THE FLORIDA BAR
ALTERNATIVE DISPUTE RESOLUTION SECTION
News & Tips

Mediation Week Special Edition

Michael Lax, Chair • Bob Hoyle, Chair-elect

Note from the Editor

A. Michelle Jernigan

In this Special Edition Newsletter, the ADR Section of The Florida Bar joins the American Bar Association in celebration of Mediation Week, October 12-18, 2014. This year's theme is, "Stories Mediators Tell – *From Rookie to Veteran, Exploring the Spectrum of Mediation."* Consistent with that theme, a collection of Florida Mediators have written inspirational stories about the art of mediation to share with our readers.

We can be proud of the progress that Florida has made in the field of Alternative Dispute Resolution over the last thirty nine years. Yes – 39 years! The first Citizens Dispute Settlement Program in Florida began its operation in Dade County in 1975. In 1982, the Florida legislature passed the first Family Mediation Statute. In 1986, the Florida Supreme Court created the Florida Dispute Resolution Center to research and develop an infrastructure for a statewide ADR program covering all court contested matters. The following year, the Florida legislature passed one of the most comprehensive legislative ADR programs in the entire country. Effective January 1988, Florida courts were granted the authority to order parties to mediation. Soon, rules of procedure, mediator training and certification measures, as well as standards of conduct for mediators, were in place.

ADR procedures in general and mediation in particular, have now permanently altered the judicial culture of Florida. Most cases in Florida are now voluntarily mediated at least once, and oftentimes twice, in lieu of going to trial. Many parties seek to utilize mediation before a lawsuit is even filed. Even parties involved in contractual arbitration frequently choose to mediate before submitting the dispute for final disposition to an arbitrator.

Clearly, mediation has fulfilled the call issued by Abraham Lincoln to his fellow lawyers to: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

Thank you for this opportunity to share "Stories Mediators Tell" with you and other members of The Florida Bar. We hope you find them insightful and thought provoking. Remember to celebrate with us this week as we reflect on what mediation has done for us as lawyers, mediators and litigants.

Warmest Regards,
A. Michelle Jernigan, Editor

Contents:

On behalf of the Executive Council, we wish to extend our gratitude to those mediators who contributed to this Special Edition. They shall remain anonymous to protect the confidentiality of the parties and the process.

Short Stories

Like many of my colleagues, I have been moved by simple and sincere expressions of gratitude after certain mediations. Beyond those who thank you from a purely professional business perspective, I refer to those individuals who "feel" truly thankful, at a personal level. I think you know that when you see it. It is one of those things that reflects why we work as mediators, why it is important to listen and be interested in what you are hearing, and why you should be persistent.

"Talk to me, please talk to me"

In honor of mediation week, I was asked to provide thoughts on any topic which is near and dear to my heart with respect to the mediation process. Since I have been mediating for over twenty years, any article would fill volumes. However, I decided that there was one area that was repeating itself in the mediation process - the lack of communication.

I take the time in my opening comments to stress that the mediation process belongs to the parties and that all matters are confidential, allowing them to speak freely and plainly with me during the mediation process; however, this does not always happen.

One example sticks out in my mind. Several years ago, I mediated an alleged breach of contract. The parties were former best friends. They entered into a contract to perform certain specific activities, sharing the expense and sharing the work. One of the parties decided that they wanted to leave Florida. Instead of talking to his/her best friend, they decided just to leave and start all over again.

A lawsuit ensued. Then the parties agreed to mediate. After my opening statement, we broke down into separate discussions in order to flush out the issues. During this process it became clear that there was more to this breach of contract action than just money damages; however, I could not get either party to talk openly with me about what was really at the heart of the matter. Slowly I started to gain their confidence that this process would be confidential and I would not be sharing their thoughts with the other party. It became quite clear during the course of the mediation that the paramount issue was "hurt feelings". The Plaintiff felt slighted and was hurt that the Defendant just packed up and left. Once I was able to elicit this information from the Plaintiff I asked him/her if I could bring this to the attention of the other side.

Finally, the Plaintiff allowed me to tell the Defendant that his/her feelings were hurt because they did not talk before the Defendant left. Once I told the Defendant this, the Plaintiff, Defendant and I were able to privately sit down and flush out the real reasons the Plaintiff filed the lawsuit. Once we were able to talk about the "hurt feelings" involved in this situation, we were able to resolve the dispute.

It became apparent to me that the lack of communication between the parties before the litigation and the inability or reluctance of the parties during the mediation to communicate openly was holding up the process.

The case eventually settled after the Defendant said, "I'm sorry I did not understand," and also paid the Plaintiff some money damages. Without the apology and direct communication between the parties, the case never would have resolved.

The lesson I learned as a mediator is to think outside the box and try to determine what is really behind the litigation, which oftentimes is just lack of communication. 👍

"To a Hammer, Everything is a Nail" … it is all how you choose to View Things

Perhaps one of the most gratifying mediations, of the hundreds of mediations which I have conducted over the course of fifteen years, could be described as a mediator's "worst" nightmare. This was a divorce case involving multiple issues. The attorneys had not scheduled enough time to even explore the issues, let alone attempt to resolve them. The attorneys had not provided me with any information regarding the case prior to mediation, and it appeared that this was a mediation scheduled solely because the Court ordered the parties to mediation. The Wife and her attorney arrived about fifteen minutes late to the mediation conference. Without any prior warning, the Husband's attorney said he had to leave, and left me with his client, the Wife, and her counsel. The Husband said he didn't have any money, wasn't even paying his lawyer, couldn't pay the mediator's fee, and left shortly thereafter.

The Wife's lawyer left me behind with his client who clearly wanted to tell me something that was troubling her. She told me how upset she was that the younger of her two sons would not be able to celebrate his bar mitzvah (the Jewish rite of passage into manhood at age thirteen) because the Husband would not contribute to the celebration, and how devastated she thought her son would be. I mentioned to

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TO A HAMMER" *from previous page*

the Wife that there was a community resource that she might contact, to help her arrange for a bar mitzvah for her son at low or no cost.

Approximately a year later, I was in a shopping center in which the Wife's office was located. When she saw me from the front window she rushed out into the plaza to greet me. She told me excitedly that through the community resource I had suggested, she had been able to plan a bar mitzvah for her son, and her son had been overjoyed. In the eyes of the Court, this mediation was a "failure." I didn't settle this case and remove it from the trial docket. Financially this mediation was a "zero"-- I didn't get paid, and I never got any more mediation business from either of the two attorneys. But in my mind, this was one of the most personally "successful" mediations I have ever handled. Just by taking some extra time to talk and listen to the Wife, and sharing a little knowledge that I had, a family caught up in crisis was able to join together as one, and celebrate a major milestone in this young man's life.

A Lawyer's Confession … About Mediator Selection

I have an odd confession to make. For part of my professional career, I held a dim view of mediation. More than once I began my opening statement by announcing, "We're here because the judge gave us no choice. This is a waste of time." Many colleagues have shared similar views with me. Perhaps you've also had such thoughts at one time or another. Several years back, I was involved in a mediation conference that proved to be my proverbial 'last straw.'

In one of my largest and most complex cases, an opposing attorney filed a motion requesting mediation far too early in the discovery process. The other litigants were insufficiently educated about the weaknesses of their cases to participate in meaningful negotiations. Naturally, I objected to the motion. The trial judge overruled me.

The case was set at a venue some 250 miles from my office, and travel was difficult for my client because of her debilitating medical condition. My biggest concern was that she probably wouldn't make it to a second session, so it was likely we'd have only one shot at getting it right. Being unfamiliar with mediators from that remote county, I trusted the judgment of one of the other lawyers and deferred to his selection of a mediator – a retired trial court judge.

The mediator's firm sent a boilerplate confirmation letter with a request for a pre-mediation case summary. Given the complexities of this case, my summary took many hours to assemble. Despite my skepticism about mediation, I took great pains to do everything I possibly could to help ensure a successful mediation. The summary carefully detailed my concerns about the prematurity of the mediation conference and the missing facts our opponents needed to consider if we were going to have productive settlement discussions. That being done, my expectations were very high and so were the stakes.

You know that feeling you get in the pit of your stomach at the beginning of trial when the judge brings in a panel of prospective jurors? That was the feeling I had as the parties convened for opening statements. It didn't take long, however, for that feeling to turn into over-whelming disappointment and frustration.

Almost immediately after we began our initial joint session, it became clear that the mediator was unprepared. He never even bothered to review my painstakingly-drafted case summary. From there, the situation went from bad to awful. We needed a sophisticated strategist to mediate this complex case. Instead, we got a disinterested go-between whose biggest concern was having lunch delivered. Not knowing how to make things right, I felt powerless as negotiations plodded along toward the inevitable impasse.

With this particular mediation, I relied on opposing counsel's word when he assured me this mediator was "perfect for the case." Huge mistake! Had I done proper due diligence, I would have discovered that for most attorneys who agreed to use him as a mediator, once was enough. While their reasons were varied, the feelings were mutual: "Never again!"

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Standing in the Midst of Miracles

Remember the famous movie, "The Miracle Worker", about Helen Keller and Anne Sullivan. Helen Keller became ill and was rendered blind, deaf and mute at the age of eighteen months. She was held captive in her own body and became so angry and frustrated at her inability to communicate that she became violent. Her parents were on the verge of institutionalizing her at age seven when Anne Sullivan ("Annie") arrived on the scene. Annie broke through the walls of silence and darkness that characterized Helen's young life. By spelling out words in the palm of Helen's hand, Annie taught Helen how to communicate with her world. Annie became Helen's life-long teacher and companion, and Helen's life of silence and darkness was transformed to one of inspiration and fulfillment.

One time I entered into mediation with the challenge asserted by one of the lawyers that, "You're a miracle worker if you settle this one!!" The case involved a commercial tenancy. The lawyer issuing the challenge had informed me prior to the mediation that the parties were disputing the applicability of a particular clause in the lease that would require the tenant to pay far more than the tenant contemplated on execution of the lease. The landlord was demanding a healthy sum (including attorney's fees) from the tenant, which the tenant could neither afford to pay, nor believed was owed. The tenant's lawyer indicated that the tenant had no intentions of offering any money to the landlord. Upon inception, it appeared to be an impasse, which was the impetus for the "Miracle Worker" challenge.

I reflected back on my mediator training and remembered Fisher and Ury's book, "Getting to Yes." I needed to dig deeper and determine what the parties' true interests were. The tenant wanted a place to operate his business and did not want to "come-out-of-pocket" with any money. The landlord had an interest in renewing the lease with the tenant, but it also wanted some compensation for what it contended was due under the disputed lease clause. Eureka!! What if the tenant would renew the lease for an increased sum of rent to compensate the landlord for what it thought was due under the lease clause? After several rounds of discussions, the concept jelled into a practical solution and a resolution was ultimately reached.

At other times, I had clients say "work your magic." The reality is that mediators are not magicians, and they certainly are not miracle workers. Having acknowledged that, I can say that mediators do stand in the midst of miracles. When Helen Keller transformed from "nothing more than an animal" to an educated, productive, spiritual, ideological human being, it was truly a miracle. When disputing parties transform from aggravated, agitated, frustrated, discouraged, weary warriors engaged in the battle we call litigation, to those holding opposite ends of an olive branch, waiting while advocates preserve peace through legal craftsmanship, it is a miracle.

"Never, Never, Never, Never, Never Quit" – *Winston Churchill*

It was late, the parties were frustrated after spending all day at the courthouse, and the deputy sheriff wanted to lock up and go home. Impasse. Then, a casual comment on the way out inspired another effort and the case settled in the courthouse parking garage on that hot, humid, sweaty summer night. Everyone's extra effort saved at least $10,000 that each party would have spent in the coming week and an estimated $50,000 in costs per party and 150 plus hours per attorney through trial.

Lessons Learned:

- Don't quit – there is almost always something more that can be done;
- When you are out of ideas, keep asking questions. The answers may reveal an opportunity to get a foot in the door;
- Mediators don't just settle cases. They change lives and their efforts affect far more people than the participants. Be passionate or do something else;

The medical malpractice mediation was scheduled to begin at 3:00 p.m., immediately after the court ordered summary jury trial ended. As I was waiting for the parties to arrive in my offices, one of the lawyers called to tell me that they were running very late and that the summary jury had just begun deliberations. Would I mind driving to the courthouse – 80 miles away – so we could begin immediately after the trial was complete? Whatever it takes! So I hopped into my car and drove to the courthouse.

I arrived at 4:30 p.m., just as the summary jury was coming back into the courtroom. After learning the verdict, the attorneys interviewed the jurors to gain further insight. Even though the malpractice occurred while the plaintiff was in surgery and unconscious, the jury found him 25% comparatively negligent. Shockingly, they said if he'd taken better care of himself, he wouldn't have needed the surgery. The interview took another twenty minutes and I listened.

The deputy said I could use the hallway and he'd keep the courthouse open until 5:30 p.m., so I could mediate. At 6:30 p.m., he told me that we had to leave so he could lock the doors. I was concerned that we would lose all the momentum that had been built during the day.

The two defense teams had gone ahead and I was walking out with the plaintiff's team. I apologized for failing to find a way when we were so close. The plaintiff said he really wanted this behind him and would have kept moving if the defense would. BINGO! I told them to wait on the bench and I ran to the garage as the two defense SUVs were exiting. I motioned for them to park and I shuttled among the parties for another hour or so and the parties got the case resolved. What a satisfying day! What a great profession!

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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.

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