THE FLORIDA BAR
ALTERNATIVE DISPUTE RESOLUTION SECTION
News & Tips

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

Chair's Message

Chester B. Chance

The Alternative Dispute Resolution Section is completing its third year since officially launching in August 2010. As we come to the end of this third year, the ADR Section has almost 1,000 members. The Section's newsletter, *ADR News & Tips*, continues to be published with articles and links of interest to its members. ADR News & Tips can be accessed on-line at the ADR Section's page of The Florida Bar's website.

The Executive Council of the ADR Section has worked tirelessly this year to make a recommendation to the Florida Bar Board of Governors for a change in the conflict rule that would allow a mediator to mediate after full disclosure of the conflict.

The ADR Section's CLE committee is planning an excellent program to be held in conjunction with the Annual Convention of The Florida Bar during June 2013, titled A.I.M. Mediation: Advocacy, Impasse & Marketing. *Please plan to join us in person or via webcast! See Page 18 in this issue*. The ADR Section co-sponsored a seminar earlier this year with the RPPTL Section. This seminar entitled Alternate Dispute Resolution Considerations for Real Property, Construction, Probate and Trust Law Practices is available for 7 hours of general credit, including .5 ethics. Click here to purchase this program on-line or as audio podcast.

The ADR Section will continue to grow and succeed under the exemplary leadership of incoming Chair, Karen Evans and Chair elect, Michael Lax. For more information on the ADR Section and opportunities to become more involved, please visit the ADR section's page of The Florida Bar's website.

Chester B. Chance
Chair, ADR Section

Contents:

How to get What You Want in Mediations: Prepare Yourself Procedurally, Substantively, and Psychologically

By David Lichter, Partner, Higer, Lichter & Givner

Preparing for mediations requires much more than evaluating legal and procedural issues. It's critical for attorneys to balance the four hats they wear: advisors, advocates for justice, negotiators, and evaluators of proposed settlements. To do this, attorneys must begin by preparing themselves procedurally, substantively and psychologically – starting with their attitudes. A great deal of time, money and angst can be saved by investing a little more energy upfront focusing on aspects that often don't receive the attention they require.

Most cases really do settle at mediation or shortly thereafter. Attorneys are infinitely more likely to achieve their desired outcomes if they and their clients enter the process ready to settle. Too often, people come into mediations thinking, "This is never going to settle." I often hear that phrase either in the morning, only to watch settlements occur that afternoon. Rather than focusing on the likelihood of an impasse, attorneys should spend time envisioning a variety of outcomes and discussing these in detail with their clients well in advance of the mediations. It's like anything else in life: If you don't have a concrete end goal in mind, you are not likely to achieve it.

In addition to understanding the legal arguments supporting and opposing every cause of action, attorneys also need to be familiar with the pleadings and procedural events in the cases, as these issues arise more frequently than you might think and attorneys often are caught looking unprepared in front of their clients. And yes, attorneys should make sure to remember who the Judges are, whether, whether the cases are bench or jury trials, and whether and when the cases are set for trial. You might be surprised how often attorneys are unaware of this basic information about their case.

Attorneys also should understand the damage calculations. He or she who controls the numbers at mediation often controls the mediation. Attorneys should make sure they understand how they and the other side reach their conclusions about damages, and the flaws in the opposition's analysis. If you don't understand their calculations, ask. If you have a damage analysis or profit and loss statement, consider sharing it with the other side (or at least the mediator) beforehand to make the mediation a more efficient process.

Next, attorneys must prepare their clients. Every client is unique and there is no cookie-cutter approach to follow, so it's critical for attorneys to take the time to understand their clients, their unique backgrounds, and what they bring to the table. For example, do they need a fuller explanation of the process? Do they have an expectation – realistic or otherwise – of what their attorneys should be doing at mediation? Do they need handholding? Just as important: what are their hot buttons, and are things so emotionally charged that both parties can't meet to explore options or at least jointly listen to opening remarks from the other side?

Attorneys must prepare their clients for the "Kabuki Dance" of mediation – the sometimes theatrical, and not infrequently elaborate song and dance required to move the other side (and their own clients) from point A to point B. Rather than relying on mediators to do everything, attorneys should keep in mind that they and their clients are equally responsible for guiding what is often a non-linear process through to resolution and should take a proactive role in doing so.

Another key psychological aspect is comfort-related. It's important for everyone in the room to feel as much at ease as possible and to trust in the integrity of the process, as people who feel comfortable are more likely to be more receptive to compromise and settle. Location may play a major role. Attorneys should work to understand whether their clients will believe that selected locations are not "neutral'; it's critical to avoid any last-minute skirmishes about where the mediation will take place. In addition, it's important to anticipate any issues related to traveling to and from the mediations, particularly when participants are arriving from out of town. Also, lawyers should assume – and should tell their clients – that mediations often take much longer than expected and lawyers and clients should develop plans for handling the "dead" time (whether it is working on discovery-related matters, reviewing strategy, or encouraging clients to bring an iPad, laptop or even good a book to read) while one or both sides wait to consider proposed settlements. They also should advise clients on how to dress for mediation, remind them not to play with their phones during opening remarks, and make sure to eat well beforehand and keep the necessary infusions of caffeine going to stay alert and engaged. It's helpful for clients if their attorneys retain an optimistic outlook –positive energy goes a long way toward achieving desired outcomes.

Preparing clients also involves discussing the possibilities of settlement, including the necessity of "giving something up" to reach agreement. Clients also should be aware in advance about the fees connected with preparing for and attending the mediation. More importantly, they should certainly have an idea of the "road ahead" both in terms of time commitments, fees and expenses if the case does not settle at mediation. Throughout the many years I've worked as a mediator, I've observed that attorneys who spend the necessary time upfront preparing themselves and their clients are much more effective in achieving their desired outcomes while at the same time helping their clients minimize much of the angst that often is associated with mediations.

The article below is a humorous take on the serious subject of Mediation. Members of the ADR Section are encouraged to submit articles for publication in the newsletter, whether tongue-in-cheek or serious. Please submit any articles to: Charles Carter, cartercdpa@bellsouth.net.

Original Manhattan Mediation

(The following is a transcript of the mediation between the Dutch- represented by Peter Minuit[1] as corporate representative of the Dutch East India Company- and the Lenape[2] Indian Tribe arising from a breach of contract action for the purchase of Manhattan Island)

Mediator: Welcome and thank you for being here. I want to remind you all, everything we say here today is subject to a confidentiality privilege, which expires in the year 2013. We will begin the mediation with a joint session.

Lenape Chief: No joints for me. Do you have a peace pipe?

Mediator: You misunderstand, Chief. At this point each side will explain itsposition in this dispute. Mr. Minuit, since you brought the action, proceed.

Minuit: We had a contract with the Lenape tribe to purchase the island we call Manhattan for 20 guilders. The Lenape failed to show-up for the closing. We are suing for specific performance, but, for today our settlement demand is to buy the island for 5 guilders.

Chief: First, the island is called Manahachtanienk[3] Island which means "island where we all became intoxicated". And by the way, thanks for the 6 cases of Heineken. And second, Minuit's demand is less money than he said he would pay before mediation! We're leaving. Somebody get our war canoe.

Mediator: Mr. Minuit, that is bad form. It is counter-productive to offer less or demand more at mediation than prior to mediation if nothing has changed in the interim.

Minuit: Well, there has been the garbage strike and the Lacrosse Team – The Mets – is in last place. Still, we are here to attempt to resolve the dispute. But, I have a galleon to catch and the outgoing tide is at 5 p.m., so we can't waste time. Are we at impasse yet?

Chief: Dutch Boy is jousting at windmills. We never agreed to sell the whole island. We only agreed to sell the 3-block area where they will film the rumble scene in West Side Story. And the number we agreed on was 200 guilders. By the way, what is a guilder?

Mediator: I am sorry Chief, I cannot give you legal advice, but, we do provide lunch from Papaya King.

Minuit: We are never paying anything close to 200 guilders! Besides, we would be crazy to accept a first offer, no one does. This is a process and we want to remain engaged. We are here to avoid legal costs and legal fees. When we arrived on the island there was one Lenape village and a law office for O'Brien, Ginsburg and Walker located at what they claim will be 5th Avenue. We hired the firm to represent us but they are pretty expensive. We will pay 30 guilders to stop the litigation cost bleed.

Chief: Minuit is negotiating in bad faith. He doesn't have full authority. He has to report to some guy in Amsterdam and it keeps taking 6 months for him to send questions by boat and get a reply. We shouldn't have agreed to excuse the President of the Dutch Company.

Mediator: By the way, I reserved 4 years for this on my calendar and there is a cancellation charge.

Chief: We are making our final offer and drawing a line in the sand-- from Times Square to Battery Park. We will sell that part of the island for 120 guilders.

Mediator: We are making progress, let's stay with this. If you don't settle you will have to go to non-binding arbitration with a panel of indentured servants and nobody understands what to do then. The glass is half full. Let's not waste the time we've spent so far.

Minuit: Oh, knock-off the mediator platitudes. We will increase our offer to 40 guilders for the whole island if the Lenape throw-in the hut where they keep their fishing equipment and bait.

Chief: O.K., we'll throw-in the Entire Bait Building, but, we want 100 guilders.

Mediator: Have either of you considered a confidentiality agreement. That way both sides avoid the possibility of this working its way into the history books.

Chief: We can't agree to a confidentiality clause because we are subject to the Iroquois Federation Sunshine Law.

Minuit: We will throw-in two tickets to the 1927 World Series.

Chief: Make that tickets to every Yankee-Cleveland series and we will sell for 80 guilders.

Mediator: We are getting very close here. Think of the time you will save. The trial date is 400 years in the future. Think of the costs you will avoid: blowing up those exhibits on buffalo hides at Kinko's is expensive. And, you avoid the uncertainty of a jury whose only qualification is they have hunting licenses. Besides, Mr. Minuit, the jury pool could

continued, next page

MANHATTAN MEDIATION *from previous page*

be bad for you as the only people in the venire are Native Americans.

Minuit: Why don't we agree to split the difference: 60 guilders.[4]

Chief: We can do that, but, only if the Dutch agree to pay the entire cost of mediation.

Minuit: We have a firm policy against that. We both agreed to mediate. Let's go Dutch treat on the mediator fees.

Chief: What, you accuse me of going back on my word? If you call me an Indian-giver we are filing a Section 1983 action and selling the story to Larry David for a future Seinfeld episode.

Mediator: Minuit, try and consider your BATNA, your best alternative to a negotiated agreement. The Dutch could end up having to purchase New Jersey from the Mohicans. Do you really want to live in Jersey?

Minuit: Alright. We agree to pay the mediator costs. Will the mediator reduce her fee?

Mediator: No. Just sign here and then I will have my scrivenor make copies of the agreement. Does anyone have an extra subway token?

Chief: Could we interest the Dutch in buying the Brooklyn Bridge?[5]

Endnotes:

1 According to tradition, purchased Manhattan on May 24, 1626.

2 Also known as "Delaware".

3 Lenape account given to Moravian Missionary John Heckewelder. Yes, that is the translation. (Wikipedia)

4 Actual value, at the time, about $1,000. (Wikipedia)

5 Minuit purchased the island from the wrong tribe. He bought Manhattan from the Canarsee who lived in Long Island and were passing through on a hunting trip – The Wappingers, an Algonquin tribe, were the owners of record. Also, 'purchase' was not understood by the Native Americans since alienable real estate was not an Indian concept. This leads to a future article on further disputes and ultimately the Marketable Record Title Act. (Wikipedia)

"Sorry Works!" Offers Chance to Break Med-Mal Gridlock in Florida

By Doug Wojcieszak, Bruce Blitman, Esq., James W. Saxton, Esq. and Maggie M. Finkelstein, Esq.*

For too long, the Florida medical, legal, and insurance communities have fought an expensive and pitched battle over medical malpractice issues. Nobody will ever really win the political brawl; patients, families, and doctors all lose. Fortunately, the national disclosure and apology movement known as "Sorry Works!" provides the opportunity to break this gridlock by reducing:

- the number of lawsuits and litigation expenses for the medical and insurance communities
- providing fair and swift justice for patients and families
- increasing patient safety (which further reduces litigation exposure and associated costs)

The philosophical basis for Sorry Works!, or enhanced post-adverse event communication, has been known to arbitrators and medical/legal researchers for well over a decade. In a nutshell, anger – not greed – is what often pushes patients and families to file medical malpractice lawsuits. Patients and families become angry when healthcare professionals display poor communication and customer service skills post-adverse event. Doctors have been asked or taught traditionally to cut off communication with patients and families when "something goes wrong" – even in instances where an adverse event was *not* caused by error – leaving patients and families feeling abandoned by the providers and institutions they entrusted with their care.

Healthcare providers usually counter that any attempts to offer sympathy, empathy, excellent service, or even an apology will probably be used against them in court. This is true when not done in the right way. When done the right way, it can help improve the circumstances. Seasoned plaintiffs' attorneys often say that a caring, empathetic provider makes for a poor target in the courtroom, whereas the physician who cut off communication with his/per patient at the time of greatest need is extremely vulnerable, even in cases where the medicine itself is defensible. This is because it is an aggravating circumstance, or a "plus" factor that impacts severity.

Sorry Works! is *not* arbitration. At the heart of Sorry Works! is a three-step process: 1) empathy & good customer service; 2) credible and quick investigation; and 3) information, and where appropriate, resolution.

Step 1: Empathy & Good Customer Service

We encourage medical providers and their institutions to initiate *immediately* after an adverse event. Empathize with the patient/family, say "sorry" about the event (say, "I'm sorry

this happened" – do not admit fault). Provide good customer service including handling simple yet important issues such as food, lodging, phone calls, etc., and promise a quick and credible investigation. Step 1 is about maintaining a relationship with a patient/family when something has gone wrong, whether the standard of care has been breached or not. Instead of abandoning patients, embrace them and draw them closer just like any good customer service program.

Step 2: **Investigation**

Investigation should be done quickly and credibly, including the involvement of outside experts when necessary. Simply put, Step 2 is all about determining if an adverse event was caused by a breach of the standard of care – an error, mistake, systems error.

Step 3: Resolution

Resolution should occur in a meeting with the patient or family and with counsel if the patient/family so chooses. If the investigation determines that an error occurred, the providers and/or institution, working in concert with their insurer(s) and defense counsel, should offer an apology, explain what happened and how it will be prevented in the future, and begin to discuss the economic and non-economic needs of the injured party. If no mistake occurred, the providers and/or institution should again empathize, share the results of the investigation, offer the records to the patient/family and their legal counsel, and answer all questions – but no settlement will be offered and any lawsuits will be contested all the way to jury verdict if necessary.

This three-step process should be used whether a case is small or big (wrongful death, crippling injury, "bad baby" case, etc.). for the three-step process to truly be successful, it must be housed in a disclosure program within the hospital, medical practice, and/or insurer(s). The program needs a well-defined policy, training for all involved parties, and a team of experts in charge to help medical providers through the three-step process.

Sorry Works! is not theory – it's actually working. Take, for example, the University of Michigan (UM) Health System, the largest healthcare business in the State of Michigan. After operating a disclosure program for over seven years, UM has cut its lawsuits by over half, reduced reserves against future losses from $72 million to less than $20 million, and cut defense litigation costs by two-thirds or $2 million annually. Other large hospital systems and risk retention groups, such as the Central Pennsylvania Physicians Risk Retention Group, across the country are starting to report similar positive results.

Sorry Works! can work even in Florida's med-mal legal environment. Fearful providers, institutions, and insurers should remember that if they truly want to limit litigation, they need to do all they can to preserve relationships with patients and families post-adverse events. The pro-active, customer service techniques of Sorry Works! can help. Sorry Works! reduces the anger felt by most patients and families and the need to pursue litigation, and in those cases that do not move forward to litigation, Sorry Works! provides a mountain of strong evidence for the defense by removing so-called plus factors, especially in cases where the medicine is defensible.

Sorry Works! was endorsed last summer by the Florida Patient Safety Corporation. Hopefully, it continues to trend throughout Florida's medical, legal, and insurance communities. To learn more, visit www.sorryworks.net.

Endnotes

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Mediator Ethics Advisory Committee Opinions

MEAC 2012-007

February 22, 2013

The Question:

In my circuit, there are a number of mediation parties being certified as indigent and therefore not obligated to pay mediation session fees. Their indigent declaration is a sworn document.

Question One: If it is determined by information either obtained or verified in mediation that the information of the sworn indigent form is false and a crime is being committed [perjury], do I have a mandatory obligation to report that information to the court?

Question Two: If it is discovered during mediation that a person either committed a crime or is going to commit a crime [perjury], is that information confidential?

Question Three: If the answer to Question Two is no, then may the mediator share the information with the court or other enforcement agencies?

Question Four: If it is determined that a mediator is required or may take some action, should that cause the mediator to terminate mediation?

Submitted by
Certified Family, Dependency, Circuit and Appellate Mediator
Southern Division

Authorities Referenced:

Rules 10.330 (a) & (b), 10.360, 10.420 (b) and 10.650, Florida Rules for Certified and Court-Appointed Mediators
Sections 401- 406, Chapter 44, Florida Statutes
MEAC Opinion 2012 – 001

Summary:

Question One: The facts in this example may constitute an exception to confidentiality under section 44.405(4)(a)(2), Florida Statutes (2012), nevertheless, there is no mandatory obligation for a mediator to report that a sworn indigent form is false or that the crime of perjury is being committed.

Question Two: Section 44.405(4)(a)(2), provides an exception to confidentiality if a mediator learns through a mediation communication information "that is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threatens violence." This section of the Florida Statute is silent with respect to past crimes.

Question Three: The mediator may disclose to an appropriate authority a "mediation communication that is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence." Id.

Question Four: If a mediator decides, during the mediation process, that s/he will report a party's mediation communications to an appropriate authority, the mediator must withdraw. Pursuant to rule 10.420(b), Florida Rules for Certified and Court-Appointed Mediators, whether termination or adjournment is appropriate depends on the circumstances of the individual case.

Opinion:

Answer to Question One: No, there is no mandatory obligation for a mediator to report the crime of perjury. Rule 10.360, Florida Rules for Certified and Court-Appointed Mediators, states, "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." There are only two mandatory reporting obligations which are exceptions to mediation confidentiality: one for child abuse, abandonment, or neglect and the second for the abuse, neglect, or exploitation of vulnerable adults. § 44.405(4)(a)(3), Florida Statutes (2012). In this instance, neither of the mandatory reporting prerequisites is present. Section 44.405(4)(a)(2), Florida Statutes (2012), while excepting from confidentiality mediation communications "used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence" does not mandate the reporting of such information.

Answer to Question Two: While a mediation communication that is "willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence" is exempt from confidentiality, [See Id.] there is no exception to confidentiality for a mediation communication that alleges past crimes, including criminal activity and threatened violence. The MEAC would direct the questioner to MEAC Opinion 2012-001.

Answer to Question Three: The mediator may disclose a "mediation communication that is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence." Id. The fact that a party reveals facts during the mediation that indicate the party is committing perjury or will commit perjury brings these communications under the exceptions in section 44.405(4)(a)(2). The MEAC notes that because this section of the statute does not address where such information could or should be reported, in exercising a mediator's option to report, a mediator should use caution in determining whether or to whom the information is reported.

Answer to Question Four: If a mediator decides, during the mediation process, to report a party's mediation communications to an appropriate body, the mediator must thereafter withdraw from the mediation to avoid the appearance of bias and/or partiality. The severity or nature of the communication will determine whether adjournment or termination is appropriate. The facts of each case must be evaluated individually.

Rule 10.330, Florida Rules for Certified and Court-

Appointed Mediators, states, (a) "A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual. (b) A mediator shall withdraw from mediation if the mediator is no longer impartial."

By reporting a mediation communication of a party to an appropriate authority, the mediator has exhibited the appearance of partiality and must withdraw from the mediation.

See also rule 10.650, Florida Rules for Certified and Court-Appointed Mediators, Concurrent Standards, which may obligate the mediator to other standards that must be considered.

_____ _____

Date Beth Greenfield-Mandler, Committee Chair

MEAC 2012-009

March 11, 2013

The Question:

Over the past several years our court program has been reporting the outcome of mediation under the following categories:

Agreement
Partial Agreement
No Agreement
Continued until a specific date or a date to be determined by the program.

It was recently brought to my attention that one of our contract mediators, at the request of an attorney who was representing one of the parties in mediation, changed the standard outcome form to read:

Full Signed Agreement
No signed Agreement
Partial Signed Agreement

My understanding is there was a verbal agreement but not enough time to prepare a written agreement before the courthouse closed. One of the parties later had a change of heart and refused to sign the written agreement. My concern is that by reporting the outcome in this manner, the mediator is providing comment therefore in violation of Rule 12.740 (f)(1)-(3) Florida Family Law Rules; basically communicating with the court that there was an agreement just not a "signed" agreement. It is understood the parties may stipulate to the agreement being electronically or stenographically recorded. If so, the mediator is to report the existence of the signed or transcribed agreement to the court without further comment. That was not the case in this mediation, there was no electronically or stenographically recorded agreement. Thus the mediator indicated on the outcome "No Signed Agreement".

Finally, Rule 1.730 (a)-(b), Florida Rules of Civil Procedure reads that a mediator may report if the agreement is "full" or "partial" and whether it was "signed" or transcribed". I believe that it was this rule that the mediator used in determining if he should file the outcome in the manner he chose. The rule applies to an agreement, however the outcome prepared reflected no agreement.

Questions:

Does the outcome form our circuit has been using to report an agreement, partial agreement, and no agreement or continued, meet the requirements of the Rules of Procedure?

Is it a violation of the rule by adding the term "signed" in the outcome if the outcome is No Agreement?

If mediation is conducted at the courthouse, and most of the program mediations are, on more than one occasion closing time arrives and the agreement has not been memorialized. Do I interpret Rule 12.740(f)(1) to read that it would it be permissible, with the consent of the parties to read aloud the agreement and record it on a digital recorder while in the presence of the parties, then transcribe the agreement and file with the court?

Submitted by
Certified County, Family & Dependency Mediator
Northern Division

Authorities Referenced:

Rule 10.420(c), Florida Rules for Certified & Court-Appointed Mediators
Rule 1.730 (a) & (b), Florida Rules of Civil Procedure
Rule 12.740 (f)(1)-(3), Florida Family Law Rules of Procedure
MEAC Opinion 2010-007
§44.404, Fla. Stat. (2012)

Summary:

Question One: Your circuit's mediation report form which has the outcomes: "agreement," "partial agreement," "no agreement," or "continuance" (adjournment), meets the requirements of the Florida Rules of Civil Procedure and the Florida Family Law Rules of Procedure.

Question Two: It is a clear violation of Florida Rule of Civil Procedure 1.730(a) to add the term "signed" to a description of an agreement in a mediation report.

Question Three: The interpretation of Florida Family Law Rule of Procedure 12.740(f)(1) on which this question is based is erroneous. Although rule 12.740(f)(1) allows the parties to agree to electronically or stenographically record an agreement, that agreement must be "made under oath or affirmed" and the transcript of such agreement must then be signed by all parties before being filed with the court.

Opinion

Answer to Question One: Only a mediation report form that has the outcomes "agreement," "partial agreement," "no agreement," or "continuance" (adjournment) meets the requirements of the Florida Rules of Civil Procedure and the Florida Family Law Rules of Procedure.

Your current form containing only the outcomes:
Agreement

continued, next page

Partial Agreement
No Agreement
Continued until a specific date or a date to be determined by the program is correct and meets the requirements under the rules.

Answer to Question Two: To add a descriptor to the word "agreement" is a clear violation of the rules. Both the Florida Rules of Civil Procedure and the Florida Family Law Rules of Procedure provide that a mediator shall report agreement or no agreement "without comment or recommendation." To add the descriptor word "signed" is comment and therefore forbidden by the rules. Further, the Committee Note to rule 1.730(a), Florida Rules of Civil Procedure, states, "the reporting requirements are intended to ensure the confidentiality provided for in section 44.102(3), Florida Statutes, and to prevent premature notification to the court." A report of "no signed agreement" implies there may be an unsigned agreement which would be a "premature notification to the court" and a violation of confidentiality.

Both the Florida Rules of Civil Procedure and the Florida Family Law Rules of Procedure require that an agreement be in writing and signed by the parties (and their counsel, if any), in order to constitute an agreement. Without meeting these requirements, there is no agreement.

Answer to Question Three: The interpretation of Florida Family Law Rule of Procedure 12.740(f)(1) on which this question is based is erroneous. Although rule 12.740(f)(1) allows the parties to agree to electronically or stenographically record an agreement, that agreement must be "made under oath or affirmed" and the transcript of such agreement must then be signed by all parties before being filed with the court.

Rule 12.740(f)(1) requires that the parties must agree if they desire to record their agreement electronically or stenographically. In this event, the agreement would be electronically or stenographically recorded then it would be read out loud. At the conclusion of the reading, the parties would both be sworn in by a court reporter or other individual authorized to take oaths, then give their consent to the agreement on the record. Upon the transcription (typed version) of the agreement, under the requirements of rule 12.740(f)(1), the parties must sign the agreement before it is filed with the court.

It is the opinion of the MEAC that "electronically or stenographically recorded" as used in both the civil and family rules are terms of art commonly understood to mean a court reporter or other person authorized to take oaths is making the recording and transcribing the document that is recorded.

Rule 10.420(c), Florida Rules for Certified and Court-Appointed Mediators, directs mediators to "cause the terms of any agreement reached to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement." As a best practice, a mediator should review the process for signing an agreement and reporting the outcome to the court with the participants so that everyone knows what to expect.

_____ _____
Date Beth Greenfield-Mandler, Committee Chair

MEAC 2012-010

March 11, 2013

The Question:

A family law mediation was held through the court mediation program. Both parties were represented by counsel. A partial agreement was reached and the mediator prepared the mediation report and agreement. The attorneys, parties and mediator signed the Mediation Report that a partial agreement was reached and set forth the remaining issues to be adjudicated by the Judge. The parties and attorneys left the courthouse as it was after 5:00 p.m. The attorneys and parties had left the mediation with the understanding that they had signed the mediation report and mediation agreement. The mediator made copies of the report and agreement and discovered that one of the parties and their attorney had not signed the Agreement. All parties and their attorneys had initialed each page of the Mediation Agreement. The mediator called the attorney that had not signed the agreement and immediately took the agreement to the attorney for signatures. The attorney told the mediator that the client had already left town but would be back the next day to sign that it was not a problem it was only an oversight. The attorney signed the original mediated agreement. The mediator checked with the attorney the next week and found out that the client would not sign the agreement now, but just wanted a few minor changes and a letter was being sent to the other attorney regarding the changes.

Fast forward, the other attorney says the parties reached an agreement at mediation; no changes will be made and wants the mediator to file the original mediation report and agreement and let the attorneys argue the issue of enforceability before the Judge.

Questions:

1. If the mediator files the Mediation Report and Agreement with all but one party's signature, is the mediator breaching confidentiality?
2. Should the mediator file the original Mediation Report and Agreement?
   a. If not, what should the mediator do with the original Mediation Report and agreement?
   b. If not, what should the mediator file with the court?

Certified County, Family and Dependency Mediator
Northern Division

Authorities Referenced:

Rule 10.360(a), and Committee Notes to rule 10.310, Florida

Rules for Certified and Court-Appointed Mediators
Rule 12.740(f)(1) & (3), Florida Family Law Rules of Procedure
§44.405(4)(a), Fla. Stat. (2012)
MEAC Opinion 2010-002

Summary:

Question One: Yes, it is a breach of confidentiality to file a mediation report and agreement when a party's signature is missing.

Question Two: No, the mediator should not file the mediation report and agreement prepared at the mediation which was signed by only one party; it is not an agreement and therefore the terms are subject to the statute and rules regarding confidential mediation communications.

If either party requests a copy of the draft agreement, the mediator should provide copies to all parties. If no request for a copy of the report or agreement is made, the mediator should follow his/her normal procedures for notes taken during a mediation in which no agreement was reached.

In the absence of signatures from all parties on a drafted agreement, the mediator should file a report of "no agreement."

Opinion

Answer to Question One: Rule 10.360(a), Florida Rules for Certified and Court-Appointed Mediators, provides that information disclosed during mediation is confidential "except where disclosure is required or permitted by law or is agreed to by all parties." Additionally, according to subsection 44.405(4)(a), Florida Statutes (2012), an exception to confidentiality is for "a signed written agreement reached during a mediation, unless the parties agree otherwise."

The document described in this question, does not fit within the definition of a "signed written agreement." Florida Family Law Rule of Procedure 12.740(f)(1) is very specific: "the agreement shall be reduced to writing, signed by the parties and their counsel, if any and if present, and submitted to the court unless the parties agree otherwise." A document purporting to be a mediation agreement signed by only one party remains a confidential mediation communication.

Until a party has signed an agreement, the principle of self determination is paramount. The Florida Family Law Rules of Procedure state that until an agreement is both written and signed by all parties, it is not an agreement. The Committee Notes to Florida Rule for Certified and Court-Appointed Mediators 10.310 state, "it is critical that the parties' right to self-determination (a free and informed choice to agree or not to agree) is preserved during all phases of mediation."

Florida Family Law Rule of Procedure 12.740(f)(3) states, "if the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court without comment or recommendation."

Answer to Question Two: For the reasons outlined in question one, the mediator should not file the original mediation agreement with the court and any mediation report should indicate "no agreement."

If either party requests a copy of the agreement as drafted during the mediation, the mediator should provide copies to all parties. If no request for a copy of the report or agreement is made, the mediator should follow his/her normal procedures for notes taken during a mediation in which no agreement was reached. See MEAC 2010-002, in which the Committee stated that a mediator may give the parties each a copy of an unsigned draft agreement if either party requests a copy.

As indicated above, the mediator should file a report indicating "no agreement" without comment or recommendation.

_____ Date

_____ Beth Greenfield-Mandler, Committee Chair

MEAC 2013-001

March 11, 2013

The Question:

As [title omitted] for the [number omitted] Judicial Circuit, I am often faced with a dilemma which has led me to request a formal MEAC Opinion for the question:

Is it a breach of confidentiality for a certified mediator or the mediation unit to report to the court that a party, appearing telephonically or by some other electronic means pursuant to a Court order, who fully participated in the mediation which resulted in an agreement, but violated the order for telephonic appearance by failing to return a mediation agreement for which said party gave verbal consent to prepare and verbally agreed to sign?

Frequently, mediations occur with at least one party appearing telephonically or by other electronic means, and often the same parties repeatedly appear by telephone. Once the mediation is complete, and an agreement is reached and drafted, the Court mediation unit, not the mediator, transmits the agreement to the party attending by telephone. The Report to the Court is held until the executed agreement is returned, at which time both the agreement and report are filed. Sometimes, the mediated settlement agreement is not returned by the party appearing by telephone, nor is any further communication received from that party, which is in violation of the Court Order permitting the telephonic attendance, requiring the party appearing by telephone to promptly execute transmitted documents and return them to the mediation unit. Is the non-action of the party appearing by telephone a "mediation communication," thus precluding the mediator/unit from reporting to the Court that the agreement was not returned? If so can the mediation unit report generally without identifying any specific case information that a party has repeatedly violated the order?

Because the mediation settlement agreement and the mediator's report is not submitted to the court until the

continued, next page

agreement is signed, the case is in a state of "limbo" while awaiting the signature of the party who appeared telephonically or by other electronic means. The court, not wanting to have such a case "fall through the cracks" has directed the unit to notify it of such outstanding cases. Is notification to the court that the mediator is "waiting for signatures" a breach of confidentiality?

A dilemma potentially is created when the mediator reports "no agreement" and the Court unknowingly allows the party to again appear telephonically or by other electronic means; thus setting the same scenario in motion.

Submitted by
Certified County and Family Mediator
Northern Division

Authorities Referenced:

Rules 10.310, 10.360(a), 10.420(a), Florida Rules for Certified and Court-Appointed Mediators
Rule 1.730(a) & (b), Florida Rules of Civil Procedure
MEAC Opinions 2004-006, 2010-007, 2010-012 and 2012-009
§44.403-405, Fla. Stat. (2012)

Summary:

Question One: Yes, it is a breach of confidentiality for a certified mediator to report to the court that a party who appears telephonically or by other electronic means pursuant to court order, failed to return the signed agreement after verbally agreeing to sign it.

Question Two: Yes, if a party appearing by phone fails to sign and return an agreement after agreeing to do so, that is a confidential "mediation communication."

Question Three: No, the mediation unit cannot report to the court that a party has repeatedly not returned signed mediation agreements after agreeing to do so.

Question Four: Yes, a notification to the court that the mediator is "waiting for signatures" for an agreement is a breach of confidentiality.

Opinion:

Answers to Questions One and Two: It is a breach of confidentiality for a certified mediator to report to the court that a party who appears telephonically or by other electronic means pursuant to court order, failed to return the signed agreement after verbally agreeing to sign it. Florida Rule for Certified and Court-Appointed Mediators 10.360(a) states, "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." The party's failure to return the signed agreement is a "mediation communication" under section 44.403(1), Florida Statutes, because it is "nonverbal conduct intended to make an assertion" by a mediation participant made during the course of a mediation. The communication does not qualify as one of the exceptions to confidentiality delineated in section 44.405(4)(a), Florida Statutes.

Florida Rule of Civil Procedure 1.730(b) requires that an agreement be "reduced to writing and signed by the parties and their counsel, if any." In instances where a party appears electronically or by telephone pursuant to court order, that requirement is not waived. To be an agreement a document must meet the requirements of the applicable rule of procedure. Mediators or mediation units may develop procedures for obtaining the necessary signatures on an agreement when one party is appearing electronically or by telephone. However, if a party fails to follow that procedure or decides not to sign the agreement after verbally agreeing to do so, that is an exercise of a party's self-determination under rule 10.310, Florida Rules for Certified & Court-Appointed Mediators.

In situations like small claims court, in which telephonic appearance by a party is more commonplace, deadlines can be imposed to ensure a mediator's report can be timely filed with the court indicating either "agreement" (all signatures obtained) or "no agreement" without further comment or recommendation. In this way, if the party appearing telephonically does not return the signed agreement by the specified time, the mediator may report either an adjournment or "no agreement." This would eliminate the need to hold the report until a signed agreement was received. See MEAC Opinions 2010-007 and 2012-009, and Florida Rule of Civil Procedure 1.730(a).

As a best practice, during the mediator's orientation session under 10.420(a), Florida Rules for Certified and Court-Appointed Mediators, a description of the procedure for the formalization of any agreement reached when one party is appearing telephonically should be included. Additionally, all parties should be made to understand the time deadlines and consequences of not signing an agreement reached verbally. If the agreement is not signed and returned by the deadline, then "no agreement" is reported to the court, thus preventing the case from staying in "limbo."

Answer to Question Three: For the reasons outlined above, it would be a breach of confidentiality for the mediation unit to report to the court that a party has repeatedly not returned signed mediation agreements after agreeing to do so. A mediation unit acts as an extension (representative) of the mediator and in that capacity is bound by the rules and statutes regulating the mediator. The unit could, however, gather statistical data on telephonic appearances and the percentage of times agreements are reached verbally and not finalized by return of a signed agreement provided any identifying data is eliminated.

Answer to Question Four: A notification to the court that the mediator is "waiting for signatures" for an agreement is a breach of confidentiality. As stated above, an agreement without all required signatures is not an agreement and to report in this manner is a "comment" and would violate rule 1.730, Florida Rules of Civil Procedure.

The MEAC would direct the questioner to MEAC Opinions 2010-012 and 2004-006 for guidance when a mediator receives a request from the court to act in a manner inconsistent with his/her ethical responsibilities.

_____ Date

_____ Beth Greenfield-Mandler, Committee Chair

ADR Section
Case and Comment!

By Perry S. Itkin, Esquire, Fort Lauderdale

ARBITRATOR'S CONTINUING DUTY TO DISCLOSE CONFLICTS! IN FLORIDA TOO!

Gray v. Chiu, et al., 2013 WL 222279 [Cal. App. 2nd Dist. 2013]

In this California case plaintiff filed a medical malpractice action and the trial court granted defendants motion to compel arbitration under the terms of the parties' "Physician-Patient Arbitration Agreement." The agreement provided for a three-member arbitration panel consisting of one arbitrator selected by the plaintiff, and one selected by the defense (party arbitrators), with a neutral arbitrator to be selected by the party arbitrators. Ginsburg, defendant Chiu's attorney, helped select the defense party arbitrator. In September, 2009 Ginsburg announced that he would retire from Peterson & Bradford, and the practice of litigation, and become an arbitrator. He started an "arbitration/mediation business known as William H. Ginsburg Mediation Services." For a while, he continued working at Peterson & Bradford. An email message from Ginsburg dated October 6, 2009, stated, "I'm doing [alternative dispute resolution] with ADR Services, Inc. . . . ." Peterson at Peterson & Bradford became lead trial counsel for the defense of this matter and Chiu retained Ginsburg as his personal counsel.

In October 2009, the party arbitrators selected the Honorable Robert T. Altman (Ret.) as the neutral arbitrator. In November 2009, ADR Services, Inc. (ADR) notified the party arbitrators that Judge Altman could not serve. The party arbitrators then selected the Honorable Alan Haber (Ret.) as the neutral arbitrator.

Judge Haber sent the parties a disclosure statement in January 2010 and a supplemental disclosure statement in April 2010. On each occasion, Judge Haber stated that he had no significant personal relationship or other professional relationship with any party, or lawyer for a party. Both disclosure statements listed the names of participants for whom a conflict check was performed, including several attorneys and firms. Ginsburg was not named on either disclosure statement.

The arbitration took place at the ADR Century City office, over nine working days from January 31, 2011, through February 10, 2011. Ginsburg attended all sessions of the arbitration, as personal counsel for Chiu, and used the defense team's private room to speak with Chiu and Peterson. Several weeks after the sessions concluded, Judge Haber issued a binding arbitration award for respondents. The award included findings that appellant failed to meet the burden of proving that respondents' care of her was "below the standard of care and practice," or that respondents caused her injuries.

Appellant filed a petition to vacate the arbitration award on multiple grounds, including the failure of Judge Haber to disclose that Ginsburg was an ADR member.

Plaintiff's counsel, Locken, and the plaintiff party arbitrator stated that prior to the arbitration, they had no knowledge that Ginsburg was a member of ADR. Locken recalled having received a business card from Ginsburg but denied that it showed any ADR affiliation. He declared that he "never received any information from any source before, or during the arbitration hearing that . . . Ginsburg was a professional associate of ADR Services, Inc."

Judge Haber also submitted a declaration. He stated that he retired from the superior court in 2004, and he was professionally acquainted with Ginsburg, who appeared in his courtroom once or twice. He had no social or other relationship with Ginsburg. After Judge Haber's retirement, he first encountered Ginsburg in the middle of 2010, and learned that Ginsburg "would be working through the ADR offices." Judge Haber occasionally saw Ginsburg at the Century City office of ADR, when they exchanged greetings, with little or no conversation. On one occasion before the arbitration, Ginsburg told Judge Haber that he would "participate with Doctor Chiu" in the arbitration. Judge Haber "made certain that [he did] not discuss any matters involving the Gray" case with Ginsburg.

During the proceedings below, the trial court stated that Ginsburg's ADR relationship "may not have been disclosed at the arbitration, but it wasn't hidden." The court also stated that "Ginsburg [was] off the case" and then he was "back in the case." On September 28, 2011, the court announced that it was denying appellant's petition to vacate the arbitration award, and cited several statutes and cases. The court did not cite Ethics Standard 8, or any other Ethics Standard. On October 31, 2011, the court entered judgment on the binding arbitration award and ordered that respondents were "entitled to have judgment entered in their favor and against [appellant] and that she should "take nothing from [them]." The judge did not issue written findings or conclusions.

Ethics Standard 8 provides in relevant part as follows: "[I]n a consumer arbitration . . . in which a [DRPO] is coordinating, administering, or providing the arbitration services, a person who is nominated or appointed as an arbitrator . . . must disclose . . .:

(1) *Relationships between the* [*DRPO*] *and party or lawyer in the arbitration.*

Any significant past, present, or currently expected

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financial or professional relationship or affiliation between the administering [DRPO] and a party or lawyer in the arbitration. Information that must be disclosed under this standard includes:

(A) A party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated is a member of the [DRPO]." (Ethics Stds., std. 8(b)(1)(A).)

An arbitrator's duty of disclosure is a continuing one. (Ethics Stds. std. 7(f))

Appellant contended that the Act and the Ethics Standards compelled the neutral arbitrator to disclose that a lawyer in the arbitration was a member of the administering dispute resolution agency. The appellate court agreed.

The parties to a medical malpractice arbitration agree upon a neutral arbitrator. Subsequent to commencing arbitration proceedings but prior to the hearing, counsel for the defendant doctor affiliates with the firm providing the arbitrator. Neither counsel nor the arbitrator discloses that relationship. Here we conclude that the California Arbitration Act (the Act) (Code Civ. Proc., § 1280 et seq.), [1] and the California Ethics Standards for Neutral Arbitrators in Contractual Arbitrations (Ethics Standards) require that the arbitrator disclose the relationship. The Act and the Ethics Standards require (1) a neutral arbitrator to disclose that a lawyer in the arbitration is a member of the administering "dispute provider resolution organization" (DRPO); and (2) section 1286.2, subdivision (a)(6) compels a trial court to vacate the arbitration award if the arbitrator fails to disclose that information.

Appellees conceded that Judge Haber failed to disclose that Ginsburg was a member of ADR, the administering DRPO. They argued that Judge Haber had no duty to disclose that information, because there was no evidence of any "significant . . . financial or professional relationship or affiliation" between the neutral arbitrator and a lawyer in the arbitration. The appellate court disagreed.

Judge Haber failed to comply with his obligation to disclose Ginsburg's membership in ADR, the administering DRPO. The California Supreme Court has termed the requirement of a neutral arbitrator "essential to ensuring the integrity of the arbitration process." [Citation] The "[Statutory] [d]uties of disclosure and disqualification are designed to ensure an arbitrator's impartiality. [Citation.]"

Onward to Florida! A refresher!

Florida Rules for Court-Appointed Arbitrators

Rule 11.040 General Standards and Qualifications

(c) Continuing Obligations. The ethical obligations begin upon acceptance of the appointment and **continue throughout all stages of the proceeding.** In addition, whenever specifically set forth in these rules, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator, and certain ethical obligations continue even after the decision in the case has been given to the parties. [Emphasis added.]

Rule 11.080 Impartiality

(a) Impartiality. An arbitrator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favoritism or bias in word, action, and appearance.

(1) Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, fear of criticism, or self interest.

(2) An arbitrator shall withdraw from an arbitration if the arbitrator believes the arbitrator can no longer be impartial.

(3) An arbitrator shall not give or accept a gift, request, favor, loan, or other item of value to or from a party, attorney, or any other person involved in and arising from any arbitration process.

(4) After accepting appointment, and for a reasonable period of time after the decision of the case, an arbitrator should avoid entering into family, business, or personal relationships which could affect impartiality or give the appearance of partiality, bias, or influence.

(b) Conflicts of Interest and Relationships; Required Disclosures; Prohibitions

(1) An arbitrator must disclose any current, past, or possible future representation or consulting relationship with any party or attorney involved in the arbitration. Disclosure must also be made of any pertinent pecuniary interest. All such disclosures shall be made as soon as practical after the arbitrator becomes aware of the interest or relationship.

(2) An arbitrator must disclose to the parties or to the court involved any close personal relationship or other

circumstance, in addition to those specifically mentioned earlier in this rule, which might reasonably raise a question as to the arbitrator's impartiality. All such disclosures shall be made as soon as practical after the arbitrator becomes aware of the interest or relationship.

(3) The burden of disclosure rests on the arbitrator. After disclosure, the arbitrator may serve if both parties so desire. If the arbitrator believes or perceives that there is a clear conflict of interest, the arbitrator should withdraw, irrespective of the expressed desire of the parties.

(4) An arbitrator shall not use the arbitration process to solicit, encourage, or otherwise incur future professional services with either party.

Committee Notes

The duty to disclose potential conflicts includes the fact of membership on a board of directors, full time or part time service as a representative or advocate, consultation work for a fee, current stock or bond ownership (other than mutual fund shares or appropriate trust arrangements), or any other pertinent form of managerial, financial or immediate family interest of the party involved. An arbitrator who is a member of a law firm is obliged to disclose any representational relationship the member firm may have had with the parties.

Arbitrators establish personal relationships with many representatives, attorneys, arbitrators, other members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances, but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

Mediation - What People Say to Avoid It and How the Court Sanctions Them [or Not]!

"I didn't show up at mediation because . . ." [select one of the following].

"My lawyer told me I didn't have to go."

"My lawyer told me I didn't have to go and the lawyer didn't go either."

"My lawyer never told me about it ahead of time and said he'd take care of it."

"Mediation would be a waste of time."

"I had a headache."

"My lawyer told me 'just phone in'."

"I couldn't find a parking space."

All of the above.

None of the above.

What do the cases say?

"MY LAWYER TOLD ME I DIDN'T HAVE TO GO."

Carbino v. Ward, 801 So. 2d 1028 (Fla. 5th DCA 2001). Please refer to the *Case and Comment* article in the Spring, 2012 issue of the ADR Section's Newsletter, *News & Tips*, Volume 1, Number 2 for the details. The court's $2,500.00 sanction imposed against the defendant for failing to appear was affirmed.

"YOU'RE OBNOXIOUS" IS NOT A DEFENSE TO AN APPELLATE COURT'S SANCTIONS!

In *Harrelson v. Hensley*, 891 So.2d 635 (Fla. 5th DCA 2005), the parties were ordered to attend appellate mediation with the potential for sanctions for failure to appear without good cause. Here's what happened.

The trial court order being appealed was an order granting attorney's fees pursuant to section 57.105 of the Florida Statutes against Harrelson and her counsel. The appellate court entered an order referring the case to mediation**.** The order stated, among other things, that "parties with full settlement authority . . . are required to attend mediation in person unless excused by the court." The order further provided that "failure of an attorney or party to appear for a duly scheduled mediation conference or otherwise comply with appellate mediation program procedures, without good cause, may result in the imposition of sanctions by this [appellate] court . . . ."

Pursuant to the order, the parties jointly selected a mediator and a mediation conference was scheduled. However, on the morning of the mediation conference, Harrelson's counsel contacted opposing counsel to advise that Harrelson would not attend the mediation conference. No motion to be excused from the mediation was filed [COMMENT: That would have been a good idea, don't you think, especially given the nature of the order on appeal!]. The mediation conference went forward with Hensley, Hensley's counsel, and Harrelson's counsel, but without Harrelson in attendance.

Subsequent to the mediation**,** Hensley filed a motion with the appellate court seeking the imposition of sanctions against Harrelson and Harrelson's counsel for willful violation of the court's referral order. In her response to the motion for sanctions, Harrelson simply contended that she "has been so disturbed by the obnoxious conduct of Hensley's counsel that she has become uncommunicative and willing only to allow counsel to continue to pursue her interests in this matter without her active involvement." Not good enough – at least not good cause! By the way, sanctions were imposed only against Harrelson and not her counsel.

The sanctions imposed:

1. All fees charged by the mediator in connection with this appellate mediation**;**

2. Hensley's reasonable attorney's fees and costs incurred in preparing for and attending the appellate mediation and filing the motion for sanctions; and,

3. Five hundred dollars ($500.00) payable to the clerk of the appellate court as a sanction for her willful failure to comply with the court's mediation order.

"MY LAWYER TOLD ME I DIDN'NT HAVE TO GO AND THE LAWYER DIDN'T GO EITHER."

David S. Nunes, P.A. v. Ferguson Enterprises, Inc., 703 So.2d 491 (Fla. 4th DCA 1997). Appellant, a lawyer, was counsel in a lawsuit in which mediation was ordered. Ap-

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pellant did not attend the mediation hearing, and he told his clients that they did not have to attend. Appellee, whose counsel did attend the mediation hearing, moved to assess attorney's fees and costs against appellant, and the court entered a judgment for attorney's fees and costs, which is the subject of this appeal. The appellate court affirmed the assessment of attorney's fees against counsel under the court's inherent power to do so.

"MY LAWYER NEVER TOLD ME ABOUT IT AHEAD OF TIME AND SAID HE WOULD TAKE CARE OF IT."

And, as you will see from this Texas case, the lawyer really did "take care of it!"

Roberts v. Rose, 37 S.W.3d 31 (Tex. App.-San Antonio [4th Dist.] 2000)

Murr originally brought suit against Pete Rose d/b/a El Segundo Ranch ("Rose") for an alleged unpaid debt, and was countersued by Rose.

On January 21, 1999, the court ordered Murr and Rose to participate in mediation. When asked on direct examination, Murr denied ever having seen the Order of Referral to Mediation. He also denied that his attorney, Roberts, ever called him to tell him the time, date, or place of the mediation, or even that he had been ordered to participate in mediation. Murr acknowledged a conversation regarding the topic of mediation between himself and Roberts saying, "[Roberts] just said it was a mediation and that he had a conflict of interests [sic], that he had another trial, and that he would take care of it." According to Murr, this conversation took place *after* March 17, 1999, the scheduled date of the mediation, and mediation "was never mentioned again."

Upon discovering a conflict with the mediation time, Roberts faxed a letter to the mediator advising him of the conflict. Roberts made no further inquiries regarding a possible time for rescheduling the mediation, or even to ensure that the mediation had been postponed. Roberts failed to advise his client fully of the mediation situation. According to testimony given by Murr on direct examination, the first time Murr became aware that he had been sanctioned by the court was *after* he sought the services of new legal counsel.

Originally, the trial court sanctioned both Murr and Roberts, ordering them to jointly pay the Plaintiff, Rose, a total of $1,250.00 for failure to appear at mediation, failure to notify the parties of their intent not to attend mediation or to confirm the possible scheduling conflict, and for Murr's failure to attend the Hearing For Sanctions. After hearing testimony during posttrial motions, however, the trial court modified the sanctions, requiring Roberts, the attorney, to pay the full $1,250.00 originally assessed against both himself and Murr. In addition, Roberts was ordered to reimburse Murr for $945.00 in attorney's fees. All sanctions against Murr were rescinded and cancelled.

The trial court determined that the attorney, Roberts, was chiefly to blame for both Murr's having missed the mediation and the following hearing. It was Roberts's failure to keep in regular contact with his client that led directly to both of these events. Murr's new counsel, Douglass, emphasized that Murr was not at fault through Murr's testimony which reflected that Murr was willing and eager to participate in his own case, if given the opportunity.

The appellate court found that Roberts' habitual failure to keep his client informed during the litigation, ultimately amounting to a missed mediation session resulting in sanctions against Murr, indicated bad faith on the part of Roberts, rather than Murr. The trial court's ruling which only assessed sanctions against Roberts was affirmed. Further the court stated that since Roberts was the principal cause of the sanctions against his client, Murr, the trial court's order that Roberts pay Murr's portion of the sanctions was appropriate.

"MEDIATION WOULD BE A WASTE OF TIME."

Physicians Protective Trust Fund v. Overman, 636 So.2d 827 (Fla. 5th DCA 1994). Petitioners, Physicians Protective Trust Fund, et al., seek the emergency issuance of a writ of certiorari to quash an order of sanctions for failure to appear at mediation in compliance with Rule 1.720 of the mediation rules and for failure to comply with orders of the lower court setting mediation. Fla. R. Civ. P. 1.720.

This is a medical malpractice lawsuit brought by plaintiffs, W. Glenn and Betty Overman, against Defendants, Marc E. Harr, M.D., Dr. Harr's professional association and Ormond Beach Memorial Hospital. Physicians Protective Trust Fund ["PPTF"] is a self-insured trust providing professional liability coverage to the Defendants.

On September 28, 1993, the lower court entered an Order Appointing Mediator in this case, and a few days later, entered an Order Referring Case to Mediation. Both orders provided in part that "if insurance is involved in the action, the insurance carrier shall send a company representative who has full and absolute authority to resolve the matter for the lesser of the policy limits or the most recent demand of the adverse party." Shortly before the scheduled mediation, it was postponed until March 30, 1994. The reason as described by respondents' counsel was:

Because the defense announced at the time of the first scheduled mediation that the -- that the insurance company representative would be coming to mediation with absolutely no money because he had no authority and so, therefore, ***mediation would be a waste of time****, to use their words. And for that reason, we postponed the mediation until March 30th, I think the date was, and we all showed up at the mediation site at that time after receiving assurances from Mr. Taraska, the defendant's lawyer, the day before and [in the lower court's presence] that the company was ready to mediate.* [Emphasis added.]

The petitioners' version was:

The reason it was postponed initially was because the information that had been produced to that time did not give

the evaluators in this case any reason to resolve the case and they determined not to do that. [COMMENT: Reframed by respondent's counsel to mean "mediation would be a waste of time."]

A mediation was held on March 30, 1994. After four hours of mediation, the mediator, in caucus with Plaintiffs, said that after he talked to the Defendants and their counsel, the representative of PPTF, told him that he had absolutely no authority to settle the case – "zero money". The mediator adjourned the mediation because the defendant had no dollar authority. Respondents filed a motion in the lower court for sanctions pursuant to Florida Rule of Civil Procedure 1.720(b). At the hearing on this motion, the lower court took testimony, part of which included the following:

THE COURT: He had no authority for nothing.

MR. TARASKA: That was the board's decision. And had they been there that day, Judge, that would have been their decision, too.

THE COURT: Well, why didn't someone say, look, this board has decided there's going to be no settlement in this case, there's no point in going, there's no point in making those people go through the travail and turmoil of preparing just as you did [COMMENT: What rule of procedure was the Court referring to without mentioning it explicitly?]

MR. TARASKA: Yes, sir.

THE COURT: -- and sending them down here and taking up a mediator's time if -- if it's just going to be flat-out no settlement, no authority, no nothing?

When asked by the lower court who evaluated and made the settlement decisions on such cases, both the adjuster and counsel identified the Board of Trustees of PPTF.

To assure full authority to settle and as a sanction for noncompliance with the rule and its orders on March 30, the lower court ordered the members of the Board of Trustees of PPTF to attend the resumption of the mediation. Upon learning of the lower court's intention to require the entire board to appear, counsel represented that the board was willing to issue a resolution that would "irrevocably" confer on a high-ranking PPTF employee "full authority to enter into complete negotiations on the case," and "total and complete authority to settle this case all the way up to and including the entire policy limits at his sole discretion, with no further consultation . . . ."

The appellate court found no departure from the essential requirements of law in the lower court's order and declined to interfere by certiorari. The appellate court also noted that respondents had expressed a willingness to accept an alternative solution if the court, in its sound discretion, elects to provide relief from its sanction.

COMMENT: The Florida Rule of Civil Procedure to which the trial judge was referring is rule 1.700(b)(4) which provides:

Fla.R.Civ.P. 1.700(b) Motion to Dispense With Mediation and Arbitration.

A party may move, within 15 days after the order of referral, to dispense with mediation or arbitration if:

(1) the issue to be considered has been previously mediated or arbitrated between the same parties pursuant to Florida law;

(2) the issue presents a question of law only;

(3) the order violates rule 1.710(b) or rule 1.800; or

(4) other good cause is shown.

"I HAD A HEADACHE"

This is not a joke!

Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762 (9th Cir. 1998).

The appellant auto parts seller filed suit against appellee tire distributor and others alleging that they had conspired to monopolize the worldwide market for vintage automobile tires among other allegations or antitrust violations. Summary judgment was entered against appellant as was an order granting appellee's motion for sanctions.

The district court imposed sanctions when Stanley Lucas, President of Lucas Automotive, failed to attend a mediation session. Lucas Automotive claims that Lucas missed the session because he was suffering from an incapacitating headache, and that his failure to appear was not intentional.

The appellate court determined that since Lucas did not

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notify the parties beforehand of his nonappearance, the district court's imposition of sanctions pursuant to Fed.R.Civ.P. 16 and the local rules for the Central District of California was appropriate.

The district court's grant of summary judgment was reversed and remanded for further proceedings. The district court's imposition of sanctions for Stanley Lucas' failure to attend the mediation session was affirmed.

"MY LAWYER TOLD ME 'JUST PHONE IN'."

O.K., E.T.

Nick v. Morgan's Foods, Inc., 270 F.3d 590 (8th Cir. 2001).

Appellant, Morgan's Foods, Inc., is represented on appeal by its chief inhouse counsel. Appellant's outside counsel is not a party to this appeal and did not represent appellant in this appeal. For reversal appellant argues that the district court abused its discretion by sanctioning appellant because (1) the sanction was not authorized under Fed. R. Civ. P. 16(f) or the inherent power doctrine; (2) fines payable to the court are not available under Fed. R. Civ. P. 16(f); and (3) the uncontroverted facts establish that appellant's outside counsel was solely responsible for violating the court order.

Nick filed suit against appellant alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964. At that time, appellant was represented by outside counsel Robert Seibel, but all business decisions were made by appellant's in-house counsel Barton Craig.

In attendance at the conference on was the court-appointed mediator; Nick; Nick's counsel; appellant's outside counsel, Seibel; and a corporate representative of appellant who had no independent knowledge of the facts of the case and had permission to settle only up to $500.00. Any settlement offer over $500.00 had to be relayed by telephone to Craig, who chose not to attend the mediation conference on the advice of outside counsel Seibel. During the mediation conference, Nick twice made offers of settlement that were rejected without a counteroffer by appellant. The mediation conference ended shortly thereafter without a settlement having been reached.

The district court issued an order directing appellant to show cause why it should not be sanctioned. In response, appellant asserted that the Referral Order was only a set of nonbinding guidelines and admitted that it decided not to comply with the guidelines, including not preparing a summary for the mediator, because doing otherwise would be a waste of time and money. Nick moved to sanction appellant and requested attorneys' fees and costs arising out of her participation in the mediation.

[COMMENT: Since when is a court order a set of nonbinding guidelines! Seriously?!? Is this even credible?]

The district court sanctioned appellant and appellant's outside counsel. These sanctions were calculated to cover the cost of the mediation conference fees and Nick's attorneys' fees. The court also ordered appellant to pay a fine to the Clerk of the District Court as a sanction. The district court ordered appellant and appellant's outside counsel each to pay for the costs she incurred attending the mediation conference.

Appellant filed a Motion for Reconsideration and Vacation of the Court's Order Granting Plaintiff's Motion for Sanctions. The district court denied the motion for reconsideration and imposed additional sanctions against appellant and appellant's counsel for vexatiously increasing the costs of litigation by filing a frivolous motion. This appeal followed. Appellant appealed the sanctions levied against it that are to be paid to the Clerk of the District Court. Interestingly, the Appellant did not contest the sanctions levied against it that were to be paid to Nick and her counsel.

Appellant urged that the "uncontroverted facts on the record conclusively establish that all of the conduct which irritated the Trial Court was the exclusive product of Appellant's trial lawyer and unknown to Appellant." Appellant argued that the affidavits of Craig and Seibel established that it had no knowledge that its conduct was sanctionable and that its outside counsel was solely responsible for the noncompliance. Appellant claimed that Seibel did not pass along to Craig the necessity for a mediation memorandum, and that, although Seibel advised Craig of the district court's Referral Order and the relevant local rules, Craig read neither and relied instead on the advice of Seibel. Appellant further claims that Seibel advised Craig that his attendance at the mediation conference was not necessary. For this reason, appellant argued that the district court abused its discretion in imposing the sanctions against it and not solely against its outside counsel.

The appellate court adopted the following reasoning of the district court:

to require other parties to attend a mediation where the individual who is participating as the corporate representative is so limited, and cannot be affected by the conversation [during the mediation], is to in effect negate that ability of that mediation to in any way function, much less be successful.... The mediation has very limited effect if the only opportunity for the decision-maker to participate in a mediation is the summary provided by counsel over the telephone, rather than participation in the mediation itself.

"I COULDN'T FIND A PARKING SPACE."

Is this guy serious?

Bulkmatic Transport Company, Inc. v. Pappas, 2002 U.S. Dist. LEXIS 8360 (S. D. NY 2002).

The plaintiff, Bulkmatic, brought an action to recover damages from the defendants for breach of fiduciary duty, fraud, violation of the Racketeer Influenced and Corrupt Organizations Act and violation of the New York Debtor and Creditor Law. The defendants filed a Third Party Complaint against several parties seeking indemnity and contribution in the event the defendants were found liable to Bulkmatic for the alleged misconduct.

On October 30, 2001, all parties were directed to attend a mediation conference in an effort to resolve the action. By agreement of the parties the conference was rescheduled for January 15, 2002 at 10:00 a.m. In spite of clear notice to that effect, one of the defendants and its counsel, Scott Y. Stuart, failed to attend. The plaintiff filed its motion for sanctions pursuant to Rule 16(f) of the Federal Rules of Civil Procedure, claiming that Mr. Stuart and his client should bear $2,634.60 in costs and legal fees incurred by Bulkmatic in attending the aborted conference. The court ordered *the attorney only*, Mr. Stuart, to pay the plaintiff monetary sanctions in the amount of $1,000.00.

The facts are not in dispute. A mediation conference was set for January 15, 2002 at 10:00 a.m. All parties were directed to send counsel and a client representative with settlement authority. On the day the order was issued, Bulkmatic's attorneys sent a confirmation fax to all parties, including Mr. Stuart, as did the mediation coordinator.

On the morning of January 15, counsel for Bulkmatic, along with the Vice President of Finance for Bulkmatic, appeared at the mediation conference as scheduled, having traveled from Chicago. Also in attendance were the appointed mediator, and counsel for the defendants. The parties then waited for Mr. Stuart and his client representative to arrive.

At some point before 12:15 p.m., Mr. Stuart was reached by telephone. He assured the attendees that he was on his way but cautioned that he would be late. At approximately 12:15, while he was looking for a parking spot, Mr. Stuart was contacted by the mediation office and told that the mediator had released the parties.

Later that day, Mr. Stuart was questioned about his truancy and reportedly stated that he was "looking for a parking space," and that he was "not responsible for traffic conditions." Mr. Stuart admitted to his tardiness, stating that he arrived in Manhattan at about 12:15, but contends that he was "delayed in getting to the mediation while awaiting entrance into an area parking lot."

The magistrate judge felt that the larger portion of Mr. Stuart's delay was due to the fact that he "was headed directly to the Federal Court in Foley Square [after an early morning court appearance]," which implies that he had scheduled an appearance at another court on the same day he was to be at a mediation conference in this Court by 10:00 a.m.

The judge determined that it was clear that Mr. Stuart failed to comply with the Court's order directing the parties to appear for mediation on January 15, 2002 at 10:00 a.m. and as a result, the plaintiff incurred real and substantial costs. Mr. Stuart gave "no reasonable explanation for his absence. . . ." This is so notwithstanding that Mr. Stuart implied that the mediation office was not reasonable in releasing the parties because he was "all of ten to fifteen minutes away from appearing at the mediation.". The judge found that "[a]side from the fact that this assertion implies that he was only fifteen minutes late when actually he was two hours and fifteen minutes late, the mediator was welljustified in deciding not to credit Mr. Stuart's prediction."

"HERE'S WHY I DIDN'T ANSWER THE APPELLATE COURT'S MEDIATION QUESTIONNAIRE – DON'T SANCTION ME!"

THE FIRST EVER APPELLATE COURT MEDIATION QUIZ: Which of the following responses by an attorney to an order to show cause as to why he should not be sanctioned for failing to timely file the appellate court's mediation questionnaire rose to the level of excusable neglect?

1. I relocated my office and . . . .
2. I was negotiating to form a new law firm and . . . .
3. Staff transitions and . . . .
4. Three hurricanes were headed my way and . . . .
5. My client had returned to Poland for treatment and . . . .
6. All of the above.
7. None of the above.

The appellate court in *Matajek v. Skowronska*, 893 So.2d 700 [Fla. 5th DCA 2005], concluded that numbers one through five were excuses only, not good cause for the unreasonable delay of over two months in filing the mediation questionnaire.

The court in imposing sanctions of $250.00 determined that (1) an attorney has an obligation to accomplish any relocation in a way as not to infringe on his ability to fulfill his required duties to the court and his clients, (2) negotiations to form a law firm must be done in such a way as not to infringe on his legal obligations to his clients and the court, (3) counsel is under a continuing obligation to perform his duties to the court and his clients regardless of staff changes, (4) the hurricanes provided some good cause for delay but not for the length of the delay in this case, and (5) since the questionnaire called for a description of the case, that could have been provided by counsel alone without input from the client.

COMMENT: Simply put the answers, other than number seven, were not good enough! Court orders and procedures are not just invitations or merely suggestions to do things – they are court *orders* and *rules* to be followed.

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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

• Live Webcast

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Webcast Presentation: Wednesday, June 26, 2013 • 2:00 p.m. to 5:00 p.m.
Annual Florida Bar Convention • Boca Raton Resort & Club • Boca Raton, FL

Course No. 1597R

To register for the June 26, 2013 presentation, you must use the Annual Convention registration form in the May 1 Bar Journal or at www.floridabar.org.

Note: Only use this brochure to register for the live webcast / virtual seminar.

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

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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.

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.

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

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