THE FLORIDA BAR

ALTERNATIVE DISPUTE RESOLUTION SECTION

News & Tips

INAUGURAL ISSUE!

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Jake Schickel, Chair • Chester Chance, Chair-elect

Chair's Message:

Off to a Great Start!

Jake Schickel

I am happy to report that 711 members of The Florida Bar have joined the Alternative Dispute Resolution Section. This is the most successful section start in Florida Bar history.

We are happy to say that you are reading our first section newsletter! We would appreciate everyone contributing articles, columns, cartoons or stories about their ADR experiences.

Now is the time to iron out the bumps and growing pains that the section has had and move forward. We have sponsored two CLE seminars on arbitration over this past year. We will be planning more seminars and will advise soon.

The Executive Council met by phone and decided to offer comments to the Florida Supreme Court about the Residential Mortgage Foreclosure Program (See page 7).

Also note that new rules went into effect dealing with mediations on November 3, 2011 and we will be more active in the future in commenting upon any rules that might be proposed regarding ADR.

Your Executive Council has a monthly conference call. We have reached out to the Council of Sections and invited their ADR committees to participate and work with us in the future.

Our next steps are to launch a website and potentially offer law school student awards to the ADR classes. We may have a competition for law students doing ADR, like moot court.

We are up and running and hopefully will be providing you value this year and into the years to come. If you have any suggestions or comments, please email Lani Fraser at lfraser@flabar.org or one of your Executive Council members.

Jake Schickel, Chair, ADR Section

INSIDE:

The Manifest Disregard of the Law Rule in Florida– Going, Going ... But Not Gone

By Donald J. Ryce

The doctrine of "manifest disregard of the law" has always been a narrow ground for setting aside an arbitration award in Florida. The proof has required not only that the arbitrator applied the wrong legal standard, but that he or she did so deliberately; *i.e.*, that the arbitrator was aware that there was a settled principle of law that controlled the dispute but intentionally chose to ignore it. See *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1223 (11th Cir.2000); *Wachovia Securities, LLC v. Vogel*, 918 So.2d 1004, 1007-1008 (Fla. 2d DCA 2006) (applying federal law under the Federal Arbitration Act).

Then *Hall Street*[1] came along. While *Hall Street* involved an effort to expand the grounds for review for challenging an adverse arbitration award, in the course of holding that such an attempt was impermissible under the FAA, the Supreme Court made several comments seeming to imply that the only grounds for vacating an arbitration award were those specifically enumerated in Section 10 of the FAA itself. Following *Hall Street*, several federal circuit courts have addressed that issue. Some held that "manifest disregard" survived *Hall Street* because that rule was shorthand for certain grounds set forth in Section 10; others concluded that "manifest disregard" was no longer a viable legal doctrine. In 2010, the Eleventh Circuit considered the issue and sided with the circuits holding that *Hall Street* precluded further application of the "manifest disregard of the law" rule*. Frazier v. Citifinancial Corporation, LLC*, 604 F. 3d 1313 (11thCir.2010).

Although *Hall Street* construed only the FAA and left open the possibility that a state arbitration code could still permit application of the "manifest disregard" rule, Florida's Arbitration Code is very limited in supplying grounds for vacating an arbitration award. Not only does it list grounds for vacatur which are similar to those of the FAA, but it contains the specific admonition not found in the FAA that "the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." Fla. Stat. § 682.13(1). Thus, the Florida Supreme Court has held that "To allow judicial review of the merits of an arbitration award for any reasons other than those stated in section 682.13(1) would undermine the purpose of settling disputes through arbitration." *Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327, 1329 (Fla. 1989).

Accordingly, it appears that the "manifest disregard of the law" doctrine is dead in Florida, whether raised under the FAA or under the Florida Arbitration Code, unless the U.S. Supreme Court eventually holds otherwise, right?

Not so fast.

Florida courts have concluded that they have jurisdiction to entertain motions to vacate pursuant to the FAA as well as motions to confirm. *A.G. Edwards & Sons, Inc. v. Petrucci*, 525 So.2d 918, 920-21 (Fla. 2d DCA 1988). In doing so, they apply federal law, because the Federal Arbitration Act supersedes Florida law where interstate commerce is involved. *United Servs. Gen. Life Co. v. Bauer,* 568 So.2d 1321, 1322 (Fla. 2d DCA 1990). However, Florida courts will not necessarily adopt the *Eleventh Circuit* interpretation of federal law. *Mora v. Abraham Chevrolet-Tampa, Inc.*, 913 So.2d 32, 35 (Fla. 2005) ("in the realm of federal statutory law, decisions of federal circuit courts are persuasive, but we are bound only by decisions of the United States Supreme Court"); *Raymond James Fin. Servs., Inc. v. Saldukas*, 851 So.2d 853, 856 (Fla. 2d DCA 2003), approved, 896 So.2d 707 (Fla.2005) ("this court is not bound by decisions of the Eleventh Circuit on issues of federal law"). As *Frazier v. Citifinancial Corporation, LLC, supra,* makes clear, there is a split in the circuits regarding the continued existence of the "manifest disregard" doctrine after *Hall Street* which has not yet been resolved by the U.S. Supreme Court. Moreover, there are no Florida appellate court decisions as of yet that have ruled on the correct interpretation of *Hall Street* with respect to this issue.

Presumably an aggrieved party will eventually move to vacate an arbitration award covered by the FAA in a Florida court instead of a federal court in order to avoid the Eleventh Circuit rule on "manifest disregard." It will be interesting to see if Florida courts will adopt the Eleventh Circuit approach to "manifest disregard" – by no means a sure thing – or whether they will adopt a different approach. Until then, while "manifest disregard of the law" may be on life support in Florida, it is not yet entirely dead.[2]

Endnotes:

1 *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).

2 As an arbitrator, the author must confess to having mixed feelings about the Eleventh Circuit disallowance of non-statutory grounds for vacatur like "manifest disregard of the law." On the one hand, no arbitrator is fond of the threat of having one of his or her awards set aside. One the other hand, it is difficult to keep a straight face while assuring parties that arbitral finality is so important that an award should not be overturned even when the arbitrator has blatantly and intentionally ignored settled law to a party's prejudice.

If We Knew Then What We Know Now:

Twelve Mediation Lessons We've Learned The Hard Way

By Carline J. Emanuel, A. Michelle Jernigan, John A. Henneberger, David J. Kaufman and Bruce A. Blitman

In 1990, Kenny Rogers and Gladys Knight (without her cousins, The Pips) collaborated to sing a beautiful ballad titled "If I Knew Then What I Know Now." As often happens in love songs-and especially in Country love songs-their relationship has soured, and the couple is left to ponder what went wrong. They wistfully sing of their doomed love, and what they would do differently if they could do it all again (which sounds like Barbra Streisand's classic rendition of Marvin Hamlisch's "The Way We Were," doesn't it?). In the song, the duo laments:

"*... And if I knew then what I know now*
I'd have found the way
To make things work out somehow
I'd have held you tight
I'd have treated you right
If I knew then what I know now...

Most of us have experienced regrets like this at some point in our lives. We wish we could have a "do over," an opportunity to take back something that we said or did, and to replay that crucial moment with the charm, sophistication and class demonstrated by our favorite actors in our favorite movies. If only...

Almost twenty years after this song rose to the top of the Country charts, the authors served as panelists at the Florida Dispute Resolution Center (DRC) 17th Annual Conference for Mediators and Arbitrators in Orlando, Florida (August 29, 2008).

Collectively, our panel of veteran mediators had been mediating for close to one hundred years and we had mediated tens of thousands of cases. Collectively, we had also made our fair share of "mediator mistakes" during this vast amount of time. Unlike most presentations, in which esteemed speakers regale their audience with tales of their brilliance and mastery, our brave ensemble shared some of our darkest professional moments in which their mistakes and errors in judgment resulted in the breakdown of negotiations, impasses, anger and frustration. None of us is perfect, as our panelists generously shared during this presentation. Like Kenny and Gladys, and Barbra, too, we all made professional mistakes which we wish could have been rectified. While we cannot go back in time to correct these errors, we sincerely hope that our readers will benefit from our painful lessons.

Hopefully, you will learn from our mediation blunders and egregious errors and not repeat them in your practice. Here are some of the lessons we have learned-the hard way. Please pay close attention:

Lesson One

1 During a private session with one of the parties and counsel, the mediator tried to impress upon a party that a jury trial is an extremely uncertain process in which the outcome is left in the hands of a jury. Calling upon "brilliant wit," the mediator "astutely" told the party that a jury could be defined as "a group of six strangers off the streets of our community who are unable to come up with a good excuse for getting out of jury duty." However, when the mediator made this "witty" remark, the mediator did not know that the party had recently served as the foreperson on a jury and had taken this important civic responsibility very seriously. The party very quickly shared these sentiments with the mediator. Oops! Open mouth and insert foot.

LESSON LEARNED: Only use appropriate humor during a mediation conference. As any good comedian will tell you, you better know your audience before you attempt to be funny.

Lesson Two

2 One Friday afternoon, the mediator was working in the office when the phone rang. The attorney on the other end of the phone politely introduced himself and asked where the mediator was. When the mediator replied, the attorney calmly mentioned that the parties and their counsel–AND THE MEDIATOR–were scheduled to mediate at the attorney's office in a neighboring county-more than 15 MINUTES AGO! Although mediation notices were timely sent to counsel of record, somehow the mediator failed to put this matter on the mediator's personal calendar. The parties and their attorneys graciously agreed to wait for the mediator, who breathlessly arrived one hour late for the session. The mediator conducted the mediation conference free of charge. An expensive lesson, but an important one.

LESSON LEARNED: Calendar all of your appointments immediately. Also, establish a reliable backup system to calendar all appointments. Please don't let this happen to you - ever!

Lesson Three

3 During a mediation conference involving a dispute between a landlord and a tenant, the parties agreed to allow an individual who was training to become a mediator to observe their mediation process. During the mediation. the mediator assigned to the case left the conference room to meet privately with another party. When

the mediator left the room, the other party remained in the main conference room along with the observer. Upon the mediator's return to the main conference room, this other party reported that the observer had helped her to resolve the issue in the absence of the mediator.

LESSON LEARNED: Mediators are encouraged to help newly trained and aspiring mediators to learn about the mediation process and fulfill their mediation certification requirements. However, the mediator is ''the captain of the ship" and is responsible for everything that takes place during the mediation conference. A mediator should never leave an unsupervised observer alone in a room with a party.

Lesson Four

Before the start of a mediation, an attorney pulled the mediator aside and suggested that the mediator dispense with the joint session at the beginning of the mediation conference. The lawyer expressed concern that the parties were so hostile towards each other that a joint session would be too volatile and potentially explosive. The mediator conferred with the other attorney who agreed with this assessment. As a result, the mediator brought the parties and their counsel together for a very brief introduction by the mediator, and then moved quickly into private sessions with the participants. Hours later, the parties and attorneys continued to utilize the mediator to transmit information back and forth.

LESSON LEARNED: The failure to engage in a joint session with the parties and their counsel can unnecessarily delay the process and deprive the parties of the opportunity to hear "directly from the horse's mouth" the other party's perspective on the case. Although there may be instances in which it is better to dispense with a joint session, most mediations should contain at least one joint session. Even if the mediator decides it is better to begin in private sessions there will usually be an appropriate time for the parties to convene in a joint session with their counsel and the mediator.

Lesson Five

One day,the mediator had an extremely busy schedule and was mediating with multiple plaintiffs without a preordained plan. The mediator met with each plaintiff separately and this resulted in other plaintiffs waiting for long periods of time .for their turn to mediate. This logistical snafu made it almost impossible to keep the plaintiffs from sharing confidential information with each other and resulted in a number of plaintiffs waiting for hours to mediate their claims.

LESSON LEARNED: When you are going to mediate with multiple plaintiffs, be sure to hold a telephone conference call with the plaintiffs' attorney and the defense attorney a few weeks before the mediation conference to establish: (1) whether the plaintiffs will participate in one joint session or in separate joint sessions; (2) if there are going to be separate joint sessions for each plaintiff, then determine the time to allocate for each and the appropriate sequence; (3) consider how to keep each plaintiff from discussing confidential information with other plaintiffs; and (4) consider the use of a mediation process which will efficiently manage the multiple claims.

Lesson Six

There is a real temptation for mediators to jump into the fray, take the reins of the dispute and ride the horse until it collapses from exhaustion. Mediators tend to get involved in the dispute and stay with it until it is resolved, even if it takes all night long. The mediator mediated a case that started at 11:00 AM on a Sunday and ended at 5:00 AM on the following Monday morning- some 18 hours later. There were several times when the attorneys wanted to stop working, but the parties wanted to continue on. The parties had food and drink to keep them going, but on more than one occasion the mediator questioned the parties and their attorneys about whether they should continue the mediation to another day. They were facing a critical deadline and assured the mediator that they should proceed. Although the circumstances were not ideal, the parties and their counsel reached an agreement.

LESSON LEARNED: While it is admirable for a mediator to persevere with a dispute until it is resolved, sometimes all involved become so fatigued that their decision-making is impaired and their ability to draft and understand a mediated settlement agreement is compromised. Make sure all participants-including the mediator-are still physically, emotionally and mentally capable of making good decisions in the wee hours of the morning. When in doubt, it may be a good idea to stop and allow everyone to rest. Parties who have engaged in "marathon" mediation sessions may be able to persuade a trial court at a later date that they were so exhausted they could no longer meaningfully participate in the mediation process and establish grounds for the court to set aside a mediated settlement agreement.

Lesson Seven

The mediator got so "caught up" in discussing legal issues with the attorneys that the mediator failed to focus much attention on the parties. This is especially true in appellate mediation, where most of the time and energy centers on the legal issues.

LESSON LEARNED: remember that the mediation pro-

cess is designed for the parties. They are the ultimate decision makers. Mediation is a unique opportunity for them to participate in a joint discussion of their case in what should be a safe environment. It is critical for the mediator to: (1) encourage participation of the parties in the joint session; (2) build a rapport and maintain a dialogue with the parties in the private sessions; (3) involve the parties in the negotiation strategy; and (4) ensure that the agreement is that of the parties.

Lesson Eight

The mediator was involved in a federal case. After many hours of back and forth discussions with two corporate owners, the parties "agreed" to allow a neutral accountant to examine the books and assets of the corporation and to render a fair division which would be binding. Due to the late hour of the day, the parties' counsel agreed to draft a settlement agreement of the terms the next day. Based on this assurance, the mediator reported to the federal court that the case had been settled. You can all imagine what happened–or did not happen–next.

LESSON LEARNED: The lawyers failed to draft the settlement terms as agreed and returned to the court. The mediator received a polite letter from the federal judge reminding the mediator that the mediator should have reported that the case awaited further discussion rather than settlement. It is important that mediators be extremely accurate when they file their mediator reports with the courts.

Lesson Nine

A very wealthy and famous heiress was suing a small family group of siblings claiming the group received the proceeds of a robbery carried out by the father, now languishing in jail. At the beginning of the mediation conference, counsel for the heiress told the mediator that his client would appear by telephone.

LESSON LEARNED: The mediator failed to realize that the mediator is without authority to excuse the personal appearance of a party. While none of the unrepresented siblings objected, this was, nonetheless, an error on the part of the mediator. Mediators should address the issue of the parties' appearances at mediation with their counsel well in advance of the scheduled mediation conference so that there is ample time for the participants to resolve any potential dispute themselves or have the court decide for them. Failure to address this issue before the mediation can sometimes result in a party's refusal to commence with the scheduled mediation conference and result in a waste of considerable time and resources for all participants.

Lesson Ten

Unrepresented parties told the mediator that they had settled their case in the waiting room before the start of their scheduled mediation conference. They told the mediator all that had to be done was the writing up of their mediated settlement agreement. Based on these representations, the mediator did not begin the mediation session with the mediator's introductory remarks, or opening statements by the parties. Rather, the mediator began writing up the settlement agreement. As the mediator was writing the agreement, the parties began arguing with each other and there was no agreement. The mediator then went Into "mediation mode," but forgot that the mediator's opening remarks had been skipped. Since the mediator failed to explain to the parties elements such as (1) what mediation was; (2) the mediator's role in the process; (3) the confidentiality of the process; and (4) the use of private sessions, they lacked a fundamental understanding of the entire process.

LESSON LEARNED: Do not skip the mediator's opening statement and introduction, even if the parties tell you they know all about mediation or have already reached an agreement. Do it anyway.

Lesson Eleven

During a mediation conference, the mediator chose to meet privately with one of the parties in a public hallway at the courthouse. Usually, the mediator would meet privately with parties inside the assigned mediation room, and ask the other party to wait in the public hallway until the completion of the private session. The party that remained in the assigned mediation room had a friend waiting in the public hallway. This friend overheard the private session between the mediator and the other party and reported back to the party on what was supposed to be a private conversation with the mediator.

LESSON LEARNED: Mediators should never engage in private sessions in public places. Walls have ears and eyes, and you never know which spies might be lurking nearby. Mediators must do everything they can to preserve the privacy of their private sessions.

Lesson Twelve

The mediator had a case involving six female teenagers who were charged with fighting. These parties were friends and siblings. The mediator decided to meet with all of the defendants and their parents at the same time. A simple fight between neighborhood girls turned out to be a family feud in which one side claimed its members were the victims and the other side's members were involved in burning down their home (or had information

pertaining to this incident). Emotions flared. Loud arguments ensued, and security officers were brought to the scene. The mediation continued, with two officers present, but the session was prolonged because of the high emotions involved.

LESSON LEARNED: In mediation, emotions always play a role. However, when a victim is in attendance these emotions can escalate. The victim and the defendant can become irate and upset. Whenever two or more sides of a story are being given, and everyone is present, there is bound to be some disagreement. There are instances where a mediation session can quickly transform from a peaceful discussion between the parties into a shouting match-or much worse. Once the mediator senses the escalating tension and emotions between the opposing parties, the mediator should quickly separate the parties and meet with them privately. Much like a referee in a boxing match, the mediator must be careful to protect the parties and their negotiation at all times. In boxing, the referee has the authority to stop the bout to protect a fighter from further injury. Similarly, as in boxing, it is far better for the mediator to separate the parties "one punch too soon, rather than one punch too late." When in doubt, separate the parties.

The authors sincerely hope that you have found these mediation lessons to be practical, educational, informative and instructive. We hope you will benefit from our mediator mistakes and misjudgments and not repeat these errors when you are entrusted with the enormous responsibility of serving as a mediator. We wish you much Good Health, Good Luck and, of course, Good Mediation!

5 Keys to a Successful Family Law Mediation

By Gale H. Moore

1. Preparation

Set an appointment to consult with your attorney in advance of mediation to discuss options and the general process. On the day of mediation come prepared with a current documents. Particularly important are:

- Financial Affidavit;
- Verification of income (tax returns and pay-stubs);
- Verification of expenses (mortgage and credit card statements);
- Daycare receipts including summer care;
- Health insurance costs breakdown (for you alone vs. for you and your spouse vs. you and your children);
- Current school schedules;
- Planned vacation dates;
- Car titles; and,
- Real property deeds.

2. Flexibility

There are 2 ways to approach mediation.

Will you be open minded and willing to listen to ideas "outside the box?"

Or are you entrenched in an immovable position? Clearly defining for yourself minimum expectations is important but of even greater importance is the ability to adapt and be open and flexible to new ideas. Often times these new ideas are not what the ultimate solution is but they can very important to narrowing down areas of disagreement and in ultimately forming a plan that will work for both parties. Remember that what you think may be most important to the other side may not actually be most important.

3. Creativity

Brainstorming ideas is critically important. One of the most wonderful advantages of mediation, as opposed to litigation, is the ability to agree to things the Court could not otherwise order. This allows parties to take ownership of their lives and empowers them to formulate specific solutions to their dispute. During the mediation process most, if not all of the time, you and your attorney will be in a separate room from your spouse and his or her attorney. These "separate caucuses" as well as the confidentiality you have during mediation ensures a free flow of ideas.

4. Patience

It is understandably difficult for many parties to believe that their longstanding disagreement can be solved in a matter of hours. But here is where patience in the process is important. Allowing each side to express their full thoughts and reasoning is critical. That opportunity often is the impetus needed for conclusion.

5. Motivation & Insight

Remember that if a solution is reached, you can move forward with life. The costs you incur during the litigation process is measured not only by attorney's fees and Court costs but the "costs" that litigation takes on your life like weakening efficiency at work, worsening health conditions and often weakened or strained relationships with children or friends as a result of the stress you are under. Keeping the goal of resolution in mind is paramount to getting to the end.

Florida's New Appellate Mediation Certification: "Mediating the Previously Decided Case"

By Gary Canner

On January 10, 2011, Chief Justice Canady issued AOSC-11, Procedures Governing the Certification of Mediators. This new AO incorporates procedures related to the certification of appellate mediators. Further, the Florida Supreme Court promulgated new appellate Rule 9.730, governing the appointment of appellate mediators.

Will appellate mediation work in this new state-wide certification format? What is the experience of other appellate jurisdictions? What are the requirements to be a Florida Certified appellate mediator?

AOSC-11 says that "an applicant for initial certification as a mediator of appellate matters must be a Florida Supreme Court certified circuit, family or dependency mediator and successfully complete a Florida Supreme court certified appellate mediation training program." This is a one-day training, without further requirement for any mentorship.

Florida Appellate Rule 9.730 clearly spells out "unless otherwise agreed by the parties, the mediator appointed by the appellate court shall be licensed to practice law in any United States jurisdiction."

Florida has long believed in appellate mediation. The 5th DCA has trained hundreds of appellate mediators over the past decade. This court regularly orders appellate cases to mediation and has a resolution rate of over 40%. Their results are consistent with other state-wide mediation programs such as Alabama's and the U.S. Court of Appeals national appellate mediation programs.

The appellate mediation certification training class covers the new mediation rules and discusses procedures applicable to the processing of an appeal, including applicable time frames. In addition, the training will recognize the characteristics of appellate mediation and the differences with pre-suit and trial court-ordered mediation and the appellate mediation techniques necessary to be considered.

With the advent of this new Order, Florida's Circuit Civil, Family and Dependency mediators will now be able to be certified to mediate the previously decided case.

Gary Canner *is a former Circuit Mediator for the United States Court of Appeals, Eleventh Circuit; Florida Supreme Court Primary Appellate & Circuit Civil Mediation Trainer. He has mediated more than 1,000 appellate cases and 6,500 trial level disputes. Gary also serves as mediation Counsel with Upchurch, Watson, White & Max. He may be contacted at garymediate@yahoo.com. www.mediationtrainings.com*

Statewide Residential Mortgage Foreclosure Managed Mediation Program

Comments sent to the Florida Supreme Supreme Court:

- The Florida Bar Alternative Dispute Resolution Section "the Section" offers the following comments and concerns regarding foreclosure mediation. The Section strongly believes that mediation has proven over time to be a very effective tool in resolving disputes among litigants. Additionally, a matter may not be resolved but the communication process may be started at mediation that leads to a resolution.
- Members of the Section have heard considerable anecdotal information that raises concern regarding the legitimate level of commitment of certain lenders to the process, including issues of settlement authority and willingness to constructively participate. Consequently, the Section urges the Court to look beyond mere statistics in an effort to fully understand how the program has performed and whether there are methods and means that would make the program more successful or whether it should be terminated.
- The Section believes an in depth fact-finding study is necessary before any determination should be made regarding the viability of the program. The Section urges the Court to appoint a commission or other investigative body to make the proper inquiries and issue a report analyzing the program, its processes and recommendations whether it is effective, can be improved or should be abandoned before making any decisions on the matter.

John J. Schickel
Chairman, ADR Section of The Florida Bar

Supreme Court of Florida

No. SC10-2329

IN RE: AMENDMENTS TO FLORIDA RULE OF CIVIL PROCEDURE 1.720.

[November 3, 2011]

PER CURIAM.

This matter is before the Court for consideration of proposed amendments to Florida Rule of Civil Procedure 1.720 (Mediation Procedures). We have jurisdiction. See art. V, § 2(a), Fla. Const.

The Committee on Alternative Dispute Resolution Rules and Policy (Committee) has filed a petition to amend rule 1.720. The amendments proposed by the Committee revise the requirements in rule 1.720 pertaining to the appearance of a party or a party's representative at a mediation conference. The proposals are in response to the Committee's charge to monitor court rules governing alternative dispute resolution procedures and to make recommendations as necessary to improve the use of mediation. See In re Committee on Alternative Dispute Resolution Rules and Policy, Fla. Admin. Order No. AOSC03-32 (July 8, 2003).

The Committee's proposals were approved by The Florida Bar's Civil Procedure Rules Committee. The Court published the proposed amendments for comment. Two comments were filed and the Committee filed a response.

Having considered the Committee's petition, the comments filed, and the Committee's response, we adopt the amendments to rule 1.720 as proposed by the Committee, with a minor modification to new subdivision (e) (Certification of Authority). We modify new subdivision (e) to provide that the written notice be served on all parties participating in a mediation conference.

Accordingly, Florida Rule of Civil Procedure 1.720 is hereby amended as set forth in the appendix to this opinion. New language is indicated by underscoring, and deletions are indicated by struck-through type. The Committee notes are offered for explanation only and are not adopted as an official part of the rule. The amendments shall become effective January 1, 2012, at 12:01 a.m.

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS

Original Proceeding – The Supreme Court Committee on Alternative Dispute Resolution Rules and Policy

Judge William D. Palmer, Chair, Committee on Alternative Dispute Resolution Rules and Policy, Fifth District Court of Appeal, Daytona Beach, Florida,

for Petitioner

Donald E. Christopher, Chair, Civil Procedure Rules Committee, Orlando, Florida, and John F. Harkness, Jr., The Florida Bar, Tallahassee, Florida; and Patrick S. Scott of Gray Robinson, P.A., Fort Lauderdale, Florida,

Responding with comments

APPENDIX RULE 1.720. MEDIATION PROCEDURES

(a) Interim or Emergency Relief. [NO CHANGE]

~~(b) Sanctions for Failure to Appear.~~Appearance at Mediation. ~~If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion shall impose sanctions, including an award of mediator and attorneys' fees and other costs, against the party failing to appear. If a party to mediation is a public entity required to conduct its business pursuant to chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity. Otherwise, unless~~Unless otherwise permitted by court order or stipulated by the parties ~~or changed by order of the court~~in writing, a party is deemed to appear at a mediation conference if the following persons are physically present:

(1) The party or ~~it's~~ a party representative having full authority to settle without further consultation; and

(2) The party's counsel of record, if any; and (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

(c) Party Representative Having Full Authority to Settle. A "party representative having full authority to settle" shall mean the final decision maker with respect to all issues presented by the case who has the legal capacity to execute a binding settlement agreement on behalf of the party. Nothing herein shall be deemed to require any party or party representative who appears at a mediation conference in compliance with this rule to enter into a settlement agreement.

(d) Appearance by Public Entity. If a party to mediation is a public entity required to operate in compliance with chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity.

(e) Certification of Authority. Unless otherwise stipulated by the parties, each party, 10 days prior to appearing at a mediation conference, shall file with the court and serve all parties a written notice identifying the person or persons who will be attending the mediation conference as a party representative or as an insurance carrier representative, and confirming that those persons have the authority required by subdivision (b).

(f) Sanctions for Failure to Appear. If a party fails to appear at a duly noticed mediation conference without good cause, the court, upon motion, shall impose sanctions, including award of mediation fees, attorneys' fees, and costs, against the party failing to appear. The failure to file a confirmation of authority required under subdivision (e) above, or failure of the persons actually identified in the confirmation to appear at the mediation conference, shall create a rebuttable presumption of a failure to appear.

~~(c)~~(g) Adjournments. [NO CHANGE]

~~(d)~~(h) Counsel. [NO CHANGE]

~~(e)~~(i) Communication with Parties or Counsel. The mediator may meet and consult privately with any party or parties or their counsel. **(f)(j) Appointment of the Mediator.** [NO CHANGE]

~~(g)~~(k) Compensation of the Mediator. [NO CHANGE]

Committee Notes

2011 Amendment. Mediated settlement conferences pursuant to this rule are meant to be conducted when the participants actually engaged in the settlement negotiations have full authority to settle the case without further consultation. New language in subdivision (c) now defines "a party representative with full authority to settle" in two parts. First, the party representative must be the final decision maker with respect to all issues presented by the case in question. Second, the party representative must have the legal capacity to execute a binding agreement on behalf of the settling party. These are objective standards. Whether or not these standards have been met can be determined without reference to any confidential mediation communications. A decision by a party representative not to settle does not, in and of itself, signify the absence of full authority to settle. A party may delegate full authority to settle to more than one person, each of whom can serve as the final decision maker. A party may also designate multiple persons to serve together as the final decision maker, all of whom must appear at mediation.

New subdivision (e) provides a process for parties to identify party representative and representatives of insurance carriers who will be attending the mediation conference on behalf of parties and insurance carriers and to confirm their respective settlement authority by means of a direct representation to the court. If necessary, any verification of this representation would be upon motion by a party or inquiry by the court without involvement of the mediator and would not require disclosure of confidential mediation communications. Nothing in this rule shall be deemed to impose any duty or obligation on the mediator selected by the parties or appointed by the court to ensure compliance.

The concept of self determination in mediation also contemplates the parties' free choice in structuring and organizing their mediation sessions, including those who are to participate. Accordingly, elements of this rule are subject to revision or qualification with the mutual consent of the parties.

CLE OPPORTUNITIES

The Continuing Legal Education Committee, the Alternative Dispute Resolution Section, and the Consumer Protection Law Committee

Arbitration Clauses and Class Action Waivers in Consumer Contracts: Perspectives from the Bench and Litigants

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

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Recorded June 24, 2011 at The Florida Bar Annual Convention, Gaylord Palms, Orlando

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Discussion with Paul Bland and Andrew Sandler
Moderated by Justice Lewis including question and answer session

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

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LECTURE PROGRAM

Welcome
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Primer on Attorney's Fees and Costs
Conducting a Florida Bar Mediation
Conducting a Florida Bar Arbitration
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8221001 Item Number

Membership Application for

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Name: _____Bar #:_____(Required)

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

Send form and check to:

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Tallahassee, Florida 32399-2300

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

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(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.)

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