THE FLORIDA BAR
ALTERNATIVE DISPUTE RESOLUTION SECTION
News & Tips

Volume II, No. 1 • Fall 2012

Chester B. Chance, Chair • Karen Evans, Chair-elect

Our Section is Growing and Working

Chester B. Chance

It is a great honor to serve this year as Chairman of your ADR Section. During this third year as a section, through the leadership of past chairs Alan Bookman and Jake Schickel, the membership has grown to almost 900 members and this is the fourth issue of the section's *News & Tips*.

Your section's executive council continues to have contact and dialogue with the DRC and its committees. Your legislative committee is working on various changes to the arbitration statutes to be presented to the Florida Legislature in the upcoming legislative session. Your executive council continues to have extensive discussions about Rule 10.340(c), Conflicts of Interest and the recent MEAC Opinion on that Rule. The executive council voted to propose a change in Rule 10.340 to allow a mediator to serve after proper disclosure and agreement of all parties.

The ADR section's CLE committee chairman, John Stewart and CLE committee members, are working with the RPPTL section to present a joint a CLE program early in 2013. The committee also continues to develop contacts and CLE programs with other sections of The Florida Bar.

The success of the ADR section continues during this year and I encourage each of you to participate in any way you can. Please plan to attend the section's annual meeting during the Florida Bar Convention in June 2013 at the Boca Raton Resort & Club. Also, please feel free to submit articles for future issues of *News & Tips*!

Chester B. Chance
Chair, ADR Section

Contents:

Editor's Message

A Rose By Any Other Name…

By Chester B. Chance and Charles B. Carter

Sharon Begley wrote an article in *Newsweek* some time ago regarding how language shapes our thoughts.

Her first example was the Viaduct de Millau, which opened in the southern region of France in 2004. The Viaduct is the tallest bridge in the world.

According to Ms. Begley, German newspapers described the Viaduct floating above the clouds with elegance and lightness and breathtaking beauty.

Ms. Begley notes French newspapers discussed the Viaduct as an immense concrete giant. She wondered why Germans saw the bridge in terms of aesthetics and beauty and the French saw power and strength.

Ms. Begley looked to Lera Boroditsky, Psychologist and Stanford University. The issues centered around whether "the language we speak shapes the way we think and see the world." If so, Ms. Begley and Dr. Boroditsky opine it means language is not merely a means of expressing thought "but, a constraint on it, too."

How so? In German, the noun for bridge is feminine. In French, the noun for bridge is masculine. As a result, Dr. Boroditsky suggests German speakers see female features in a bridge while French speakers see masculine ones. By way of further example, Germans describe keys (as in used to open a door) with words such as hard, heavy, jagged, metal, etc. The Spanish describe keys as golden, intricate, little and lovely. The German word for key is masculine and the Spanish word for key is feminine.

"Even a small fluke of grammar" - the gender of nouns – "can have an affect on how people think about things in the world" according to Dr. Borditsky.

Grammatical gender influences our perception of abstractions. Depictions of death and victory in art are more likely to be represented by a man if the noun is masculine and a woman if the noun is feminine. Thus, a German would tend to see death as male while a Russian would see death as female.

Some more interesting examples: People apparently remember colors more easily if different shades of color had distinct names. In English, we may refer to something as light blue or dark blue, but a Russian would have a specific word for the shade nuances and thus, tend to remember them more easily. They thus perceive color differences more easily.

Koreans use a word for "in" when an object is in another snuggly and a different one when an object is in something loosely. As a result, Ms. Begley suggests Korean adults are better than English speakers at distinguishing tight fit from loose fit.

There are many other examples of how language shapes our thoughts and perceptions. Cultural and individual perceptions of thoughts, actions, and abstractions shape thought.

Ms. Begley suggest that in English we might say, "she broke the bowl" even if it was smashed accidentally. However, Spanish and Japanese would describe the event more like "the bowl broke itself" if it was an accident. As an eyewitness, English speakers seem to remember who was to blame even in an accident, but Spanish and Japanese remember it less well than they do intentional actions. "It raises questions about whether language affects even something as basic of how we construct our ideas of causality," according to Ms. Begley. Thus, there's an influence on witness perception and eyewitness testimony.

As lawyers, it seems there are many occasions to remember that language may shape our thoughts. Certainly this would apply, the studies suggest, to eyewitness testimony. It also applies to communication during negotiations, mediations, closing argument, etc.

Some people have suggested that communication never "communicates" at a 100% effective level. The studies suggested in the Newsweek article by Ms. Begley seemed to confirm that thought. The impreciseness of communication has something to do with our differences over the connotation as well as the denotation of words and how words shape our thoughts, our perceptions, our reality, our ability to do tasks, etc.

We relay this article not only to provide thought for communications during alternative dispute resolution sessions, but, in other legal scenarios and perhaps in our personal communications. Never take it for granted that the listener interprets what we say in exactly the same way. Assume that what we say is never heard in the same way we intend.

In a world where so much of our communication is now done electronically, without the benefit of personal expressions, perhaps languages shapes our thoughts and our perceptions even more than ever before.

Mediator Ethics Advisory Committee Opinions

2012 Opinions

MEAC 2012 – 004

1. In a case in which a mediator's former law partner is representing a party as an advocate subsequent to the mediator leaving the law firm, there is no pre-determined amount of time that must elapse before the mediator may mediate such cases. In conflict of interest cases, each case must be evaluated individually through a series of filters to determine if the conflict is waivable or a "clear" conflict and therefore non waivable.

2. It is a clear conflict of interest for a mediator to mediate a case in which his/her former law partners represented any of the parties while the partnership was in effect. This would be a non waivable conflict.

MEAC 2012 – 005

In accordance with Rule 10.520, a certified mediator conducting a mediation in U.S. Bankruptcy Court for the Middle District of Florida who discloses that "a party failed to negotiate in good faith" or "willfully failed to appear at mediation" does not violate the mediator's ethical responsibilities to mediation confidentiality as such disclosure is required by the local rules of that court. As a result, a mediator may ethically participate in a mediation program that has formal rules requiring the disclosure of certain elements of party participation.

MEAC 2012 – 006

Under certain circumstances, an attorney who conducted a joint representation of a couple in an adoption or in working with them on an estate plan, may, upon both parties' request, subsequently serve as their mediator in an unrelated legal proceeding.

MEAC 2012 – 008

It would be inappropriate and improper for a certified mediator to offer remuneration to individuals who refer students to the certified mediator's mediation certification training programs and any other mediation trainings.

To view MEAC opinions, please visit **The Mediation Training Center** or **The Florida Dispute Resolution Center**.

The Florida Bar's Grievance Mediation and Fee Arbitration Programs Need More Volunteers!

Persons eligible to be program arbitrators are:

(1) retired judges and justices of the courts of the State of Florida;
(2) persons who were members of the circuit fee arbitration committees at the time or prior to the merger of the grievance mediation and fee arbitration programs;
(3) persons who have served on a circuit grievance committee for 1 year or more; and
(4) any other person who, in the opinion of the committee, possesses the requisite education, training, or certification in alternative dispute resolution to be a program mediator.

Persons eligible to be program mediators are:

(1) Supreme Court of Florida certified mediators;
(2) retired judges and justices of the courts of the State of Florida;
(3) persons who were certified program mediators at or before the merger of the grievance mediation and fee arbitration programs; and
(4) any other person who, in the opinion of the committee, possesses the requisite education, training, or certification in alternative dispute resolution to be a program mediator.

If you or anyone you know may be interest in becoming certified as an arbitrator and/or mediator under The Florida Bar's Fee Arbitration and Mediation Programs, please review the Grievance Mediation and Fee Arbitration Manual and complete the Program Mediator/Arbitrator Application form. Return your application to The Florida Bar, Attn: Susan Austin, 651 E. Jefferson St., Tallahassee, FL 32399. For further information, you may also contact Shanell M. Schuyler, Director, ACAP/Intake, at (850)561-5647.

ADR Section
Case and Comment!

By Perry S. Itkin, Esquire, Fort Lauderdale

Don't Pay the Mediator – Get Suspended from the Practice of Law!

People of the State of Colorado v. Duggan, Case No. 11PDJ060 consolidated with 12PDJ001 [July 5, 2012]

The Presiding Disciplinary Judge suspended Attorney Duggan for eighteen months for failure to pay the mediator [COMMENT: To quote Gomer Pyle {you remember him, right?!?}, "Shame, shame, shame!"] among other transgressions such as failing to respond to requests for information from the Office of Attorney Regulation Counsel, practicing law while suspended, failing to notify clients and opposing counsel of the suspension and more. [COMMENT: The failure to pay the mediator was an independent grievance proceeding consolidated with the others.]

In September 2009, Duggan entered into a written agreement with the mediator to mediate on behalf of his client. Mediation was held on September 10, 2009, and as a result, Duggan owed the mediator $1,093.00 in fees, pursuant to their agreement.

On September 14, 2009, the mediator sent Duggan an initial invoice for the fees owed. [COMMENT: As part of your mediation practice, do you request a deposit in advance of the session? Do you have a written agreement with the lawyers to be financially responsible to pay your fee?] As you might imagine, Duggan failed to make payment. The mediator sent follow-up invoices on October 27, 2009, April 12, 2010, May 11, 2012 and June 24, 2010. In addition, on November 11, 2009, December 10, 2009 and February 11, 2010, the mediator emailed Duggan requesting payment. There's more: on February 25, 2010 the mediator spoke with Duggan and Duggan stated he would pay the fee. More than 2 years later, as of the disciplinary hearing on April 30, 2012, Duggan had not paid the mediator the $1,093.00 fee for mediation services.

The Presiding Disciplinary Judge found, in pertinent part:

> Respondent's [Duggan] failure to pay [the mediator] despite repeated written and oral requests for payment violated Colo. RPC 8.4(d), which provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

[COMMENT: **Rule 4-8.4, Misconduct, *Rules Regulating the Florida Bar*** provides in subsection (d) that *A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice. . . .* While there's much more I'd like to write on this point and I leave it now for you to ponder along with offering a suggestion that you review Florida Rule of Civil Procedure 1.720[k] Compensation of the Mediator, the case of *Bauer v. Hardy*, 651 So.2d 748 [Fla. 1st DCA 1995] and MEAC Opinions 95-001 and 2006-008. All to say, how do you protect payment of your mediator fees?]

"Me First!" "No, Me First!! More on Suspension from the Practice of Law and Mediation!

The Florida Bar v. Patrick, 67 So.3d 1009 [Fla. 2011]

In this case the attorney, Patrick, was suspended from the practice of law for one year for violating Rules 3-4.3 and 4-1.8[e] of the *Rules Regulating the Florida Bar* where Patrick induced his client to reject a settlement offer made during mediation so that the attorney could pursue full payment of their attorney's fees plus the attorney paid a portion of the fees of appellate counsel retained by the attorney to pursue appellate remedies.

Here's what happened. Patrick represented Dr. Newman, a chiropractor, on two PIP claims against Progressive Insurance Company regarding the treatment of two patients. The representation was pursuant to a contingency fee contract which provided that if Newman prevailed the insurance company would be required to pay Newman's attorney's fees to Patrick. If Newman did not prevail, Newman would not owe Patrick any attorney's fees. Conversely, if Progressive prevailed, the contract provided that Newman alone could be responsible for Progressive's attorney's fees and costs.

The treatment claim involved $24.00 for each patient. The entire benefit Newman could gain from the case was payment of $48.00 and a clear statement to Progressive the Newman would pursue claims and that the claims were valid. By the time the case reached mediation, Patrick had spent approximately sixty hours working on it or $13,500.00 in hourly attorney's fees.

The Mediation:

At mediation Progressive offered $2,500.00 to settle the claim which would have covered the $48.00 in full and, as the referee found, "Newman could not have gained or benefited any more than the offer made at mediation." However, if Newman accepted the offer, Patrick would have been compensated less than $2,500.00 for sixty hours of work. Newman rejected the settlement offer. The reason for the rejection was the primary factual dispute in this case.

The two PIP trials:

Because the offer was rejected at mediation, the two PIP claims proceeded to trial and appeal. One of the cases was tried non-jury and Newman was awarded $24.00 in damages plus an entitlement to attorney's fees and costs. In this

case Patrick was awarded attorney's fees of $120,772.50 and costs on the $24.00 claim.

In the other case, Progressive was awarded a Final Summary Judgment and attorney's fees of $9,000.00 plus $1,200 in costs. The court authorized a setoff for these claims that would have netted Patrick approximately $110,000.00 in attorney's fees. Progressive appealed and Newman filed a cross-appeal.

Patrick "retained" another lawyer to represent Newman in the appeal and pursuant to the contingent fee agreement Newman was not responsible for payment of any fees to the appellate lawyer.

The Appeals:

Progressive prevailed on both appeals, the award of attorney's fees to Patrick was set aside and Newman was now legally responsible for Progressive's fees and costs. [COMMENT: This could not be good for Newman as you'll soon see!]

Progressive, having prevailed on both appeals, sought payment from Newman for the fees that were awarded to Progressive in the approximate amount of $200,000.00 [COMMENT: Ouch!]

Patrick then retained the services of another lawyer to pursue additional appellate remedies and Patrick, not Newman, signed the fee engagement letter with this new lawyer. Patrick paid approximately $5,800.00 in fees to the new lawyer and Newman paid nothing.

Newman's grievance hearing testimony:

1. He was inclined to accept the offer since it would have given him everything he could have received in the case and eliminated any risk that he would be liable for Progressive's fees and costs.
2. Patrick raised the issue that he had spent sixty hours on the case and that this would be a low amount of compensation for him.
3. Patrick wanted to proceed with the case and indicated there was a high likelihood the claim would be upheld and then Patrick could be appropriately compensated.
4. Patrick would be responsible for all of Progressive's fees and costs if Progressive prevailed.
5. Based on Patrick's representations, Newman rejected the mediation offer.

Patrick's grievance hearing testimony:

1. He admitted he did raise the issue of the time he had invested in the case.
2. He denied advising Newman to reject the offer.
3. He denied offering to be responsible for Progressive's possible attorney's fees or costs.

The issue for the referee:

Whether Newman rejected the offer to settle and accepted responsibility of the potential liability for Progressive's attorney's fees or whether Patrick induced Newman to reject the offer so that Patrick could pursue full payment of attorney's fees and costs and Patrick assume responsibility for Progressive's attorney's fees in the perceived unlikely event that Progressive ultimately prevailed in the case.

The findings of the referee:

1. Newman rejected the offer of settlement based upon Patrick's inducements so Patrick could pursue the full claim for attorney's fees.
2. Patrick told Newman that if Progressive prevailed, Patrick would be responsible for Newman's fees and costs to Progressive.
3. Specifically rejected Patrick's assertions that he did not induce and encourage Newman to reject the offer of settlement and that he did not indicate to Newman that he, Patrick, would be responsible for Progressive's fees and costs if Progressive prevailed.
4. Newman's actions after the rejection of the settlement offer were consistent with Newman's reliance on Patrick's assurance that he would have no ultimate risk because Patrick had assumed all risk of continuing the prosecution of these small PIP clams. Absent Patrick's assurances, Newman faced significant risk in having the cases proceed after mediation and Newman's decision not to sign the second appellate lawyer's engagement letter and refusal to pay any fees were consistent with this position.
5. Patrick's explanations of the rejection offer "defy reason, logic, and an attorney's duty to zealously represent a client."
6. Patrick's claim that he merely let Newman decide without

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
Lynn Brady, Tallahassee ..... Layout

providing a recommendation falls below any reasonable level of competency. Patrick should have advised Newman to accept the offer because the offer gave Newman everything Newman could have gained in the case.

The entire motivation to reject the offer at mediation and proceed with this claim was based upon Patrick's desire to be fully compensated for the time, money, and effort he had placed in this case. In order to be able to do so, he induced and convinced Newman to reject the offer by accepting all of the additional risk. Patrick clearly placed his personal interest of being compensated above the interest of his client. Patrick wrongfully advised and induced his client to reject an offer for full compensation so that Patrick could personally benefit. Patrick wrongfully agreed to, and paid, approximately $5,800.00 towards [the second appellate attorney's fees.]

7. Patrick's conduct, which includes placing his personal interest above the interests of his client, inducing his client to reject an offer that could subject his client to significant liability and his refusal to abide by his representations to Newman significantly damaged his client.

Recommendations as to Guilt:

The referee found that Patrick violated Rules 3-4.3 [general misconduct] and 4-1.8[e] [improper financial assistance to client] and that Patrick be suspended for one year, successfully complete an ethics course and pass the ethics portion of the bar examination.

Patrick petitioned the Florida Supreme Court for review.

The Florida Supreme Court found that there was competent substantial evidence in the record to support the findings of the referee and that Patrick developed "too great a stake in the litigation."

Postscript. The referee found that Newman settled his loss for approximately one third of the $200,000.00 he was held liable to pay.

[COMMENT – It's a long one! Hindsight is sometimes easy, sometimes difficult – if you, as a member of The Florida Bar, were the mediator in this case how would you have addressed the issues between Patrick and Newman as presented during mediation?

As a member of The Florida Bar what, if any, ethical dilemmas are present in this case while you are serving as the mediator assuming you were present during the conversations between Patrick and Newman? Would your answer be different if you were not present during those conversations notwithstanding your knowledge of the $48.00 claimed in the litigation and the $2,500.00 offer to settle?

Remember Rule 10.360(a), [Confidentiality; Scope] of the *Rules for Certified and Court-Appointed Mediators*: "A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or **permitted by law** or is agreed to by all parties." [Emphasis added.]

Remember Rule 10.650 [Concurrent Standards] of the *Rules for Certified and Court-Appointed Mediators*: "Other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediation services, however, these rules prevail over any conflicting ethical standards to which a mediator may otherwise be bound."

Remember F.S. 44.405(4)(a)(6): There is no confidentiality or privilege for any mediation communication "Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct."

Remember recently revised Rule 4-8.3 of the *Rules Regulating The Florida Bar*, Reporting Professional Misconduct:

> (a) Reporting Misconduct of Other Lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.
>
> (c) Confidences Preserved. This rule does not require disclosure of information
>
> (2) gained by a lawyer while serving as a mediator or mediation participant if the information is privileged or confidential under applicable law;
>
> The Comment to this section provides in part:
>
> Generally, Florida statutes provide that information gained through a "mediation communication" is privileged and confidential, including information which discloses professional misconduct occurring outside the mediation. **However, professional misconduct occurring during the mediation is not privileged or confidential under Florida statutes.** [Emphasis added.]

Plus, take a look at Mediator Ethics Advisory Committee Opinion 2006-005 and make sure it is dated March 10, 2008. The 2008 dated opinion supersedes the same opinion number which is dated September 21, 2006. You can access the correct opinion here http://www.mediationtrainingcenter.com/images/MEAC_Opinion_2006-005_final_3-10-2008.pdf.

All to say, there's a lot to think about!]

The "M" Word

Sun Harbor Homeowners' Association, Inc. v. Bonura, 37 Fla. L. Weekly D1398 [Fla. 4th DCA 2012]

Sun Harbor is a townhouse community which has a "no dogs allowed" policy. Bonura owns a Sun Harbor Townhouse where he resides with his fiancée and her dog. The underlying litigation was instituted when Sun Harbor filed a two-count complaint against Bonura seeking declaratory relief with respect to whether the presence of his fiancée's dog on the Sun Harbor premises was a violation of the Homeowners' Declaration of Covenants. Sun Harbor also sought removal of the dog via injunction.

Bonura filed a responsive pleading and counterclaim al-

leging that Sun Harbor's actions in trying to have the dog removed were in violation of Florida's Fair Housing Act and the Federal Fair Housing Act because Bonura's fiancée suffered from a disability, thus entitling her to a reasonable accommodation for the use of an emotional therapy dog. Bonura alleged that pursuant to the Federal Act and the Florida Act, Sun Harbor was on notice that his fiancée suffered from a disability.

Sun Harbor responded to the counterclaim denying liability under both statutes and affirmatively alleged that [1] Bonura never requested an accommodation; [2] there was no nexus between the alleged disability and any assistance provided by the alleged service animal; [3] the dog was not an individually trained service animal or even a service animal; [4] Bonura produced nothing to show any accommodation was necessary; and [5] he failed to comply with the conditions precedent to pursue a claim under the Florida Act.

A bench trial resulted in a judgment in favor of Bonura.

The Facts:

Bonura became a resident of Sun Harbor after the "no dogs" policy was adopted. Bonura's fiancée moved in with him and approximately one month later. Sun Harbor sent Bonura a letter that the dog residing at his property violated the "no dogs allowed" policy. He responded denying there was a dog present. Sun Harbor sent another letter demanding the dog be removed and Bonura, through his attorney, admitted there was a dog living in his townhouse, that it belonged to his fiancée who lived with him and that it was a "registered service dog" needed to assist his fiancée with an unspecified disability and he demanded an accommodation.

Sun Harbor advised Bonura in writing that he needed to have any request for an accommodation placed on the Association's agenda for the next regularly scheduled Board Meeting at which he would have to demonstrate certain items pertinent to the alleged disability and the service animal and to notify the Association if he wanted to be placed on the agenda.

Bonura never requested to be placed on the Association's monthly meeting agenda.

Pre-suit mediation pursuant to Chapter 720, Florida Statutes, governing homeowner associations was unsuccessful. Suit was filed and a second mediation also ended in impasse. However, the parties agreed that Bonura would attend the next association meeting to attempt a resolution.

Bonura and his fiancée appeared at the next meeting and requested an accommodation based on the need of a therapy dog for the fiancée's condition.

The outcome of the trial:

At the conclusion of the bench trial, the court entered its final judgment in which it determined that the fiancée resided with Bonura and that she was a handicapped person as defined in the Federal Fair Housing Act and that she was entitled to an accommodation permitting her to possess her therapy dog.

The appeal:

Sun Harbor contends that Bonura did not prove that there was any request for accommodation and denial before suit was filed. It claims error to the extent that the trial court may have relied on any evidence from mediation to find a request for accommodation.

Sun Harbor submits that the first valid request for an accommodation was lodged at the association meeting after suit was filed and thus Bonura could not demonstrate the request or denial under the Federal Act. Among the elements required to prevail on a cause of action under the Federal Act is the fiancée's handicap, Sun Harbor's knowledge of the handicap and whether Sun Harbor of the fiancée's request for an accommodation and refused her request, before Bonura filed his counterclaim.

Bonura argued that those elements were proven through his lawyer's letters, medical testimony at trial and his fiancée's testimony recounting the parties' conversation and the presence of her medical records during the first mediation which occurred before the counterclaim was filed. He also argued that the refusal to accommodate was demonstrated by the failed mediations and subsequent initiation of legal proceedings.

Now it's Sun Harbor's turn: The Association responded that the letters contained no evidence of a need or request for an accommodation, that the medical testimony did not support the finding of a handicap as defined in the statute and with respect to the information revealed during the parties' mediation, Sun Harbor argued that the mediation privilege bars the admission of the content of the parties' conversations that took place during mediation and anything that may have been revealed at that time.

The Decision:

The Fourth District Court of Appeal concluded that the Association's request for the accommodation to be placed on the board's meeting agenda was not fulfilled and that Bonura and his fiancée only attended a board meeting months after suit was filed and after the second mediation was conducted. Further the Court concluded that the attorney's letters did not establish the existence of the fiancée's handicap, that Sun Harbor knew of the nature or extent of the handicap or that Sun Harbor refused to make a reasonable accommodation. In addition, the Court concluded that the medical testimony at trial was insufficient to establish that the fiancée suffered from a handicap as defined by the Federal Act.

Regarding the propriety of the introduction of evidence of conversations which took place during the first mediation, Bonura sought to introduce information provided at mediation to establish Sun Harbor's knowledge of his fiancée's disability. As you might expect or hope that this would occur, Sun Harbor objected to any testimony relating to events which occurred during mediation on the basis of privilege. The trial court overruled the objection on the basis of waiver in that Sun Harbor's counsel had waived any objection by questioning a witness **regarding whether the parties had**

attempted to mediate. [COMMENT: Mentioning the "M' word is waiver of confidentiality and the privilege – Seriously?!?] Sun Harbor did not delve into any communications taking place at mediation.

> *We hold that the mention of mediation taking place does not constitute a waiver of an objection to the introduction of the substantive communications involved in such mediation. As such, the trial court erred when it concluded that Sun Harbor had waived any objection and when it allowed the contents of conversations which took place during mediation into evidence. See* **§44.405(1), Fla. Stat. (2009). . . .**

Having determined that [1] the mediation evidence was inadmissible and [2] the evidence failed to prove a case of disability discrimination under the Federal Act, the Fourth District Court of Appeal reversed and remanded for entry of judgment in favor of Sun Harbor.

Gomer Pyle, Gunsmoke and Mediation

What do the television shows *Gomer Pyle* [yes, him again] and *Gunsmoke* [okay, you must remember this one – it's the longest running prime time live action drama running from 1955 to 1975 with 635 episodes – I know, *Law and Order* tied the 20 year time record in 2010 but with only 456 episodes; maybe *Law and Order* has passed the episode record by now] have to do with mediation? Well, another of Gomer's exclamatory catchphrases was "Sur-prise, sur-prise, sur-prise!" and *Gunsmoke* – wait, I've gotten that backwards – I'm thinking of the "smoking gun!"

Garvin v. Tidwell, 37 Fla. L. Weekly D2506a [Fla. 4th DCA 2012]

Appellant appealed from an order denying her motion to rescind a mediated settlement agreement because the Appellee's discovery responses failed to disclose an advertisement and other information potentially adverse to the defense [COMMENT: Hence, Gomer's catchphrase and the "smoking gun."] Since the Appellee violated her discovery obligations and the trial court abused its discretion in denying her motion to rescind and in granting Appellee's motion to enforce the settlement, the Fourth District Court of Appeal reversed and remanded the case for further proceedings consistent with the Court's opinion.

The Appellee owned a quarterhorse named "Buster" and asked Appellant, an experienced equestrian, if she would like to ride Buster. Since Appellant limited her riding to docile horses she asked Appellee several times whether Buster had ever exhibited any dangerous behavior and Appellee replied, "No." During Appellant's third ride on Buster, he reared up on his hind legs, bolted off at a fast gallop, stopped suddenly and abruptly changed directions. As a result, Appellant fell off the horse, hit a fence and fell to the ground suffering injuries to her back which required surgery.

Appellant filed suit against Appellee alleging negligence and negligent misrepresentation. Specifically, Appellant alleged that Buster had a long and well-known history of bucking and running away with riders and Appellee negligently failed to disclose Buster's dangerous propensities.

During discovery, Appellant sent interrogatories and requests to produce calculated to disclose the names of persons with any knowledge of the facts at issue and, in particular, the names of persons and documents concerning the care, maintenance and training of Buster including feeding, medical issues and riding. Appellee answered the discovery by giving names, producing some photographs and objected to interrogatories on the basis of work product privilege. Appellant never filed a motion to compel in response to any of Appellee's answers.

Appellee and her daughter testified in depositions that there were some instances of Buster being "spooked" or "bucking," mostly as a young horse, but said that was not a "characteristic." Buster's personality was described as "a gentleman" who was "lazy, if anything."

The parties went to mediation and settled in the fall of 2010. Soon thereafter, Appellant's counsel received an unmarked envelope [COMMENT: Usually these are not good to receive!] The envelope contained a magazine advertisement for a dietary supplement for horses dated "Spring 2010." This advertisement featured a page about the horse

calming successes of the supplement "Ex Stress," featuring a color picture of [COMMENT: Take a "wild" guess here!] *Buster* [COMMENT: You knew that was coming, right?!?]. The advertisement quoted Appellee as saying that she decided to give Ex Stress to Buster because he "can be a little difficult at times" and "What a difference it made in him. Ever since he's been on it, we've had nothing but great rides." [COMMENT: Who sent this unmarked envelope with the ad in it? Some things we may never know!]

Appellee had not produced this advertisement in response to Appellant's discovery requests or mentioned use of any calming supplements. Neither Appellee nor her daughter mentioned Buster's use of calming supplements or "difficult" behavior during their depositions.

When asked by Appellant's counsel, Appellee's counsel admitted that he and his client were in possession of the Ex Stress advertisement at the time of the depositions and when they responded to the interrogatories and requests for production.

Appellant moved to reopen discovery and rescind the mediation agreement and for sanctions. The trial court denied Appellant's motion to rescind the mediation agreement and for sanctions, and granted Appellee's motion to enforce the settlement.

The Fourth DCA cited several opinions for the proposition that one of the primary functions of discovery is to enable parties to enter settlement negotiations with an understanding of their chances at trial and then found that

> . . . appellee violated her discovery obligations by failing to disclose the Ex Stress advertisement and information known to her about Buster's behavior which prompted the use of Ex Stress. This information was relevant to appellant's discovery requests and to some of the questions posed during the depositions. It is likely to be an important exhibit at trial. The appellant has referred to the advertisement in her brief and oral argument as a "smoking gun."

The Fourth DCA then cited a series of opinions [COMMENT: Quite a nice review of the topic!] on the requirements to be met in order to rescind an agreement for unilateral mistake, [COMMENT: Not an easy task, by the way!] and stated

> Since our system of justice depends on truthful discovery, misconduct in discovery must be discouraged by disallowing the settlement which is the fruit of such misconduct.

[COMMENT: I'm still wondering, though – who sent that unmarked envelope containing the "smoking gun"?!?]

[COMMENT: Looking forward to a great 2013! Nevertheless, be careful out there!]

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

ADR Section Financial Summary as of October 31, 2012

Line Item Name	October 2012 Actual	YTD 12-13 Actual	Budget 12-13	Proposed 13-14 Budget
REVENUE				
Section Dues	$105	$28,560	$28,000	$29,750
Admin Fee to TFB	($53)	($14,282)	($14,000)	($14,875)
CLE Courses	$997	$4,780	$500	$5,000
Section Differential	$25	$435	$300	$350
Sponsorships	$0	$0	$750	$500
Advertising	$0	$0	$300	$300
Investment Allocation	($133)	$508	$397	$833
TOTAL REVENUE	$941	$20,001	$16,247	$21,858
EXPENSES				
Credit Card Fees	$0	$2	$225	$225
Employee Travel	$0	$126	$496	$591
Postage	$0	$3	$15	$15
Printing	$0	$3	$0	$10
Newsletter	$0	$0	$1,000	$1,000
Committee Expenses	$1,288	$1,792	$2,950	$3,250
Board of Council Meetings	$0	$0	$3,000	$3,000
Website	$0	$0	$0	$1,000
Council of Sections	$0	$0	$300	$300
Operating Reserve	$0	$0	$1,034	$1,089
Graphics & Art	$0	$172	$125	$1,500
TOTAL EXPENSES	$1,288	$2,098	$9,145	$11,980
NET OPERATIONS	($347)	$17,903	$7,102	$9,878
Fund Balance	$0	$16,088	$13,219	$20,321
TOTAL CURRENT FUND BALANCE	($347)	$33,991	$20,321	$30,199

CLE OPPORTUNITIES

The Florida Bar Continuing Legal Education Committee and the Alternative Dispute Resolution and Real Property Probate and Trust Law Sections present

Alternate Dispute Resolution Considerations For Real Property, Construction, Probate and Trust Law Practices

Save the date!

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation & Webcast:
Thursday, February 28, 2013
Fort Lauderdale

Course No. 1507R

8:30 a.m. – 8:50 a.m. **Late Registrations**

Opening Remarks and Introductions

Sticks and Stones… Who Said Words Can't Harm You? The Dos and Don'ts of Arbitration Provisions

Mediation Conflicts of Interest: Traps for the Unwary

Preparing for Mediation: Client, Counsel and Mediator

Privatizing Disputes in Probate and Trust Practice using ADR

A View from the Panel: Effective Advocacy in Arbitration

ICCA MIAMI 2014

Gladiators not Welcome; Effective Advocacy in Mediation

Dispute Boards for Claims Avoidance and Mitigation

3:50 p.m.– 4:40 p.m. **Legal Update: Recent Florida law on Arbitration and Mediation**

REGISTRATION FEES:	**WEBCAST:**
• Member of the Alternative Dispute Resolution Section, OR Real Property Probate and Trust Law Section— $245	$280
• Non-section member—$295	$330
• Full-time law college faculty or full-time law student—$168	
• Persons attending under the policy of fee waivers—$40	

CLER PROGRAM
(Max. Credit: 7.0 hours)
General: 7.0 hours Ethics: 0.5 hours

CERTIFICATION PROGRAM
(Max. Credit: 5.0 hours)
Construction Law: 1.0 hour
Civil Trial: 5.0 hours Elder Law: 1.0 hour
Wills, Trusts & Estates: 1.0 hour

To REGISTER, order audio CD or course material, go to FLORIDABAR.ORG/CLE and search by course number 1507R.

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

ADR and The Bar: Introduction to Grievance Mediation and Fee Arbitration

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Audio CD / Video DVD Available

Recorded September 23, 2011
Hilton Walt Disney World Resort • Lake Buena Vista

Course No. 1383R

LECTURE PROGRAM
Welcome
Overview of Chapter 14 – Rules
Primer on Attorney's Fees and Costs
Conducting a Florida Bar Mediation
Conducting a Florida Bar Arbitration
Professionalism

CLER PROGRAM
(Max. Credit: 4.5 hours)
General: 4.5 hours
Ethics: 3.5 hours
Professionalism: 1.0 hour

❑ **AUDIO CD (1383C)**
- $145 plus tax (section member)
- $180 plus tax (non-section member)

(includes electronic course material)

❑ **DVD (1383D)**
- $250 plus tax (section member)
- $275 plus tax (non-section member)

(includes electronic course material)

To order audio CD / DVD, go to FLORIDABAR.ORG/CLE and search by course number 1383C.

Share with a colleague!

8221001 Item Number

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.

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