THE FLORIDA BAR
ALTERNATIVE DISPUTE RESOLUTION SECTION
News & Tips

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Jake Schickel, Chair • Chester Chance, Chair-elect

Chair's Message:
Keeping You Up to Date

Jake Schickel

Welcome to our second edition! The ADR Section is so very lucky to have Charles Carter as our editor. He, along with Chester Chance and the ever capable Lani Fraser, put together this newsletter and named it ***News and Tips*** for very obvious reasons. We want to keep you abreast of the happenings in the ADR world and also give you suggestions on the alternative dispute resolution practice. To do that we need a lot of help ... from YOU!

To accomplish this goal, we will be including MEAC opinions, ethics opinions, rule changes and new cases that affect all of us. This is the ***"News"*** side of the newsletter.

We also want **you** to bring us news and your opinions of the news and how it affects us all. We invite you to comment and share your experiences. In that regard, Karen Evans has written an article on the new FRCP 1.720. The new rule was missed by many while in the formative stage. Thus, the ADR Section's Executive Council decided to wait and see how the practitioners actually dealt with the rule, before approaching the Court. Therefore, if you become involved with any problems (or solutions), let us know. We want to share everyone's experiences.

Also, the Supreme Court Committee on ADR Rules & Policy (who presented the Rule to the Florida Supreme Court) is in the process of developing a form for the certification requirement. Your ADR Section's Executive Council is reviewing the form and offering input.

On the ***"Tips"*** side, we had many great articles in our first edition and hope to have more in the future, with your help! In this edition, the article by Kahlil Day and Alan M. Gordon, "Green over Red," shows an innovative way to address a problem. It is as interesting as it is intriguing!

The Executive Council meets monthly by conference call to remain up to date and timely with our profession. We will also meet in June during The Florida Bar's Annual Convention. We welcome you to join us or provide input to any of the members. If you need information about the ADR Section, please contact Lani Fraser at lfraser@flabar.org.

Please share with us your ***News and Tips!***

Jake Schickel, Chair, ADR Section

INSIDE:

10 Ingredients for a Successful Mediation Process

By Bruce A. Blitman, Esq./Certified Circuit, Family and County Mediator

It's hard for me to believe I've been mediating since 1989. During the past twenty two years, I've been privileged to mediate thousands of disputes. When I started out as a mediator, my definition of a successful mediation was pretty simple: if the case settled (and I was fully paid for my mediation services), it was a successful mediation. However, through the years, my definition of a successful mediation has evolved. I've discovered that a case can be successfully mediated even if it is not completely or even partiallyresolved at the conclusion of the mediation session. Today, I consider a mediation to be successful whenever the parties and their attorneys are able to exchange information, ideas, and perspectives. When they are able to leave a mediation session with a better understanding of their own interests, needs, motivations and concerns, as well as a keener understanding of the other parties' interests, needs, motivations and concerns, I believe the participants have engaged in a successful mediation process.

I've had the unique opportunity to work with exceptional negotiators from diverse backgrounds and professional experiences. Many of these disputes were settled at mediation. Unfortunately, some were not. After each mediation, I review the case to explore how and why the case ended the way it did. Through the years, I have found common elements present in cases that were "successfully mediated" and absent in those cases which ended badly. In this article, I will discuss 10 key ingredients that should help you and your clients have a successful mediation. If you liberally apply these ingredients when you mediate, you will have the recipe for a successful mediation-one in which you and your clients will get the most out of your mediation experience.

1. PREPARE YOUR CLIENT: Clients are more comfortable during a mediation conference when they understand how the mediation process works. Take the time to educate your client about the basic workings of the mediation process BEFORE the mediation. For example, furnish your client with written materials which explain mediation. Show the client a videotape of what a mediation conference looks like. There are some outstanding videos available. The Florida Dispute Resolution Center (DRC) has produced an excellent thirty-minute videotape titled "Mediation Works." It can be purchased for approximately $10.00 from the DRC, which is located at: Florida Supreme Court Building, Tallahassee, Florida 32399-1905 Telephone: (850) 921-2910. Time invested in preparing your clients for mediation will yield significant dividends during the mediation process.

2. PREPARE YOURSELF: Well prepared attorneys are an essential ingredient to a successful mediation process. Well prepared counsel know everything they need to know about their file. They are ready and eager to intelligently discuss both the strengths and weaknesses of their client's case, as well as the strengths and weaknesses of their opponent's case. Frequently, well prepared advocates will prepare a mediation summary for the mediator (and the client) to review before mediation. They are aware of the governing rules of state and federal civil procedure, and furnish their opposing counsel with copies of their summaries, when required by law. They know what they will need to prove in order to prevail at trial. They have reviewed all pertinent jury instructions with which a jury is likely to be charged. They have all of the necessary medical records, financial records, tax returns, and/or other documentation needed to prove their case available at the mediation conference. They are familiar with personal details of the clients' lives, such as their age, marital status and occupation, and are well aware of their clients' emotional and financial needs. All of this information helps them thoroughly and comprehensively present their clients' perspective during the mediation conference. Well prepared attorneys understand that, during the mediation conference, they are also being scrutinized by their own clients, as well as by the opposing parties and their counsel. They also understand that excellent preparation, coupled with an excellent presentation at mediation, can significantly affect the outcome of the case.

3. KNOW WHAT YOUR CLIENTS REALLY WANT AND NEED: Cases cannot be resolved unless a sufficient number of the parties' interests and needs can be satisfied. Do the parties want money damages, just compensation, vindication, retribution, an apology, or a "pound of flesh"? In successful mediations, the parties and their counsel understand their own, and the other participants,' interests, needs, motivations and concerns. This understanding can frequently save attorneys and their clients a lot of time, money, and unnecessary aggravation.

4. HAVE A GAME PLAN: In successful mediations, the parties and their counsel are effective negotiators. They know what they want out of the case and develop a strategy to accomplish their objectives. They understand that the mediation process is a negotiation process. They know where they want to begin and where they would like to finish, and have a flexible strategy for getting there.

5. DRESS FOR SUCCESS: In successful mediations, all of the participants understand the mediation conference is really a prelude to the

trial. During mediation, the decision makers (the parties and counsel) have a unique opportunity to look at each other face to face and get some sense of how the parties will present themselves before a trier of fact. They recognize this is not the time for their "casual Friday" attire. Well prepared counsel instruct their clients to dress appropriately and SHOW them what that means. It is amazing how standards of personal taste vary-one person's definition of "appropriate" can differ dramatically from that of another. In my mediation experience, I've found the appearance of an articulate, well-groomed party at a mediation conference has significantly influenced the other party's evaluation of the case on several occasions. Unfortunately, so has the appearance of an inarticulate, inappropriately dressed party. Effective advocates know their clients and present them in the most favorable light possible at mediation.

6. USE DEMONSTRATIVE EXHIBITS: The use of graphs, photographs, models and other demonstrative exhibits can sometimes be extremely compelling during a mediation conference. The presentation of these exhibits can demonstrate counsels' professionalism and their strong commitment to their clients' cases. Sometimes the right picture truly "can be worth a thousand words" — and a significant amount of money.

7. SCHEDULE THE MEDIATION FOR THE APPROPRIATE AMOUNT OF TIME, AND AT THE APPROPRIATE TIME OF DAY: We are all busy people. In successful mediations, the parties and their counsel respect each other's valuable time. When they choose to mediate they prioritize the case and give it their undivided time and attention. They do not want any of the participants in the mediation process to feel rushed or unduly pressured. An attorney who schedules a mediation conference for 1:00 p.m. knowing he has to attend an important deposition at 2:00 p.m., has done a great disservice to his client and the mediation process. Invariably, effective mediation negotiators try to schedule their mediation conferences for times when they and their clients are at their emotional and physical best. If they know they (or their client) is not a "morning person," they won't schedule their mediations for early morning. Similarly, when they know they have to attend a hearing on a judge's morning motion calendar, they will schedule the starting time for a mediation conference accordingly. They understand it can be considered very impolite to keep their clients, the other parties, opposing counsel and the mediator waiting for them to return from a delayed hearing. As a mediator, I have witnessed several cases unravel before they ever began, simply because one party kept the other waiting for a prolonged period of time.

8. BE PATIENT: In successful mediations, the parties and their counsel demonstrate extraordinary patience and self control. They understand that in many cases, it is virtually impossible for the parties and their attorneys to settle a case in under one hour. In cases that are emotionally charged or technically complex, it may take the parties and the mediator several hours to unravel and identify numerous issues and areas of conflict that have taken years to litigate. By working through these issues calmly and carefully, parties are frequently able to resolve their differences. Mediators should not rush the parties or force them to reach agreements. In successful mediations, cases resolve only when the participants are ready to settle.

9. EDUCATE, DON'T INTIMIDATE: In successful mediations, parties and their counsel may disagree, but they do so agreeably. They use the mediation process to explain their positions to the other parties. They do not engage in yelling, screaming, and name-calling. They understand that such behavior may help them and their clients feel better, but it will not help them negotiate more favorable settlement agreements. Instead, they use the mediation process to calmly justify, document and persuade the opposing parties about the reasonableness of their clients' positions in the case.

10. DON'T SLAM DOORS OR BURN BRIDGES: In successful mediations, the parties understand there is no rule which prohibits them from settling their dispute tomorrow, next week, or some months after the initial mediation. They use the initial mediation conference as an opportunity to begin a dialogue with each other. They develop a positive line of communication during the mediation process, and build upon this initial rapport. They are frequently able to establish a framework for future negotiations which may ultimately result in settlement. Enlightened negotiators view mediation as an ongoing process, not a "one-time" event. At the conclusion of a mediation session, they do not issue threats or ultimatums, or storm out of the conference room indignantly. Instead, they politely shake hands and encourage future conversations. The liberal use of these 10 ingredients is your recipe for a successful mediation process. Best 'wishes for good health, good luck, and good mediation.

 Bruce A. Blitman is an attorney and certified mediator with a solo practice in Ft. Lauderdale. He is certified by the Florida Supreme Court as a County, Circuit and Family Mediator. Blitman is a Diplomate member of the Florida Academy of Professional Mediators, Inc. and a former President of the Academy. He can be reached at (954)437-3446 and BABMEDIATE@aol.com. His website is www.bruceblitman.com and Facebook at Law Office of Bruce Blitman. His office is located at 9050 Pines Blvd. Suite 450, Pembroke Pines, Fl. 33024

Amendments to Florida Rules of Civil Procedure 1.720 (Mediation Procedures)

By Karen Evans, Miami

Effective January 1, 2012, amendments to the mediation procedures as set forth in the Florida Rules of Civil Procedure (Rule 1.720) were instituted. The amendments redefine "appearance at mediation" and "full authority to settle," and additionally require parties to serve written notice 10 days prior to mediation identifying who will attend the mediation and confirming that those persons have the requisite authority to settle without further consultation. Failure to comply with this new confirmation process creates a rebuttable presumption of failure to appear.

Section (b) entitled, *Appearance at Mediation* provides that "Unless otherwise permitted by court order or stipulated by the parties in writing, a party is deemed to appear at a mediation conference if the following persons are physically present: (1) a party or 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."

A new Section (c) defines the concept of 'full authority to settle' as being the person who is both the final decision maker and has the ability to execute a binding settlement agreement. It states, "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."

A new Section (d) provides for appearance at mediation by public entities. The language is the same as in the prior version of the Rule; it has simply moved from being part of Section (b), to having its own section and title.

Sections (e) and (f) reflect the greatest change in the Rule. Section (e) requires parties to provide written notice, 10 days before mediation, of the names of the person(s) attending mediation and confirmation that they have the requisite authority to settle as defined in Section (b). Specifically, the Rule states:

> (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).

Section (f) contains the same provision regarding failure to appear without good cause as was previously contained in Section (b); but also provides that the failure to file the confirmation of authority, or have the identified party representatives appear as now required by Section (e) creates a rebuttable presumption of failure to appear.

> (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.

The remaining sections of Rule 1.720 remain unchanged other than new section numbers, except for former Section (c) relabeled as Section (i) also has a change in its title, but not its body.

Karen Evans *is in her twentieth year working exclusively as a neutral, both mediating and arbitrating. She is an approved federal court mediator for the United States District Court, Southern and Middle Districts of Florida, and certified by the State as a civil circuit mediator and insurance mediator. Mrs. Evans is a member of the Dade County Bar Association; South Florida Chapter of The Federal Bar Association; the Spellman-Hoeveler Chapter of American Inns of Court; Florida Association of Women Lawyers; and the Florida Association of Professional Mediators, Diplomate. She serves on the Executive Council of The Florida Bar's Alternative Dispute Resolution Section and is a member of the Labor and Employment Law Section of The Florida Bar.*

2011 Mediator Ethics Advisory Committee Opinions

MEAC 2011-001
It is neither a requirement nor a violation of the Florida Rules of Civil Procedure or the Rules for Certified and Court-Appointed Mediators for a certified mediator to sign a written settlement agreement in the capacity of mediator.

MEAC 2011-002
A mediator can complete and submit the Department of Financial Services Disposition of Property Insurance Mediation Conference form referencing a "first offer" if this information is not a mediation communication protected from disclosure by Florida Statute Chapter 44, sections 401 - 405, Mediation Confidentiality and Privilege Act.

MEAC 2011-003
A certified mediator may report an attorney's misconduct, solely for the internal use of the body conducting the investigation of the conduct, without violating ethical duties.

MEAC 2011-004
The Committee remains confident in the continuing correctness of MEAC 2010-004 which states in part, "a mediator is prohibited from taking on the dual role of mediator and notary."

MEAC 2011-005
The MEAC remains confident in its previous decisions, most recently 2010-014. Upon the request or demand of a party at the mediation, the mediator must declare an impasse. Mediators must act in accordance with the Florida Rules for Certified and Court-Appointed Mediators and must conduct the mediation so that the principles of self-determination are protected. However, a mediator should not declare an impasse under this scenario before the opening statement is delivered pursuant to Rule 10.420[a] and should attempt to explore options or alternatives with the party requesting same.

MEAC 2011-006
Although the inquirer is a certified mediator, the question of who determines who is a company representative for the purposes of mediation participation is not a question of mediator ethics. The rendering of legal guidance is not within the jurisdiction of the MEAC.

MEAC 2011-007

1. How to handle a situation when a mediation disagreement takes on an unprofessional tone is primarily a matter of mediator technique and practice and further calls into consideration the mediator's duty to maintain a balanced process and to consider options for termination and adjournment referenced in the Rules for Certified and Court-Appointed Mediators.
2. What a mediator is to do when mediation participants are acting unprofessionally and preventing a resolution of issues is a matter of mediator training and skill, and is generally dealt with by Rules 10.410 [Balanced Process] and 10.420[b][3] [Conduct of Mediation].
3. and 4. While it may be beneficial for the employing company of the professional to know that the professional is behaving in a way the mediator considers "unprofessional," a disclosure of unprofessional conduct to the company that the offending professional is employed by is prohibited by the Mediation Confidentiality and Privilege Act [F.S. 44.405].

MEAC 2011-008

1. As stated in SC09-1384, "an accurate representation of the mediator's judicial experience in references to background and experience in **bios and resumes** would not be inappropriate." [Emphasis added.] The MEAC does not have the power or authority to determine the answers to the questions posed with regard to constitutional rights.
2. The MEAC does not have the power or authority to determine constitutional rights and therefore declines to answer this question [reqgrding a former judge's First Amendment protection in marketing].
3. It is false and misleading and therefore prohibited for a certified mediator to use letterhead that is entitled "Judge ___ [ret]" or "former judge".

MEAC 2011-009
It is inappropriate to use a business name ["The Litigation Terminators"] or phrase to advertise mediation services that portrays the mediation process or the role of a mediator in a manner that is untrue, misleading or demeans the dignity of the mediation process or the judicial system.

MEAC 2011-010
It is misleading and inappropriate for a mediator who has completed a Florida Supreme Court mediation training but is not yet certified to advertise him/herself as Florida Supreme Court County Court "Trained" Mediator.

MEAC 2011-011
The questions presented [i.e. conflicts of interest] relate to the Code of Ethics for Public Officers and Employees, Chapter 112, Florida Statutes and not the Florida Rules for Certified and Court-appointed Mediators.

MEAC 2011-012
Certified mediators do not have the authority to unilaterally ban the use of cellular communications during the mediation process.

MEAC 2011-013
A certified mediator does not have the authority to direct or suggest to an attorney, acting as a party representative in a small claims case, to make a phone call over the objection of the physically present named party.

To view the complete 2011 MEAC opinions, please visit one of the following:

The Mediation Training Center

or

The Florida Dispute Resolution Center

Termination of the Residential Mortgage Foreclosure Mediation Program

Administrative Order No. AOSC11-44

On December 19, 2011, Florida's Supreme Court entered Administrative Order No. AOSC11-44 which terminated, effectively immediately, the statewide mandate for the mediation of all residential mortgage foreclosure matters stating it "cannot justify continuation of the program." That same administrative order reminded circuit chief judges of their responsibility "to do everything necessary to promote the prompt and efficient administration of justice."

While it remains to be seen where the dust will ultimately settle for mandated foreclosure mediation, some circuit chief judges acted immediately to rescind their local administrative orders requiring the mediation of residential mortgage foreclosure actions. Other chief judges issued orders only temporarily suspending their programs, while still others acted quite quickly to promulgate and adopt new administrative orders devising new and improved managed mediation programs and processes for residential mortgage foreclosure. In order to determine precisely the status of foreclosure mediations in any given circuit, please contact the court administrator's office in your circuit or visit the circuit court's website.

On the federal front, on December 6, 2011, Representative Frederica Wilson of South Florida, introduced federal legislation (H.R. 3595 – The Mandatory Foreclosure Mediation Act) proposing federally mandated managed-mediation for residential mortgage foreclosure matters. That bill was referred to the House Committee on Financial Services on December 7, 2011 and subsequently, on January 12, 2012 was referred to the Subcommittee on Insurance, Housing and Community Opportunity. We will keep you apprised of the progress of this legislation and how it may effect foreclosure mediation in Florida as new information becomes available.

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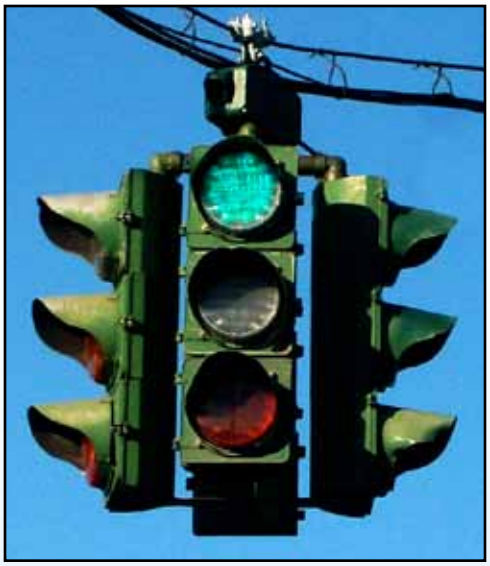
Green over Red:
A Case of Conflict Resolution Through Reconciliation of Mutual Interests

By Kahlil Day and Alan M. Gordon

It has been suggested that disputes are resolved in one of three ways: They are resolved based upon which side has the greatest strength; or based upon with side is right; or, alternately, disputes may be resolved based upon the mutual interests of the parties.[1] In State and Federal courtrooms across the country, lawyers valiantly argue about which side has the strong or right position, relying on the principle of legal precedent dating back to 1466.[2] In our role as mediators we explore with the parties to each dispute not only the strength or rightness of the parties' respective positions, but also what is in the mutual interests of the parties. The resolution of the Tipperary Hill "stone throwers" problem described below illustrates the importance of exploring mutual interests.



A colleague of ours who is formerly from Syracuse, New York, relays that in 1928 the city council was presented with a recurring problem in the Irish-American Tipperary Hill neighborhood within the city. A group of neighborhood youngsters know as the "stone throwers" repeatedly threw rocks and knocked out the stop light at the intersection of Tompkins Street and Milton Avenue. Concerned by the potential for harm caused by these acts, the city council set about to address the issue. In the course of discussion it was proposed that if the stoplight were inverted, with the (Irish) green light atop, instead of the (British) red light, this might resolve the issue. Accordingly, the stoplight was inverted to show the green light above the yellow and red lights. We are advised by our colleague that as a result of this change, the broken stop light problem was abated.[3]

In this instance the problem was solved not through action in the courts but rather based upon the mutual interests of the parties. The city council had an interest in neighborhood safety and the neighborhood youngsters had an interest in seeing the Irish green above the British red.

The story is instructive to us as mediators. While we challenge the parties to mediation with regard to whether they are likely to prevail before the judge based upon the law and facts of the particular cases, we also focus on what exactly is in the best interest of the respective parties. In *Getting to Yes,* Roger Fischer describes an anecdote of two sisters fighting over an orange.[4] One sister wants the flesh of the orange to eat and the other sister wants the peel to bake a cake. The children split the orange, not realizing that each could have exactly what she wants. In mediation, oftentimes by actively listening to the parties to determine their wants and needs, a skilled mediator, along with able counsel, may guide the parties to a resolution satisfactory to all sides by realizing that each side may want something different.

Applicable rules for mediators may include the responsibility to look to the parties' interests. For example, the Florida rules for Certified and Court Appointed mediators indicate that the mediator owes a duty to the parties,[5] the process,[6] the courts,[7] and the profession.[8] As we meet these concurrent obligations, we are given the opportunity to aid the parties to craft a resolution to a dispute that is tailored to the specific needs of the particular parties. Effective mediators are able to encourage the parties not to dwell on the perceived wrongs of the past but rather to focus on reaching a resolution in the parties' mutual interest. This conduct empowers the parties to arrive at a decision rather than to have the decision rendered by a judge who is compelled to rule upon the facts and evidence presented in accordance with the law.

Encouraging a party to litigation to focus on interests rather than merely who is right and who is wrong or who is more powerful has several advantages. First, the focus on mutual interests and subsequent resolution removes the uncertainty of judicial resolution from the table. Second, a focus on mutual interests resulting in resolution reduces the parties costs. Third, focus on mutual interests may help permit an ongoing relationship to continue that would other side end as a result of protracted litigation. Fourth, the focus on the mutual interests of the parties empowers

the parties to reach a decision based upon self determination. Fifth, the focus on interests of the parties leads to a speedier resolution in general. Focusing on strengths and weaknesses of the parties' respective cases while at the same time encouraging an exploration by the parties of their respective interests is an effective means for reaching resolution at mediation.

Kahlil Day *is a twenty-five year member of The Florida Bar and a Florida Supreme Court Certified County, circuit, Family and Appellate mediator. He is also certified civil case mediator for the Federal District Court for the Middle District of Florida. Kahlil is a past member by appointment of the Chief justice of the Florida Supreme Court to the Florida Mediation Qualification board and is a current member of the Mediator Ethics Advisory Committee. He is presently the vice chair of the Florida Bar Standing Committee on Grievance Mediation and Fee Arbitration. Kahlil is a member of the ABA TIPs ADR Committee and Honorary Master of the Bench of the E. Robert Williams American Inn of Court, and a Life Fellow of the American Bar Foundation.*

Alan M. Gordon *has been a mediator for the years for the Florida Department of Administrative Hearings and the Judges of Compensation Claims. He is a member of The Florida Bar and a Florida Supreme Court Certified Circuit Court Mediator. He is the past chair of The Florida Bar Grievance and Fee Arbitration Committee and the President-elect/Counselor for the E. Robert Williams American Inn of Court in Jacksonville, Fla. Mr. Gordon is a frequent lecturer regarding mediator continuing education and ethics.*

The authors are thankful to friend and colleague and long-time Orange County Assistant Public Defender ***Bill Kinane,*** *for his recall and relaying of the history of the stoplight at Tompkins Street and Milton Avenue and to* ***Tara Sa'id,*** *a long-time colleague and skilled Worker's Compensation and Appellate advocate, for her assistance with the revisions of this article.*

Endnotes:

1. William Ury, et al., Getting Disputes Resolved (San Francisco, CA., Josey-Bass, 1993), pp. 4-7.
2. "The Case of the Thorns," Y.B. 6 Ed. 4.17, pl. 18 (K.B. 1466).
3. Bill Kinanne advised "The city leaders determined that at the intersection at issue, an exception would be made to the normal colors of the light with the green light being situated atop the yellow and red lights. The stone throwers of the mid and late twenties (and their younger brothers and cousins) in the early 1940s went off to fight in Europe and the Pacific. After WWII, they came back to Tipperary Hill and as well as becoming nationally recognized as captains of industry, sport coaches, politicians and clergy, organized an American Legion Post known as the Tipp Hill Post." In 1964, Bill Kinane, then a Syracuse law student, was employed to work on the reconditioning of the City traffic code and was instrumental in reasserting the exception for the Tipp Hill light.
4. Roger Fischer, William Ury, Bruce Patton, Getting to Yes, (N.Y., N.Y.: Penguin Books, 1991). P. 73.
5. Fla. R. for Cert. and Ct. Appt. Med. Rule 10.300.
6. *Id.* Rule 10.400.
7. *Id.* Rule 10.500.
8. *Id.* Rule 10.600.

Welcome to the ADR Section's Case and Comment!

By Perry S. Itkin, Esquire, Fort Lauderdale

The purpose of this column is to keep you advised of appellate cases, as well as trial court orders, and rule and statutory changes, so you will be a more informed and thoughtful mediation practitioner. In pursuit of this goal, I solicit your help. If you discover court opinions (appellate as well as those orders entered at the trial level), rules or statutory changes that would be meaningful to fulfill this purpose, please send them to me to consider for inclusion in this column. I would especially appreciate receiving copies of motions and written trial court orders and opinions which impact the practice of mediation (either from the perspective of the mediator, litigator, judge or party or non-party) and therefore serve as a useful learning tool for others. These would not be otherwise available without your valued contributions.

"*The British are coming! The British are coming!*"

"No – the Russians are coming! The Russians are coming!"

"No – Sanctions are coming! Sanctions are coming!"

"No sanctions for me – my lawyer told me I didn't have to go!"

"Not so fast. . . !"

By now we're aware that the Florida Supreme Court has adopted amendments to Florida Rule of Civil Procedure 1.720 effective January 1, 2012 – *In Re: Amendments to Florida Rule of Civil Procedure 1.720*, 36 Fla. L. Weekly S 627 (Fla. 2011). The amendments revise the requirements in rule 1.720 pertaining to the appearance of a party or a party's representative at a mediation conference.

The part of the rule I'd like to address is 1.720(b) – the listing of individuals who are required to be physically present (unless otherwise stipulated by the parties or permitted by the court) at a mediation conference in order for a party to satisfy the rule. They are (1) the party or 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. The descriptions are not much different than as listed in the prior rule and the biggest change *(COMMENT: Okay, not so big.)* is, well . . . the addition of the word "and".

Under the earlier version of the rule there are some appellate opinions that are helpful in explaining the distinctions among the categories.

Carbino v. Ward, 801 So. 2d 1028 (Fla. 5th DCA 2001). This is a **case of first impression** in Florida. The Carbinos sued Ward in negligence for damages arising out of an automobile accident. Ward had an insurance policy with a $100,000.00 limit. The Carbinos made a demand for the policy limit, which was rejected by Ward and his insurer, State Farm Mutual Automobile Insurance Company.

The trial court ordered the parties to mediation. At the time of the scheduled mediation, the Carbinos, their attorney, two representatives of State Farm, and Ward's attorney were present, but Ward was not. In response to an inquiry from Carbino's counsel, Ward's counsel stated that he had advised his client that it was not necessary for him to appear at the mediation. *(COMMENT: Was this a good idea? Nope!*) No prior arrangements had been made for Ward's non-attendance, nor had a motion been filed pursuant to Florida Rule of Civil Procedure 1.720 seeking to excuse Ward from attending the mediation. Counsel for the Carbinos chose not to go forward with the mediation since Ward was not present. The Carbinos thereafter filed a motion for sanctions, seeking an award of their mediator costs, attorney's fees, and lost wages. Ward filed his own motion for sanctions, alleging that the Carbinos were not justified in refusing to go forward with the mediation because he suffered from leukemia and heart problems and had waived his personal attendance.

At a hearing on the parties' cross motions, the trial court found that pursuant to the language of Florida Rule of Civil Procedure 1.720(b) Ward was required to be present at the mediation. The trial court awarded the Carbinos their mediator costs and attorney's fees, but denied their request for lost wages. Upon rehearing, being presented with the argument that Ward had been advised by his counsel that he did not have to appear at the mediation, the trial court found that Ward had a good faith argument against appearing (although it did not rise to the level of good cause) and, accordingly vacated the sanction of attorney's fees, while continuing to award the Carbinos mediator costs as a sanction. This appeal followed.

The key issue presented in this case is whether Ward was required to personally appear at the mediation when State Farm sent a representative who had full authority to settle the matter up to the policy limits.

The version of Florida Rule of Civil Procedure 1.720(b) in effect prior to January 1, 2012 provided:

(b) 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 an award of mediator and attorneys' fees and other costs, against the party failing to appear. . . . Otherwise, unless stipulated by the parties or changed by order of the court, a party is deemed to appear at a mediation conference if the following persons are physically present:

(1) The party or its representative having full authority to settle without further consultation.

(2) The party's counsel of record, if any.

(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 up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

(COMMENT: Not really much different than the new rule which made minor modifications.)

Ward argued that the same person can fulfill the roles of both sub-sections (b)(1) and (b)(3) because a representative of the insurance carrier can also serve as a "representative having full authority to settle without further consultation." *(COMMENT: Nice try!)*

The appellate court disagreed for two reasons:

(1) The trial court properly concluded that the phrase "its representative" in sub-section (b)(1) relates to a party such as a corporation, partnership, incapacitated person, or minor which must appear through a duly authorized representative.

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Lani Fraser, Tallahassee..... Program Administrator
Lynn Brady, Tallahassee..... Layout

(2) In this case, the State Farm representative did not fit the definition of a "representative having full authority to settle without further consultation." Rather, State Farm's representative only had authority to settle the matter up to its policy limits and the Carbinos had not agreed to limit their demands to said limits. Although the Carbinos had previously made a demand for policy limits, that demand had been rejected and, accordingly, the Carbinos could have made a demand at the mediation conference for an amount in excess of the policy limits.

Since Ward failed to appear at the mediation without good cause rule 1.720 required the trial court to impose sanctions against him, including both mediator costs and attorney's fees. At the initial hearing, the trial court recognized this fact and ruled that the Carbinos were entitled to receive both. However, upon rehearing, the trial court withdrew its award of attorney's fees based upon the finding that Ward had *a good faith argument, but not good cause*, for his failure to appear. All parties agree that under the rule, the trial court could not properly award mediator costs and deny attorney's fees. Since the trial court found that Ward failed to appear without good cause, the court was required to award the Carbinos both mediator costs and attorney's fees.

As for the issue of lost wages, the appellate court agreed with the trial court that the Carbinos were not entitled to receive an award of lost wages under the "other costs" provision of rule 1.720(b).

(COMMENT: There's more to this story!)

The Carbinos further requested, in the appellate court, an award of their reasonable *attorney's fees on appeal* pursuant to rule 1.720(b) of the Florida Rules of Civil Procedure and rule 9.400(b) of the Florida Rules of Appellate Procedure. The motion was granted and the appellate court held that the amount of such fees must be determined by the trial court upon remand. The appellate court added:

> *"To hold otherwise would substantially weaken the sanction mechanism which the Supreme Court saw fit to make mandatory upon a party's failure to appear at mediation without good cause."*

As to Ward's defense that "My lawyer told me I didn't have to go", the appellate court noted (a) the Florida Rules of Civil Procedure required that the sanctions be entered against Ward personally (not against his attorney) and (b) that was a matter for resolution between Ward and his attorney! (*COMMENT: Ouch!)*

(COMMENT: This is a very important decision – keep it in your briefcase!)

The next case carries sanctions to a higher level – appellate mediation!

In *Segui v. Margrill*, 844 So.2d 820 (Fla. 5th DCA 2003) the appellants filed a motion with the court requesting the imposition of sanctions against appellee, David Margrill, for his failure to appear at court-ordered appellate mediation.

The appellate court ordered this case to appellate mediation and the order specifically stated that

> *". . . parties with full settlement authority and counsel are required to attend mediation, unless excused from attendance by the mediator. Failure of an attorney or party to appear for a duly scheduled mediation conference or otherwise comply with the appellate mediation program procedures, without good cause, may result in imposition of sanctions by this court. . . ."*

Margrill admitted he failed to appear for the mediation and, in response to appellants' request for sanctions, he contended that the imposition of sanctions was not appropriate because his attorney attended the mediation with "full settlement authority." He further contended that sanctions were not warranted since, during the mediation he could have been contacted at all times by telephone, although he did not contend that he had requested or received permission from this court or the mediator to attend by telephone. The appellate court rejected these arguments as meritless.

> *"We required Margrill to attend mediation because* ***a party's actual presence at mediation is often critical to its success. Counsel is clearly not a "party," regardless of whether he or she is given authority to settle by the client****."* (Emphasis added.)

The court determined that appropriate sanctions for a party's failure to comply with the court's order included the award of reasonable attorney's fees and mediator fees. Although the order of referral to mediation did not specifically list the award of attorney's fees as one possible sanction, no such specific reference is required. Citing *Carbino v. Ward*, 801 So. 2d 1028 (Fla. 5th DCA 2001).

Appellants' motion for sanctions specifically sought attorney's fees in the amount of $1,384.50 and mediator fees in the amount of $100.00. Margrill's response to the motion did not contest the reasonableness of those fees. The appellate court imposed sanctions in those amounts and direct Margrill to make payment of $1,484.50 to appellants' counsel within 15 days from the date of its opinion.

"Play It Again, Sam."

In *Mash v. Lugo & Irizarry*, 49 So.2d 829 (Fla. 5th DCA 2010) Mash filed a motion for sanctions against Lugo and Irizarry *and their counsel* after Lugo and Irizarry failed to appear for an appellate court ordered mediation. Mash and his counsel appeared and only Lugo and Irizarry's counsel appeared.

In response to the motion for sanctions, appellees' counsel filed affidavits *(COMMENT: They didn't help as you'll soon see.)* stating that only appellees' insurer had the exclusive right to decide to defend or settle any claim or suit within policy limits and that appellees had no authority to bind the insurer to any settlement and that *(COMMENT: You may already have guessed what's next.)* their attorney had full settlement authority on behalf of the insurer.

The motion for sanctions was granted – neither appellee appeared nor did any representative of the insurer. There was no court order excusing the appellees nor the insurer nor was there any agreement that they could appear electronically. *(COMMENT: The court said "Don't mess with Texas" – okay it didn't say that; however it did say what follows.)*

> *"Appellees' counsel's claim that he had full authority to settle the case on behalf of the insurer does not excuse the failure to attend of the appellees and a representative of their insurer."*

As you might expect the court cited both *Segui v. Margrill*, 844 So.2d 820 (Fla. 5th DCA 2003) and *Carbino v. Ward*, 801 So. 2d 1028 (Fla. 5th DCA 2001). Appellees were ordered to pay, within 30 days from the date of the opinion, the following:

(1) To the mediator, all fees charged by the mediator in connection with the appellate mediation and

(2) To opposing counsel, reasonable attorneys' fees and costs incurred in preparing for and attending the appellate mediation and filing the motion for sanctions.

In furtherance of positive foreshadowing, the court appointed the trial judge as commissioner to conduct an evidentiary hearing in the event the parties could not agree on the amount of reasonable attorneys' fees and costs and to make a recommendation to the appellate court of the amount.

Okay, just one more time – fast forward to 2012!

In *Carden & Associates, Inc. and Hollister v. C.O.D. Trees Partnership*, 37 Fla. L. Weekly D 104 (Fla. 5th DCA 2012) C.O.D. Trees Partnership filed a motion with the appellate court seeking sanctions against Carden & Associates, Inc. and Hollister for their failure to appear at appellate mediation in violation of the court's order to mediation.

Neither Hollister nor a representative of Carden attended the mediation – only their insurance company representative and attorney appeared *(COMMENT: "When will they ever learn?" Thank you Pete Seeger* –Where Have All The Flowers Gone? *[1961]. . . . Peter, Paul and Mary too!)*

No motion was filed with the court requesting that Carden and/or Hollister's personal appearance be excused from the mediation. Citing *Carbino v. Ward*, 801 So.2d 1028 (Fla. 5th DCA 2001), the 5th DCA reiterated that:

"The law is clear that, absent being excused by the court, the party must appear at mediation and a representative of the insurance company cannot take the party's place. The fact that Carbino involved a trial mediation, rather than an appellate mediation, is of no relevance since the appearance language in the applicable rules are identical."

As you might have surmised by now, the motion for sanctions was granted and Carden and Hollister were ordered to pay, within 30 days from the date of the opinion, the following:

(1) all fees charged by the mediator in connection with the appellate mediation and

(2) C.O.D.'s reasonable costs and attorneys' fees incurred in preparing for and attending the appellate mediation and filing the motion for sanctions.

Once again, the court appointed the trial judge as commissioner to conduct an evidentiary hearing in the event the parties could not agree on the amount of reasonable attorneys' fees and costs and to make a recommendation to the appellate court of the amount.

The court went on to order that any dispute over the reasonable amount of attorneys' fees and costs *"will not delay the obligation to timely pay the mediator fees."*

Be Careful What You Ask For – The Law of Unintended Consequences – Or the Case of the Backfiring Sanctions

Here are the details of the Court's Order on Plaintiff's Motion for Sanctions in *Garrett v. Townley Foundry & Machine Co., Inc.*, Case No. 5:11-cv-77-Oc-34TBS (United States District Court, M.D. Florida, Ocala Division).

The motion arose out of the Defendant, Townley Foundry & Machine Co., Inc.'s failure to appear at the parties' scheduled mediation conference in Tampa. Plaintiff filed the motion for sanctions alleging that:

(1) the Defendant "willfully chose not to attend the mediation conference";

(2) the Defendant "cannot show good cause as to why it did not attend the mediation";

and

(3) prior to filing the motion Plaintiff conferred with the Defendant in a good faith effort to resolve these issues.

(*COMMENT: Well, this doesn't sound so good! Wait, though, for the rest of the story.)*

In response, the Defendant's corporate representative averred that:

(1) he mistakenly believed the mediation conference was to take place in Ocala in the same office where his deposition had been taken one month earlier;

(2) he drove to that office and after realizing he was in the wrong place immediately began driving to Tampa;

(3) he offered to attend the mediation telephonically while he was driving to Tampa to appear in person *(COMMENT: I wouldn't want to be on the same road at the same time as the corporate representative.);*

(4) defense counsel was physically present at the mediation and prepared to make an opening statement;

(5) the mediator was willing to move forward with the mediation telephonically;

(6) Plaintiff's counsel refused to remain at the mediation; and

(7) Defendant agreed to pay the entire cost of the mediator's fee and actually made the payment.

(COMMENT: So, based on the preceding opinions what do you think was the outcome of the hearing on Plaintiff's Motion for Sanctions?)

The court found the Defendant's failure to attend the mediation was not willful since it was undisputed that the corporate representative offered to participate telephonically while driving to Tampa, would have arrived prior to the conclusion of the scheduled mediation but Plaintiff's counsel declined to move forward with the mediation because according to Plaintiff's counsel the Defendant did not seem willing to consider his settlement offer.

Also, the court found that the Defendant did not violate any court order by failing to appear since the Case Management and Scheduling Order relating to mediation required the parties to attend mediation on or before December 30, 2011 and the mediation had been rescheduled for November 15, 2011.

Ultimately, the court found that Plaintiff's counsel (*COMMENT: Here's the backfiring part.*) failed to comply with the local rule requiring a moving party to confer with counsel for the opposing party in a "good faith effort to resolve the issues raised by the motion . . . " and that the purpose of the rule "is to require the parties to communicate and resolve certain types of disputes without court intervention."

As it turned out, the only time Plaintiff's counsel discussed the issues raised in the Motion for Sanctions was at the mediation conference and according to the court "there is no question that Plaintiff's counsel did not confer in a good faith effort to resolve these issues." Given the circumstances in items (1) to (7) above, it was inexplicable to the court why Plaintiff's counsel unreasonably refused to continue with the mediation, especially since the Defendant paid the entire mediation fee.

All to say, the court had no difficulty concluding that Plaintiff's counsel failed to confer with Defendant's counsel in a good faith effort to resolve the issues raised by the motion.

As stated by the court:

"The Court would advise Plaintiff's counsel to familiarize himself with the requirements of Local Rule 3.01(g) and insure that all future motions comply with the Rule.

Plaintiff's Motion for Sanctions is DENIED. It is worth noting that even if the Court had been inclined to award sanctions, Plaintiff's counsel was wholly unprepared at the hearing regarding the amount of sanctions sought.

Finally, Plaintiff's counsel made a number of serious representations in this case that he was unable to support – i.e., that Defendant "willfully chose not to attend the mediation conference"; that Defendant "can not show good cause as to why it did not attend the mediation"; and that Defendant's "complete disregard for this Court's Orders requires sanctions."

Plaintiff's counsel is cautioned from making unsubstantiated representations in the future." (Emphasis added.)

(COMMENT: I hope the above cases will be useful to you in appreciating the appearance category distinctions in Florida Rule of Civil Procedure 1.720(b) as well as offering some tips on how to address the expected (you know, "expect the unexpected"), albeit, unusual situations that occur often enough in mediation to be memorable. Be careful out there!)

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

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

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

ADR Section Financial Summary as of December 31, 2011

Name	2010-11 End of Year	YTD 2011-12 Actual	Budget 2011-12 Budget	2012-13 Proposed
REVENUE				
Section Dues	$14,035	$23,660	$17,500	$28,000
Admin Fee to TFB	($6,442)	($11,830)	($8,750)	($14,000)
CLE Courses	$0	($75)	$0	$500
Section Differential	$0	$680	$0	$300
Sponsorships	$0	$0	$0	$750
Advertising	$0	$0	$0	$300
Investment Allocation	$575	($514)	$375	$397
TOTAL REVENUE	**$8,168**	**$11,921**	**$9,125**	**$16,247**
EXPENSES				
Credit Card Fees	$116	$6	$225	$225
Employee Travel	$322	$111	$0	$496
Postage	$5	$2	$0	$15
Printing	$0	$3	$0	$0
Newsletter	$0	$0	$0	$1,000
Committee Expenses	$964	$208	$1,750	$1,750
Board of Council Meetings	$0	$0	$0	$3,000
Website	$0	$0	$0	$1,200
Council of Sections	$300	$0	$0	$300
Operating Reserve	$0	$0	$0	$1,034
Graphics & Art	$94	$508	$0	$125
TOTAL EXPENSES	**$1,801**	**$838**	**$1,975**	**$9,145**
NET OPERATIONS	**$6,367**	**$11,083**	**$7,150**	**$7,102**
Fund Balance	$0	$6,368	$5,300	$13,219
TOTAL CURRENT FUND BALANCE	$6,367	$17,451	$12,450	$20,321

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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Course No. 1378C

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Moderated by Justice Lewis including question and answer session

The course material covered is *AT&T Mobility LLC v. Concepcion Opinion;* Supplemental Brief – Kentucky; Supplemental Brief – Cruz; Sprint Brief; and the Arbitration article: http://www.floridabar.org/cmdocs/cm410.nsf/WDOCS/B9983893198C01DB852578BE0051CFC7

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8221001 Item Number

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