial cases is the subject of this article.

Although some lawyers define their role as showing up at the mediation to argue and negotiate for their clients, a lawyer's serious work begins long before the parties arrive at the mediation table. The lawyers' first task is to determine whether cases are simple or complex. In the multi-party case, the complexity is inherent and usually obvious, although even multi-party cases are sometimes successfully resolved as money cases. Lawyers and most mediators are comfortable with the money case paradigm, and we usually find what we are looking for, so lawyers and mediators alike often fail to recognize complexity in two party cases where the money case approach may prove inadequate to produce a settlement.

To determine whether a case is complex, lawyers should meet with their clients. Most lawyers assume they know what their clients want. All too often, however, the lawyers' assumptions about what their clients want prove to be either wrong or incomplete, so it is necessary to ask clients both open ended and probing questions concerning their feelings about their cases, to listen carefully to what they say they want, and then to try to understand what it is that they really need, especially where, as is often the case, the clients may be able to voice lists of specific wants, but unable to identify or articulate their essential needs.

In a business divorce case, for example, where princi-

pals, managers, or key employees of a business believe they can no longer work together, the pleadings will often frame the dispute as a money case with claims and counterclaims for money damages, sometimes leavened with claims for injunctive relief. But where one or more of the parties intend to continue doing business after they have parted company, more may be needed than just the payment of money to satisfy their needs. For example, a settlement agreement might also deal with the division in kind of tangible assets, such as business premises, machinery, equipment, and inventory, as well as intangible assets, including customer accounts, product lines and territories. If the needs of the parties can be identified, and if the parties can then cooperate in crafting nonmonetary as well as monetary terms, the size of the settlement pie to be divided may increase, overcoming the zero sum limitation inherent in the money case paradigm and increasing the likelihood the parties will be able to negotiate a settlement. Until the lawyers make the effort to determine the needs of their clients, however, the added possibility of finding a richer, multi-dimensional, needs based resolution is less likely. Where mediation of a complex case may result in a settlement agreement containing complex payment and nonmonetary terms, the trial lawyer should also assure that a transactional lawyer will be available to provide necessary tax advice and drafting assistance.

Lawyers next must engage their clients and convince them to buy in to a fair valuation of the case, taking into

continued on page 7

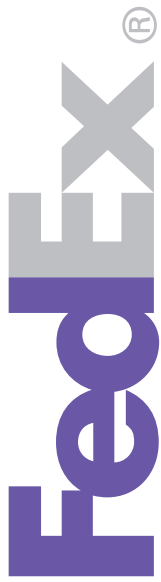
ALTERNATIVE DISPUTE RESOLUTION SECTION EXECUTIVE COUNCIL 2013 - 2014

Karen Evans, Miami..... Chair
Michael Lax, Miami..... Chair elect & Secretary
Chester Chance, Gainesville..... Immediate Past Chair
Charles Carter, Gainesville..... Editor

Stephen Bailey	Jesse Diner	Lawrence Saichek
Tom Bateman	Manuel Farach	Stephen Sawicki
Alan Bookman	D. Robert Hoyle	Jake Schickel
Carol Cope	Perry Itkin	John Stewart

News & Tips 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.

Lani Fraser, Tallahassee..... Program Administrator
Clay Shaw, Tallahassee..... Layout



Florida Bar members saved an average of \$368 last year with FedEx*

Are you taking advantage of the shipping discounts FedEx offers to Florida Bar members? In 2013, Florida Bar members saved an average of \$368 through the FedEx Advantage® program. It's free to enroll, and there are no minimum shipping requirements.

Your FL Bar Member Discounts**

Up to 26% off	FedEx Express® U.S. services
Up to 20% off	FedEx Express international services
Up to 12% off	FedEx Ground® services
Up to 20% off	FedEx Office® services

Enroll today!

Just go to enrolladvantage.fedex.com/6824 and enter passcode FLBAR1. Or call 1.800.475.6708.



* This data, which is directional only, reflects the average annualized aggregate savings per active association member for discounted services from January to September 2013.

** FedEx shipping discounts are off standard list rates and cannot be combined with other offers or discounts. Discounts are exclusive of any FedEx surcharges, premiums, minimums, accessorials charges, or special handling fees. Eligible services and discounts subject to change. For eligible FedEx services and rates, contact your association. See the FedEx Service Guide for terms and conditions of service offerings and money-back guarantee programs.

† Black & white copy discounts apply to 8-1/2" x 11", 8-1/2" x 14", and 11" x 17" prints and copies on 20-lb. white bond paper. Color copy discounts are applied to 8-1/2" x 11", 8-1/2" x 14", and 11" x 17" prints and copies on 28-lb. laser paper. Discount does not apply to outsourced products or services, office supplies, shipping services, inkjet cartridges, videoconferencing services, equipment rental, conference-room rental, high-speed wireless access, Sony® PictureStation™ purchases, gift certificates, custom calendars, holiday promotion greeting cards, or postage. This discount cannot be used in combination with volume pricing, custom-bid orders, sale items, coupons, or other discount offers. Discounts and availability are subject to change. Not valid for services provided at FedEx Office locations in hotels, convention centers, and other non-retail locations. Products, services, and hours vary by location.

ADR Section Case and Comment!

By Perry S. Itkin, Esquire, Fort Lauderdale

PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY IN AGREEMENTS TO ARBITRATE – ARE NOT CREATED EQUAL!

Basulto v. Hialeah Automotive, et al., 2014 WL 1057334 [Fla. 2014]

Roberto Basulto and Raquel Gonzalez purchased a new 2005 Dodge Caravan from Hialeah Automotive, LLC. They alleged that while at the dealership, the dealer had the buyers sign the contract in blank, with the representation that the agreed-upon numbers would be filled in. They alleged that when the dealership completed the sales contract, it allowed them a lower trade-in allowance than the amount agreed upon and the dealer refused to correct the situation. After negotiations proved unsuccessful, the buyers returned the van to the dealership having driven a total of seven miles and demanded the return of their trade-in. The trade-in had been sold.

The buyers sued alleging fraud in the inducement and violation of the Florida Deceptive and Unfair Trade Practices Act. They also sought rescission of the arbitration agreements they had signed and rescission of the loan agreement.

The dealer moved to compel arbitration. At the evidentiary hearing the buyers and dealer representatives testified. The buyers testified with the assistance of a court-approved interpreter since they were only able to communicate in Spanish. All of the documents pertaining to the civil action between the buyers and the dealership were in English.

Findings of fact from the trial court include:

1. The buyers could not communicate in English.
2. The documents they signed were in English.
3. Some of the documents were blank when signed by the buyers and pertinent information was filled in after the fact.
4. The dealership's employees who presented the terms of the deal to the buyers in Spanish did not have any basic understanding about the nature of arbitration.
5. There was no evidence that anyone explained the potential valuable rights the buyers were waiving by purportedly entering into the three separate agreements.
6. "[E]ach of the competing dispute resolutions provisions at issue contemplates the enforcement of a different remedy whose terms and conditions are irreconcilable with the terms and conditions of each of the other conflicting provisions."

The trial court concluded as a matter of law that no valid agreement to arbitrate exists in this case. The trial court also concluded as a matter of law that there was no meeting of

the minds with respect to the terms by which [the dealership] intended the parties to be bound and that accordingly, no valid agreement existed for the trial court to enforce.

The trial court further concluded that even if the arbitration provisions could be construed as agreed upon by the parties, the provisions are unenforceable because they are procedurally and substantively unconscionable.

The Third District Court of Appeal rendered a decision that affirmed in part, and reversed in part, the trial court's judgment.

The buyers appealed to the Florida Supreme Court on the ground that the Third District's decision expressly and directly conflicted with *Seifert v. U.S. Home Corp.*, 750 So.2d 633 (Fla. 1999) on a question of law.

The Florida Supreme Court disagreed with the Third District's decision, quashed it and remanded with instructions to reinstate the trial court's judgment – the record supported the conclusion that there was no "meeting of minds" between the buyers and the dealership, which constituted the making of an enforceable arbitration agreement.

The Florida Supreme Court went on to explain that, even though the issue of whether the purported arbitration agreements are unconscionable is beyond the scope of whether the decision on review conflicts with *Seifert*, such discussion is discretionary and under Florida law, **both** the procedural and substantive prongs of unconscionability must be established as an affirmative defense to prevent the enforcement of an arbitration agreement.

Procedural unconscionability is the absence of meaningful choice when entering into a contract, i.e. the manner in which the contract was entered, and the unreasonableness of the terms is often referred to **substantive unconscionability** which focuses on the agreement itself.

*When analyzing unconscionability, courts must bear in mind the bargaining power of the parties involved and the interplay between procedural and substantive unconscionability. . . . Given that the doctrine of unconscionability is not a rigid construct where the procedural aspects are separate from the substantive aspects, we conclude that both the procedural and substantive aspects of unconscionability must be present, although not necessarily to the same degree, and both should be evaluated **interdependently** rather than as independent elements. [Emphasis added.]*

Thus, a balancing or sliding scale approach is applied – in other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.

continued, next page

CONFIDENTIALITY IN MEDIATED SETTLEMENTS AND FACEBOOK!

Gulliver Schools, Inc., et al v. Snay, 2014WL769030 [Fla. 3rd DCA 2014]

Gulliver Schools appealed from a trial court order granting Snay's motion to compel enforcement of a settlement agreement. The school maintains Snay is precluded from enforcing the agreement because he violated a material term, the non-disclosure clause, when he disclosed to his daughter that his case against Gulliver was settled and he was happy with the result [COMMENT: Not so happy after all, as you will see!].

Snay sued Gulliver when the school did not renew its contract as the school's headmaster. The parties executed a settlement agreement for full and final settlement of Snay's claims with the school to pay \$10,000.00 in back pay with Check #1; \$80,000.00 to Snay as a "1099" with Check #2; and \$60,000.00 to Snay's attorneys with Check #3. The parties also executed a general release.

Central to the agreement was a detailed confidentiality provision, which provided that the existence and terms of the agreement between Snay and the school were to be kept strictly confidential and that should Snay or his wife breach the confidentiality, the \$80,000.00 portion of the settlement proceeds would be disgorged:

13. Confidentiality . . . [T]he plaintiff shall not either directly or indirectly, disclose, discuss or communicate to any entity or person, except his attorneys or other professional advisors or spouse any information whatsoever regarding the existence or terms of this Agreement. . . . A breach . . . will result in disgorgement of the Plaintiff's portion of the settlement Payments."

Only four days after the agreement was signed, Gulliver notified Snay that he had breached the agreement based on the Facebook posting of Snay's college-age daughter, wherein she stated:

Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.

The Facebook comment went out to approximately 1200 of the daughter's Facebook friends, many of whom were either current or past Gulliver students.

Snay's position was that he never told the daughter that he had "won" the case and the daughter did not go to Europe that summer, nor had she planned to do so.

About a week later, Gulliver sent a letter to Snay's counsel stating it was tendering the attorney's fees portion of the parties' agreement but was not going to tender Snay's portion because he had breached the confidentiality provision. The action was dismissed with a reservation of jurisdiction for enforcement of the settlement agreement.

Roughly seven months later, Snay filed his motion to enforce the settlement agreement arguing that his statement to his daughter and her comment on Facebook did not constitute a breach. The court held a hearing and entered an order

finding that neither Snay's comments to his daughter nor his daughter's Facebook comments constituted a breach of the confidentiality agreement. The Third District disagreed and reversed.

At the hearing Snay explained that he knew the litigation was important to his daughter and he knew he would have to tell her something about its resolution. Moments after signing the agreement, he had a conversation with his wife and they agreed to inform their daughter that the case was settled and they were happy with the result.

He further explained:

What happened is that after settlement my wife and I went in the parking lot, and we had to make some decisions on what we were going to tell my daughter. Because it's very important to understand that she was an intricate part of what was happening. She was retaliated against at Gulliver. So she knew we were going to some sort of mediation. She was very concerned about it. Because of what happened at Gulliver, she had quite a few psychological scars which forced me to put her into therapy.

So there was a period of time that there was an unresolved enclosure for my wife and me. It was very important with her. We understood the confidentiality. So we knew what the restrictions were, yet we needed to tell her something.

[COMMENT: What are you wondering about at this point? Was the daughter a "nonparticipating person" affected by the actual agreement? What would you do as the mediator if this was part of the discussion?]

The court held that the plain, unambiguous meaning of paragraph 13 of the agreement is that neither Snay nor his wife would "either directly **or indirectly**" disclose to anyone (other than their lawyers or other professionals) "any information" regarding the existence or the terms of the parties' agreement. Snay's testimony established a breach of this provision and the trial court should have denied his motion for enforcement of the agreement. The fact that he testified he knew he needed to tell his daughter something did not excuse the breach. There was no evidence that he made this known to the school or to his or its attorneys so that the parties might hammer out a mutually acceptable course of action in the agreement.

Snay violated the agreement by doing exactly what he had promised not to do and his daughter did precisely what the confidentiality agreement was designed to prevent – advertising to the Gulliver community that Snay had been successful in his case against the school.

© 2013 Perry S. Itkin. All Rights Reserved. [Used with permission of the author.]

Perry S. Itkin, Esquire
Dispute Resolution, Inc.
2200 NE 33rd Avenue, Suite 8G
Fort Lauderdale, FL 33305
954.567.9746
Email: PerryItkin@MediationTrainingCenter.com
Web: www.MediationTrainingCenter.com

account the best available estimates of the likelihood of success at trial, damages, legal fees and costs; whether contractual or statutory fee shifting is available; and collectability issues. The result is sometimes then adjusted up or down by the clients' desire to seek or avoid publicity or to establish or avoid setting a judicial precedent. In the complex commercial case, nonmonetary terms should also be given a fair value, which may be asymmetrical; i.e., a concession may have either greater or lesser cost to the donor than its value to the recipient. If the stakes are high enough to justify the cost, it may be worthwhile to engage a jury consultant and present the case to a mock jury as an aid to valuing the case in preparation for mediation.

After the lawyer has talked to the client, agreed with opposing counsel on the selection of a mediator, and submitted a confidential mediation statement to the mediator, the lawyer should speak privately with the mediator, usually by phone. The lawyer needs to make sure that the mediator understands and appreciates the client's side of the case, including the client's needs both concerning and in addition to the amount of money to be paid or received to settle the case. To help the mediator prepare, the lawyer should let the mediator know why the parties have been unable to settle without mediation; i.e., what have been the obstacles to settlement; and whether the case is ripe for mediation, i.e., has there been sufficient discovery so that the parties share a common picture of the relevant facts. The lawyer should also tell the mediator whether there are any dispositive motions pending; when the case is set for trial or a dispositive motion set for hearing; whether any of the parties has made a settlement offer or served an offer of judgment; whether any party has a greater interest in obtaining publicity or setting a judicial precedent than in settling the case; and whether the financial distress or collectability of any party will be an issue at the mediation. The lawyer also needs to let the mediator know whether each side will have a representative with sufficient authority to settle the case physically present at the mediation, and whether any non-party, such as an insurance carrier, guarantor or indemnitor, whose participation or consent may be essential to reaching a settlement, will be present or otherwise available.

Equally as important as valuing the case is working with clients to decide how the monetary and other concessions they are willing to make are to be fed out into the negotiations. Many lawyers fail to realize they need to formulate a negotiating plan. Without a plan, parties tend to negotiate emotionally and reactively, which can stalemate the mediation process, especially in the early stages. To the extent mediators allow or are unable to prevent parties from opening with trivial concessions, such paltry offers will invariably be met with, "This is insulting; they are asking us to negotiate against ourselves;

we're going to send them a message (by making an even smaller and more trivial concession)!" Needless to say, this does not further the mediation process.

What the parties are really doing in the caucus phase of mediation is engaging in a dialogue through an intermediary seeking to reach a consensus as to the proper range in which a settlement is possible. The greatest fear a party has in any negotiation is the fear of "leaving money on the table," i.e., of failing to exact the maximum concessions the other party is willing to yield to reach an agreement. Rather than moving through a chaotic series of emotionally driven small and large concessions, a negotiating plan should show clear and consistent movement towards a party's aspirational target, i.e., the package of concessions the client is readily willing to give or accept to settle the case. Once each party has put on the table the full amount of its aspirational target, it is the job of the mediator to help the parties bridge whatever gap remains.

The best way to send a clear message about where a party is going is by using tapered concessions: a party's opening move should be its largest move, and each further move should be smaller than the last move that party made. Negotiating plans based on tapered concessions provide at least two benefits. They get the negotiations off to a constructive start with each side making a substantial move, and they evidence a consistent pattern so that what a party later professes to be its final offer will seem credible to the party receiving it. Where one side adopts this approach, but the other insists on responding with a trivial move, a skilled mediator knows how to deal with that party to keep the negotiations on track.

Most clients have an emotional investment in their case and often a burning desire to see justice done; i.e., to have a tribunal recognize the injustice done or sought to be done to them and to vindicate their position or conduct. It is not just individual or small business clients who react emotionally to litigation. Client representatives of major businesses, financial institutions, and governmental entities -- sometimes even insurance carriers and professional fiduciaries -- often have a strong emotional stake in the dispute to be mediated. Because commercial cases are rarely tried, lawyers need to recognize that resolving cases at mediation requires addressing not only their clients' economic needs but also their emotional needs.

One aspect of dealing with clients' emotional needs is familiar, the gradual process of reconciling a client to recognize and embrace the best available option, even if that option is not an attractive one, simply because it is the best option the client has. Equally important is satisfying the clients' emotional need to have their day in court. They want their stories to be told to and acknowledged by the judge or jury, but settling their cases in mediation risks leaving their stories untold and their emotional needs unmet.

Fortunately, however, lawyers do have the opportunity

continued, next page

to tell their clients' stories at mediation by delivering well prepared opening statements. Among other things, the opening statements let the lawyers vent on behalf of their clients. By means of the opening statements, the mediation can become a simulated tribunal with the mediator at the head of the table standing in for the judge, and the adverse parties across the table standing in for the jury. If the mediator acknowledges that he or she has heard and understands -- without adopting or agreeing to -- what a party has said, and has the adverse parties do likewise, the mere acknowledgment affords the party offering the opening statement not only the opportunity to vent but also to receive validation of its position. The venting and validation help a party to deflect its attention away from emotional concerns and focus on finding a business resolution to the dispute being mediated.

Using PowerPoint presentations, poster boards, graphs, charts and other visual aids may enhance the effectiveness of counsel's opening statement. Giving the client representative an appropriate speaking role in the opening may also increase its impact, add to the client's emotional satisfaction, and sometimes create an opportunity to show off a good trial witness without subjecting the witness to cross examination.

Some able and experienced lawyers nevertheless favor dispensing with opening statements and proceeding straight to caucus, either because they believe that all sides are already sufficiently familiar with the relevant facts and applicable law, or because they believe that opening statements will serve only to inflame emotions, making a settlement less likely. These lawyers, however, fail to appreciate two important points. First, the purpose of the opening statement is not just to speak to adverse parties. Opening statements are at least equally necessary to afford clients the opportunity to hear their own lawyers, the champions they have selected to advocate their causes, venting for them, telling their stories, and perhaps obtaining an acknowledgment that their stories have been heard and understood. Second, the opening statement may be the only pre-trial opportunity for a lawyer to speak directly to an opposing party's client representative and to give that opposing party a firsthand preview of what will be aired in the courtroom if the case does not settle. This opportunity for direct access to the opposing party is too valuable to waive without a compelling reason. As for the possibility that opposing parties will be offended by counsel's opening statement, they and the whole world will likely hear far worse should the case go to trial. The possibility that an opening statement may be poorly handled and give offense to an opposing party does not justify declining to present one. What is called for is tactful and effective advocacy on the part of counsel. Clients deserve no less.

The last task for the lawyer before the mediation is to prepare the client for what will happen there. The client

needs to understand the role of the mediator and the process that will unfold, including the joint opening session and the caucus breakout. The lawyer should share with the client whatever is known about the background, temperament, personality, and style of the mediator. If it is decided a client representative should speak in the opening, the representative needs to rehearse, but not over-rehearse, his or her part.

Clients at a mediation are often put off by the initial round of caucus bargaining in which the parties establish their opening or anchor positions, either not wanting to approach or not wanting to be limited by the midpoint of the initial range. Lawyers should let their clients know that bargaining at mediation is rarely symmetrical. In any round of bargaining, the parties will not usually make concessions of equal value. Rather, the concessions should and usually do reflect the relative strength of the parties' cases. Lawyers should counsel clients to stick to their negotiating plan and let the bargaining develop. Lawyers should also caution their clients to avoid the greatest failing a party or its counsel can display at mediation, the sin of impatience. The mediation process needs time to work its magic.

Perhaps most important, lawyers must empower their clients. In all other phases of the litigation process, it is the lawyers who act. It is the lawyers who research legal issues, draft pleadings, depose witnesses and argue in court. At the mediation it is the clients' interests and only derivatively those of their lawyers that are at stake. It is the clients, guided by the advice of their lawyers, who are the ultimate decision makers. If the clients want to settle their case, they have the power to do so, and in complex cases, the clients will be more knowledgeable than their lawyers concerning the nonmonetary issues that so often make the difference between settlement and impasse. Lawyers need to urge their clients to play a leading role in negotiating a settlement at mediation.

A mediation is sometimes described as an informal proceeding, which reflects its procedural flexibility, but understates its importance as an efficient forum for resolving complex commercial cases. To obtain an optimal result at mediation of a complex commercial case, lawyers need to do whatever is necessary to assure that both they and their clients are well prepared to take their places at the mediation table and bargain effectively to reach an acceptable settlement that satisfies the monetary, business, and emotional needs of the clients.

Francis L. Carter is of counsel to Katz Barron Squitro Faust in Miami and Fort Lauderdale and is a full time mediator and settlement counselor in commercial civil and bankruptcy cases. He is a graduate of the University of Pennsylvania and of the University of Virginia Law School, is included in Best Lawyers in America and Chambers USA, and is a Fellow of the American College of Bankruptcy. Mr. Carter is a frequent lecturer on mediation advocacy skills.

Membership Application for The Florida Bar Alternative Dispute Resolution (ADR) Section

Name: _____ Bar #: _____ (Required)

Name of Firm: _____

Address: _____

City: _____ State: _____ Zip Code: _____

Office Phone: _____ Office Fax: _____

E-Mail Address: _____

Complete this form and return with your check payable to "THE FLORIDA BAR" in the amount of \$35.

Send form and check to:

The Florida Bar
ATTN: Lani Fraser
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Or pay \$35 by credit card by faxing the completed form to Fax # (850) 561-9404.

Type of Card: MasterCard Visa American Express Discover

Credit Card #: _____ Exp Date: _____

Name on Credit Card: _____

Signature of Card Holder: _____

Mail your application today!

*(Please Note: The Florida Bar dues structure does not provide for prorated dues.
Your Section dues cover the period of July 1 to June 30.)*

**The Florida Bar
Alternative Dispute Resolution (ADR) Section**

Alternative Dispute Resolution (ADR) Section

Organized 2010

The Alternative Dispute Resolution (ADR) Section was designed to provide a forum for lawyers interested in alternative dispute resolution and to share common interests, ideas and concepts. The Section will provide continuing legal education as well as be a central source for either advocacy or communications and deal with all forms of alternative dispute resolution.

Membership Eligibility:

Any member in good standing of The Florida Bar interested in the purpose of the Section is eligible for membership upon application and payment of this Section's annual dues. Any member who ceases to be a member of The Florida Bar in good standing shall no longer be a member of the Alternative Dispute Resolution Section.

Affiliate Members. The executive council may enroll, upon request and upon payment of the prescribed dues as affiliate members of the section, persons who are inactive members of The Florida Bar and who can show a dual capacity of interest in and contribution to the section's activities. The purpose of affiliate membership is to foster the development and communication of information between arbitrators, mediators, and the people who often work with arbitration and/or mediation lawyers. Affiliate members must not encourage the unlicensed practice of law. The number of affiliates will not exceed one-half of the section membership. "Affiliate" or "affiliate member" means an inactive member of The Florida Bar. Affiliate members have all the privileges accorded to members of the section except that affiliates may not vote, hold office, or participate in the selection of officers or members of the executive council, or advertise affiliate membership in any way. Affiliates may serve in an advisory nonvoting capacity which the executive council may from time to time establish in its discretion. Affiliate members will pay dues in an amount equal to that required of section members.

The purposes of the Section are:

- a. To provide an organization within The Florida Bar open to all members in good standing in The Florida Bar who have a common interest in Alternative Dispute Resolution.
- b. To provide a forum for discussion and exchange of ideas leading to an improvement of individual ADR skills and abilities, both as a participant and as a neutral.
- c. To assist the Courts in establishing methods of expeditious administration of mediations by making formal recommendations to the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy.
- d. To assist members of The Florida Bar who generally desire to increase their effectiveness as ADR participants.
- e. To keep the membership informed and updated regarding legislation, rules, and policies in connection with mediation and other ADR processes and the responsibilities they impose on mediator and arbitrator members (as well as other ADR professionals who may ultimately be included).
- f. To provide a forum for the educational discussion of ethical considerations for ADR participants.

Membership Information:

Section Dues \$35

The membership application is also available on the Bar website at www.floridabar.org under "Inside the Bar," Sections & Divisions.

8221001 Item Number

Rev. 02/13



THE
FLORIDA
BAR
CLE

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

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

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Recorded at:

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

Course No. 1597R

2:00 p.m. – 3:00 p.m.

Perry Itkin, Fort Lauderdale

The Fallacy of Impasse

Style: Interactive

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

3:00 p.m. – 4:00 p.m.

John J. Upchurch, Daytona Beach

Mediation Advocacy - What Works and What Doesn't

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

4:00 p.m. – 5:00 p.m.

Rodney Romano, West Palm Beach

Marketing Your Mediation Practice Ethically

Style: Interactive Lecture/Case study

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

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

CLE CREDITS

CLER PROGRAM

(Max. Credit: 3.5 hours)

General: 3.5 hours

Ethics: 2.5 hours

CERTIFICATION PROGRAM

(Max. Credit: 2.5 hours)

Civil Trial: 2.5 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

CME Credits – This course is eligible for up to 3 CME hours. Mediators are required to self report those hours applicable to their areas of certification at the time of their renewal. For more information on the CME requirement, visit, www.floridabar.org, select Alternative Dispute Resolution/Mediation.

ALTERNATIVE DISPUTE RESOLUTION SECTION

Chester B. Chance, Gainesville — Chair

Karen Evans, Miami — Chair-Elect

CLE COMMITTEE

Paul H. Chipok, Orlando, Chair

Terry L. Hill, Director, Programs Division

To purchase a copy of this webinar,
click the button below.



THE
FLORIDA
BAR

CLE

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

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

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Webcast Only Presentation:

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

Webcast
Only

Course No. 1755R

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

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

1:00 p.m. – 2:10 p.m.

New Arbitration Code

2:10 p.m. – 3:15 p.m.

Recent Developments in Arbitration

CLE CREDITS

CLER PROGRAM

(Max. Credit: 2.5 hours)

General: 2.5 hours

Ethics: 0.0 hours

CERTIFICATION PROGRAM

(Max. Credit: 2.0 hours)

Appellate Practice: .5 hours

Civil Trial: 2.0 hours

FACULTY & STEERING COMMITTEE

Jon Polenberg, Ft. Lauderdale — Program Chair
Gerald Cope, Miami
Karen Evans, Miami
Michael Higer, Aventura
Larry Leiby, Ft. Lauderdale
Donna Greenspan Solomon, Ft. Lauderdale

CLE COMMITTEE

Laura Sundberg, Orlando, Chair
Terry L. Hill, Director, Programs Division

REFUND POLICY: A \$25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid.

To purchase a copy of this webinar,
click the button below.