



THE FLORIDA BAR ALTERNATIVE DISPUTE RESOLUTION SECTION

News & Tips

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Michael Lax, Chair • Bob Hoyle, Chair-elect

Chair's Message



Michael H. Lax

Greetings from the Chair! Welcome to the New Year and thank you to the members of the Section for all of their accomplishments in 2014. To briefly refresh, we elected a new Executive Council, set up new committees in Recruitment, Website, CLE, Legislation and Newsletter, and created an ADR Section website. Membership in the Section has grown and we look forward to continuing growth this year.

In February 2015, we launched the ADR Section's new website, www.fladr.org. The website will provide access to information for all members of the section. We hope you find it useful and visit the site whenever you need information pertaining to MEAC opinions, information about the section and information on section members.

In December 2014, the ADR Section filed Comments with the Florida Supreme Court to the Proposed Amendment to the Florida Family Law Rules and Florida Rules of Civil Procedure creating "other ADR Processes" and we continue to monitor this proposed amendment. We are developing audio webinars and live seminars on various topics of importance in the field of alternative dispute resolution. The seminars will provide opportunity for CLE credits, and may also provide CME credits.

We invite all members of The Florida Bar who are actively engaged in the alternative dispute resolution practice to join the ADR Section of The Florida Bar and enjoy the benefits membership provides.

Michael H. Lax
Chair
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Note: Newsletter editor A. Michelle Jernigan is soliciting articles for the Fall edition of the ADR News & Tips. All articles should be submitted to mjernigan@uww-adr.com by May 15th.

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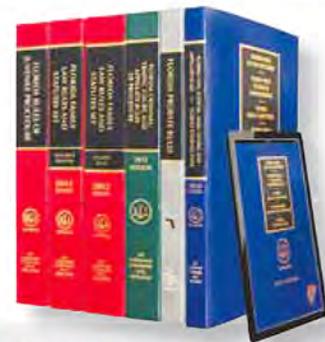
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MEAC Opinion 2014-022 – Prohibiting Key Information in Mediation Reports

By Robert H. Sturgess

A new opinion from the Mediator Ethics Advisory Committee [“MEAC”] now requires mediators to report to the court that a mediation concluded either with an “agreement” or with “no agreement”, even if there was an agreement only as to some parties or issues. The conundrum for mediators following a partial settlement is that reporting there was an “agreement” is misleading, while reporting there was “no agreement” is outright untrue. MEAC reasons that any descriptor or modifier preceding the word ‘agreement’ in a mediator’s report violates the Mediation and Confidentiality and Privilege Act because it “would be sending information to the court.”

THE OPINION

According to Opinion Number 2014-022 of MEAC, issued on September 8, 2014, a mediator is not allowed to report to the court with comments, recommendations, descriptors or modifiers regarding whether there was an ‘agreement’ or ‘no agreement’. That is, a mediator who achieves a partial agreement between certain parties or regarding certain key issues may not report the qualifier to the court. The descriptor “partial” is not allowed.

In so doing, MEAC retracts its 2012-009 opinion along with any other opinion that is inconsistent with this new opinion. Opinion 2012-009 approved a circuit’s mediation report form that included “partial settlement” as an alternative to ‘agreement’ or ‘no agreement.’ In particular, MEAC announced a ‘partial settlement’ report “meets the requirements of the Florida Rules of Civil Procedure and the Florida Family Law Rules of Procedure.”

In its new Opinion, MEAC reasoned the inclusion of language other than ‘agreement’ or ‘no agreement’ “would be sending information to the court, an action which is prohibited by the Mediation Confidentiality and Privilege Act, sections 44.401-405, Florida Statutes.” [“the Act”] The Opinion does not include a pinpoint citation to the Act, nor does it quote the Act. MEAC makes the broad statement that the Act prohibits ‘sending information to the court’ without discussing or distinguishing, for example, that the entire purpose of a mediator’s report is to send information to the court. (The Act does, however, refer to “partial settlement” when defining the end of a mediation’s duration. Section 44.404(1)(a) and 44.404.(2)(a).)

As it did in the 2012-009 opinion, MEAC made additional determinations focused on Rule of Civil Procedure 1.730(a) and Family Law Rule of Procedure 12.740(a). The 2014-002 opinion states, “These [Civil and Family Law] rules do not restrict the parties from agreeing on additional language,

descriptors, or modifiers in the **written agreement.**” (emphasis in original)

Absent a full and final settlement, therefore, the mediator can, upon reaching a partial settlement, draft any language which might reasonably facilitate the furtherance of settlement that the parties consent to in a written agreement, so long as the mediator reports one of the falsehoods there was an “agreement” or “no agreement.” Further, the parties may consent to a mediation report that identifies pending motions or legal issues that might facilitate a settlement if resolved by the court. The mediator’s report may also identify “any . . . other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.”

THE DISSENT

The dissenting opinion is divided into two sections. The first section begins by noting that neither the Act nor the broadly applicable Florida Supreme Court Rules of Procedure states that a mediator is prohibited from reporting a “partial agreement” to the court, and such a report is simply not a confidential mediation communication. It can be misleading to report ‘no agreement’ or ‘agreement’ to the court when there is a partial agreement. The dissent also notes that appellate mediators are required to use the district court’s form, and the fifth district’s new form allows for a descriptor.

The second section of the dissenting opinion argues the

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language of the majority opinion is confusing and misleading. The dissent acknowledges that the Civil and Family Law Rules permit the inclusion of explanatory language in the mediator’s report with the consent of the parties, but argues that the permissible language is unduly limited. The purpose of the majority’s opinion is to preclude the potential for language “which might cause the Court to draw any negative inferences against either or both of the parties regarding why the case did not settle or what happened in the mediation.” The dissent does not believe the majority opinion is effective in that way.

DISCUSSION

What appears to be missing from the overall discussion is that (i) parties are capable of deciding what is in their best interest, including whether an agreement should be reported to the court as partial, and (ii) it is wrong to decide the nuances of mediation procedures on the presumption judges make negative inferences or take negative views of realities such as partial settlements. First, the majority opinion itself concedes that in civil and family law cases, the parties can consent to tell the judge anything they agree to tell via the mediator’s report. Rule of Civil Procedure 1.730(a) states, “With the consent of the parties, the mediator’s report may also identify any pending motions or outstanding legal issues, discovery process, or **other action by any party** which if resolved or completed, **would facilitate the possibility of a settlement.**” (emphasis added).

Phrases such as “other action” and “facilitate the possibility” conceivably include information that could go miles beyond what the phrase “partial settlement” would indicate to a judge. In fact, the parties can even agree to dispense with the application of sections 44.405(1), 44.405(2) or 44.406 if they agree in writing. Section 44.402(2), Florida Statutes. According to section 44.405(4)(a)(1), the parties can entirely waive the confidentiality or privilege against disclosure if they all agree.

The simple fact is that the mediator, with the consent of the parties, can tell the judge exactly what legal issues remain and what actions taken by any party might resolve the case, if such information would “facilitate the possibility” of a complete settlement.

Second, while MEAC wrestled with the word “partial”, or any other descriptor before the word ‘agreement’, judges must wonder why the Committee is so concerned the judiciary would instinctively presume negativity on one or more parties to a mediation that only partially settled. Judges are more insightful than MEAC thinks. There is a fine argument that judges do not need a Committee to protect them from one word “descriptors” that do nothing but provide a truer understanding of the outcome of mediation.

Finally, the majority does not address the dissent’s argument that the majority opinion bypasses Rules of Civil Pro-

cedure 1.730(b), which states in part, “If a partial . . . agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any. The agreement **shall be filed** when required by law or with the parties’ consent.” (emphasis added) MEAC Opinion 2014-002 is viewed by many as an invitation – if not a call – for the various Rules Committees to address the conflicts and confusion created by the Opinion. One suggestion may be an agreement on a uniform mediation report form to be made part of the Florida Rules of Civil Procedure. The Opinion is also viewed by many others as a hyper-technical requirement that a mediator must keep certain important, truthful information from a report to the judge, who will almost certainly learn the information in any number of other ways.

FLORIDA FEDERAL DISTRICT COURTS

The three federal district courts have mediation report rules that are consistent with state rules, particularly in the sense there is little agreement on whether a partial settlement should be reported to the court after mediation. Southern District Local Rule 16.2(f) states the mediator report “shall indicate whether . . . the cases settled (**in full or in part**), whether the mediation was adjourned or whether the case did not settle.” (emphasis added).

Northern District Local Rule 16.3(A) states, “Absent a settlement or consent of the parties, the mediator will **only** report to the presiding judge whether the case settled, was adjourned . . . continued . . . or was terminated . . .” (emphasis added). There is no express reference to partial settlements in the mediator report, but as with MEAC Opinion 2014-002, the door has been left open for such a report with “consent of the parties.”

Middle District Local Rule 9.06(a) states that “the mediator shall file a Mediation Report indicating . . . whether the case settled, was continued with the consent of the parties, or whether the mediator was forced to declare an impasse.” The Tampa Division, however, attaches a form Mediation Report to its mediation orders. In addition to either reporting a settlement, continuance or impasse, the Tampa Division expressly allows the mediator to choose the following: “The case has been partially resolved and lead counsel has been instructed to file a joint stipulation regarding those claims which have been resolved within ten (10) days. The following issues remain for this Court to resolve:” (emphasis in original).

The Tampa Division Mediation Report form and the Southern District Local Rule seem to resolve at least a couple of issues. First, the federal district judges in Tampa feel competent and confident enough to know the full truth about a partial settlement without making improper inferences. Second, there is no apparent reason why any judge cannot, either by motion or sua sponte, include in the mediation order that a partial settlement shall be reported.

As an additional comment regarding the lack of concern other jurisdictions have with the issues raised in Opinion 2014-002, a cursory search of other states revealed that disclosing partial settlements in mediator reports is allowed

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in Illinois, Tennessee, Kentucky and Alabama. A nationwide survey is not necessary to make the point that the disclosure of a partial agreement in a mediator’s report is not per se offensive to the aspirations of confidentiality.

CONCLUSION

MEAC summarizes its position in Opinion 2014-002 by claiming that “it is **clearly stated**” in the various rules of procedure, “No descriptors or modifiers may be used in the mediation report.” (emphasis added). Having insisted its position is ‘clearly stated’ in the rules, MEAC then explains, “This committee interprets the rules” to prohibit comment or recommendation. (emphasis added). The latter statement is more forthcoming.

When interpreting the various rules, MEAC expressly presumes there is per se harm in allowing descriptors or modifiers of an agreement in a mediator’s report because

it “would be sending information to the court,” which MEAC further presumes to be intrinsically threatening to the spirit of the confidentiality guarded by the Act.

One might wonder whether the better presumption would be – as exemplified by Florida federal courts – that judges are qualified to handle sensitive information regarding partial settlements without using it in a prejudicial manner or with negative inferences. Similarly, the better ‘implied presumption in MEAC’s interpretation of the Rules is that mediators should not be required to falsify their reports following a partial settlement to say there was no settlement at all. This is especially true since the Civil and Family Rules allow the parties to consent to a thorough and honest report to the court of a partial settlement.

Robert (Bob) Sturgess is a full-time mediator in Nassau County (northeast) Florida. He was a Senior Staff Attorney at the First DCA before practicing civil litigation in Jacksonville for two decades. Bob is ‘AV’ rated, and an Inn of Court ‘Master of the Bench’. Get more information at www.mediationfirstcoast.com.

Mediation in the Electronic Age; Physical Presence, Lifelines and Self-determination

By Brian P. Battaglia, Esq.

The initiation of mediation can occur when it has been ordered by the court, or where the parties voluntarily agree to attend mediation. In each instance, counsel for the parties or the pro se litigant will contact the Mediator to schedule the mediation and confirm the date, time and location. If mediation is court ordered, or simply by voluntary agreement of the parties, various rules will govern the mediation process depending on the type of mediation. (i.e. Circuit, County, Family, Dependency, etc.)

This article will explore the applicable rules and issues in mediation concerning a party or representative’s appearance at mediation by electronic means and applicable rules and issues that may arise during the mediation when there is a “request” for further consultation with a non-party participant. (emphasis supplied)

Fla. R. Civ. 1.720 (b) in part indicates that the appearance of a party at the agreed upon mediation occurs *when the party or party’s representative having full authority to settle without further consultation, and the party’s counsel of record, if any, are physically present.*¹ (emphasis supplied)

First, if there is a request to appear telephonically, the Mediator should confirm that the order, joint-stipulation or

agreement authorizes the party or representative to appear in such a fashion.² The Mediator should not assume it was expressly addressed in the order, joint-stipulation or agreement. If it was not, then the Mediator should notify the parties that telephonic appearance can occur when proper authorization has been obtained. One role of the Mediator is to ensure that proper procedures are followed with respect to the mediation.³ Once the Mediator confirms that telephonic appearance is authorized, it would be prudent for the Mediator to take the time to determine if there exist any potential logistical issues or impediments that may result from a party or its representative’s lack of “physical presence” at the mediation. For example, if counsel for a party will be appearing telephonically, but his or her client will be physically present at the mediation, it may be wise to determine in advance the type of communication equipment that will be available, obtain primary and backup phone numbers, fax numbers and e-mail addresses and consider how discussions and caucuses will be conducted telephonically.

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Importantly, an early evaluation of how effectively the mediation can be carried out, with one or more parties or counsel not being physically present, may be helpful in the long run. Such an evaluation will, of course, depend on any information submitted in advance by the parties, including mediation summaries. Addressing these logistical issues in advance can avoid potential delays or even the need to reschedule the mediation at the last minute.

Another important issue and potential problem that can arise is the use of cell phones to communicate with persons who are not parties to the dispute. This may occur during caucuses or at a point in time where critical decisions are being considered by a participant with respect to proposed settlement terms or conditions.

As the Mediator, a situation may occur where you observe during the mediation a party's hesitation and uncertainty as to one or more issues. Unable to obtain, for whatever reason, a level of comfort from counsel who has appeared telephonically or is present at the mediation, the party expresses the desire to call a friend, family member or confidant in order to discuss the issue(s) further. As the Mediator, you must determine whether it is appropriate to permit the call, knowing that the individual to be called is not a party, a representative or person that has been authorized to participate in the mediation.

The first question to be explored is: Have the parties agreed that there may be a communication with someone not present at the mediation? The parties have already agreed to permit counsel or parties to appear by telephone, but calling an outsider may not have been contemplated. As well, the Mediator may not have raised this issue before the mediation or when discussing the ground rules during the opening of the mediation session.⁴ Mediations are confidential, so at first it would appear that such a call may be problematic.⁵ However, the issue has been addressed in several MEAC (hereinafter “Mediator Ethics Advisory Committee”) Opinions’ including the following: 2006-07, 2008-006, 2010-14 and 2011-012.

One of the core principles of mediation is that of self-determination. This principle requires that mediation be conducted in an atmosphere that enables the parties to reach a settlement on their own agreed upon terms and conditions. A Mediator's decision to prohibit a party from communicating with whomever they choose during a mediation session would be in conflict with a party's right to self-determination. The above referenced decisions issued by MEAC suggest that since the attendance of a “non-party” does not impact the confidentiality or privileged nature of mediation communications pursuant to Section 44.405, Fla. Stat., a mediator cannot exclude a non-party, but should tell the party⁶, as well as the non-party that they are bound by the confidentiality requirements contained in the statute

and rule.⁷ However, the opinions also point out that although there may be no violation of confidentiality due to a non-party's presence or participation, if another party objects, the Mediator may attempt to resolve the objection. In the event the Mediator is unable to do so, the only viable alternative maybe to adjourn or terminate the mediation in instances where the party indicates that they will not continue without the involvement of the non-party or the Mediator concludes that the party will be unable to participate meaningfully in the process.⁸

In MEAC Opinion 2011-012 the Committee addressed a question raised by a Mediator that concerned confidentiality and the ever increasing use of cell phones⁹ by parties during caucuses to call “family, friends, pastors, etc.” The Committee determined that Mediators could not unilaterally ban the use of cell phones during mediation, based once again, upon self-determination principles.

The Committee in its findings determined, as follows: “Ultimately, all parties to mediation have the ability to jointly and unanimously decide whether it is acceptable for anyone participating in the mediation to communicate with someone who is not present at the mediation. Mediators may wish to consider addressing the use of cell phones or a texting device in their opening orientation by obtaining agreement as to the use of such devices and further reminding parties that mediation confidentiality applies to all mediation participants, whether present in person or by electronic means”.¹⁰

Conclusion

The core principle of “Self-determination” in the mediation process can be best achieved where the Mediator confirms procedural compliance, addresses logistical issues well in advance of mediation and is familiar with cutting edge issues affecting the mediation process in Florida.

Brian P. Battaglia, Esq. of *Brian P. Battaglia, P.A. and Bay Mediations* is a Florida Supreme Court Certified Circuit, Family and County Court Mediator and practices in the areas of Civil Litigation, Labor and Employment Law and Health Law. Brian has been a member of the St. Petersburg Bar since 1986.

Endnotes

1 Fla. R. Civ. P 1.720 also addresses the requirements relating to the appearance at mediation of a representative of an insurance carrier or public entity. This article will not be addressing any nuances or issues relating to that category of representative. Also, it should be noted that in Family mediation, Fla. Fam. L. R. P. Rule 12.740 (d) states that: Unless otherwise stipulated by the parties, a party is deemed to appear at a family mediation convened pursuant to this rule if the named party is physically present at the mediation conference. In the discretion of the mediator and with the agreement of the parties, family mediation may proceed in the absence of counsel unless otherwise ordered by the court.(emphasis supplied)

2 *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. See, Fla. R. Civ. P.1.720 (b). (emphasis supplied)

3 See, Fla. R. Civ. P. 1.720 (h).

4 Fla. R. Med. 10.420 (a) (3) entitled “Orientation Session” states in part

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that ...”communications made during the process are confidential...”

5 Fla. R. Med. 10.360 and Chapter 44 Fla. Stat.

6 MEAC Opinion 95-003 also states that the “...mediator should remind the party making the communication of the privilege provided by statute and that any communication about the specific content of the mediation shall remain confidential”.

7 A “mediation participant” is defined in the confidentiality statute as “a mediation party or a person who attends mediation in person or by telephone, video conference, or other electronic means.” Section 44.403(2), Fla. Stat. (emphasis supplied)

8 Rules for Certified and Court-Appointed Mediators require that decisions made during the mediation are to be made by the parties and a mediator shall not coerce any party to make a decision or unwillingly participate in mediation. Fla. R. Med. 10.310 (a) and (b) (Emphasis supplied). In addition, MEAC Opinion 99-004 determined that agreement of all parties was necessary for the non-party to assist the party in the mediation. The Committee noted that “...”there are instances in which negotiations may be hampered by the absence of such [non-] parties. However, in MEAC Opinion 2001-004 the Committee indicated (in a family law mediation case) that the Mediator upon discovering the pro se party was speaking with an attorney by cell phone need not immediately cancel mediation [simply] because a party calls a mediator or other “extra mediation source or advisor”.

9 Three short years after MEAC Opinion 2011-012 texting and other electronic messaging are more than ever being utilized in many settings, including mediation.

10 See, MEAC Opinion 2011-012.

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.....

If you or anyone you know may be interested in serving as a volunteer arbitrator and/or mediator under The Florida Bar’s Fee Arbitration and Grievance Mediation Program, and in accordance with the eligibility requirements list above, please review the [Grievance Mediation and Fee Arbitration Manual](#) and complete the Program Mediator/Arbitrator Application form. Return your application to The Florida Bar, Attn: Susan Austin, 651 E. Jefferson St., Tallahassee, FL 32399. For further information, you may also contact Shanell M. Schuyler, Director, ACAP/Intake, at (850)561-5647.

ADR Section Case and Comment!

By Perry S. Itkin, Esquire, Fort Lauderdale

“Let’s mediate over lunch.”
“You mean, during lunch?”
“No, I mean over lunch.”
“What? Do you mean mediate about lunch?”
The judge’s order reflects “Thinking Outside the Box – Lunch.”

Although not a Florida case, this Arizona Superior Court judge . . . Well, you’ll see.

Physicians Choice of Arizona, Inc. v. Mickey Miller, et al., Case No. CV 2003-020242, Superior Court of Arizona, Maricopa County [July 16, 2006].

The court ruled on 2 pending motions. What follows are the Court’s rulings in their entirety [for the most part].

PLAINTIFF’S MOTION TO COMPEL ACCEPTANCE OF LUNCH INVITATION

The Court has rarely seen a motion with more merit. The motion will be granted.

The Court has searched in vain in the Arizona Rules of Civil Procedure and cases, as well as the leading treatises on federal and Arizona procedure, to find specific support for Plaintiff’s motion. Finding none, the Court concludes that motions of this type are so clearly within the inherent powers of the Court and have been so routinely granted that they are non-controversial and require no precedential support.

Plaintiff’s counsel extended a lunch invitation to Defendant’s counsel “to have a discussion regarding discovery and other matters.” Plaintiff’s counsel offered to “pay for lunch.” Defendant’s counsel failed to respond until the motion was filed.

Defendant’s counsel distrusts Plaintiff’s counsel’s motives [COMMENT: Seriously?!?] and fears that Plaintiff’s counsel’s purpose is to persuade Defendant’s counsel of the lack of merit in the defense’s case. The Court has no doubt of Defendant’s counsel’s ability to withstand Plaintiff’s counsel’s blandishments and to respond sally for sally and barb for barb. Defendant’s counsel now makes what may be an illusory acceptance of Plaintiff’s counsel’s invitation by saying, “We would love to have lunch at Ruth’s Chris with/on . . .” Plaintiff’s counsel.¹

Plaintiff’s counsel replies somewhat petulantly, criticizing Defendant’s counsel’s acceptance of the lunch invitation on the grounds that Defendant’s counsel is “now attempting to choose the location” and saying that he “will oblige,” but Defendant’s counsel “will pay for its own meal.”

There are a number of fine restaurants within easy driving distance of both counsel’s offices, e.g., Christopher’s,

Vincent’s, Morton’s, Donovan’s, Bistro 24 at the Ritz-Carlton, The Arizona Biltmore Grill, Sam’s Café [Biltmore location], Alexi’s, Sophie’s and, if either counsel has a membership, the Phoenix Country Club and the University Club. Counsel may select their own venue or, if unable to agree [COMMENT: Nice try!] shall select from this list in order. The time will be noon during a normal business day. The lunch must be conducted and concluded not later than August 18, 2006.²

Each side may be represented by no more than two [2] lawyers of its own choosing, but the principal counsel on the pending motions must personally appear.

The cost of the lunch will be paid as follows: Total cost will be calculated by the amount of the bill including appetizers, salads, entrees and one non-alcoholic beverage per participant.³ A twenty percent [20%] tip will be added to the bill [which will include tax]. Each side will pay its *pro rata* share according to the number of participants. The Court may reapportion the cost on application for good cause or may treat it as a taxable cost under ARS § 12-331[5].

During lunch, counsel will confer regarding the disputes identified in Plaintiff’s motion to strike Defendant’s discovery motion and Defendant’s motions to quash, for protective order and for commission authorizing out-of-state depositions.⁴ At the initiative of Plaintiff’s counsel, a brief joint report [COMMENT: Really?!? These lawyers couldn’t agree on lunch!] detailing the parties’ agreements and disagreements regarding these motions will be filed with the Court not later than one week following the lunch and, in any event, not later than noon, Wednesday, August 23, 2006.

DEFENDANT’S MOTION TO STRIKE PROPOSED AMENDED COMPLAINT

To demonstrate to counsel that the Court has more on its mind than lunch, the Court has considered Defendant’s motion to strike Plaintiff’s proposed amended complaint. The motion will be granted.

Plaintiff’s proposed amended complaint is 56 pages long and has 554 separately numbered paragraphs. It contains 19 counts. It is prolix and discursive in the extreme. It violates the Court’s order of July 22, 2005, permitting the Plaintiff to file “an agreed-upon [COMMENT: Again, really?!? “agreed-upon”?] form of Amended Complaint to clean up housekeeping matter.” It is not the “short and plain statement” required by Rule 8[a][2]. . . [I]t violates the observation of French philosopher Blaise Pascal, who concluded a long letter with an apology, saying he’d “had not the leisure to make it shorter.” Since

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this is a 2003 case with no end in sight, Plaintiff's counsel has the leisure to make his complaint shorter.

The judge ordered, in part, as follows:

1. Plaintiff's motion to compel Defendant's counsel's acceptance of lunch invitation is granted on the terms and conditions set forth above.

2. The parties are directed to file the joint report referred to above.

[COMMENT: How about that?!? If the judge had ordered this dispute to mediation and appointed you as the mediator [it's unlikely, the lawyers would agree on a mediator], what techniques would you consider using – declaring an impasse does not count – to assist the lawyers in their decision-making? The judge's terms and conditions demonstrate positive foreshadowing in there detail and, in fact, logically as written would fulfill a Florida mediator's obligation under *Florida Rules for Certified and Court-Appointed Mediators*, Rule 10.420(c), Closure:

*The mediator shall cause the terms of any agreement reached to be memorialized appropriately and **discuss with the parties and counsel the process for formalization and implementation of the agreement.*** [Emphasis added.]

What Florida Rules of Civil Procedure, parts of Chapter 44, Florida Statutes, and Florida Rules for Certified and Court-Appointed Mediators are identifiable in the judge's discussion in the Motion to Compel Acceptance of Lunch Invitation segment?

If you were the mediator, would you suggest taking a break for lunch?!? [Just kidding – okay, not really!]

MEDIATION IN FLORIDA HAS BEEN THREATENED!

Jilco, Inc. v. MRG of South Florida, Inc., 2014 WL 5149077 [Fla. 4th DCA 2014].

Jilco sought certiorari review of an order denying its motion for protective order on a request for post-settlement discovery. Granted.

Jilco subleased commercial property to MRG. After a dispute arose regarding the sublease, the court ordered mediation where the parties entered into a preliminary settlement agreement titled "Memorandum of Mediation Results." The memorandum included a provision stating that the "[p]arties contemplate executing more formal documents to implement this agreement. However, if not done, this agreement shall be enforceable by the parties/courts." [COMMENT: Good job, mediator, in addressing the "what if" issue!]

Paragraph [a] of the agreement provided that MRG's rent would be set at \$31,000 per month. Paragraph [b] provided that the rent would always be \$14,000 more than Jilco's rent to the owner of the property. [COMMENT: Do you see any issue at this point?]

A few months after the agreement was signed, Jilco learned that its rent was being increased due to a property tax increase passed through by the property owner and notified MRG that rent under the sublease would be increased to

\$33,995.71, with was \$14,000 more than Jilco's new rent to the owner.

MRG filed a motion to enforce settlement asking the court to enforce paragraph [a], which set the rent amount at \$31,000 and Jilco argued that the increase was consistent with paragraph [b] of the agreement. Alternatively, MRG asked that the agreement be rescinded or voided due to mistake or absence of a meeting of the minds.

[COMMENT: As an important aside, Section 44.405[4][a] of Florida's Mediation Confidentiality and Privilege Act provides, in pertinent part:

Notwithstanding subsections [1] and [2], there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:

5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation. . . .]

MRG subpoenaed 19 years of payment history and correspondence between Jilco and the property owner. Jilco moved for a protective order seeking to limit discovery to information relevant to the dispute regarding the settlement.

The trial judge took the position that until the settlement issue was decided, the case remained open and full discovery would be available – essentially finding that there was no settlement agreement until one was submitted and approved by the court [COMMENT: Where did that notion come from?]. Jilco argued that the agreement did not need to be approved by the court to be valid and that discovery beyond the terms of the settlement was prohibited at this time. The appellate court agreed.

*The court departed from the essential requirements of law in finding that no agreement exists unless approved by the court. Florida Rule of Civil Procedure 1.730 grants a trial court broad discretion to grant relief as to settlement agreements reached through mediation. It is undisputed that the parties reached an agreement that was reduced to writing and signed by all of the parties as required under rule 1.730[b]. A signed mediated settlement agreement is a contract [citation omitted]. Florida courts have routinely permitted issues of enforceability of settlements to be resolved through motions filed in the pending litigation rather than requiring independent actions [citation omitted]. The proper course is for the court to resolve the dispute regarding the validity of the agreement before ruling on the request for discovery. **To treat the agreement as though it did not exist, simply because it was being challenged, would pose a great threat to mediated settlements** [Emphasis added.]*

Where the parties enter into a settlement agreement, the settlement bars discovery regarding settled matters no longer at issue in the litigation [citation omitted]. An order compelling discovery while the settlement agreement is still in effect constitutes a departure from the essential requirements of the law.

Because the challenge to the agreement is unresolved, the trial court should first determine whether the agreement is valid and enforceable. If so, the court should limit discovery

continued, next page

to information on issues which survive the terms of the settlement agreement.

WATCH YOUR LANGUAGE! OR, THE MEDIATION PARTIES HAVE MORE POWER THAN THE COURT OR THE LEGISLATURE – UP TO A POINT, THAT IS!

Herbst v. Herbst, 2D13-2745 [Fla. 2nd DCA 2014].

The spouses entered into a mediated marital settlement agreement that provided for nonmodifiable alimony payable to the Former Wife for the remainder of her life as follows:

7. Alimony. The [obligor Husband] agrees to pay the [obligee Wife] alimony in the amount of \$4,500 beginning the date of the final judgment and continuing for the life of [obligee Wife]. The parties agree that this alimony is non-modifiable.

The mediation agreement was incorporated into the final judgment of dissolution of marriage.

About a year later the Former Wife remarried and [COMMENT: You guessed it!] the Former Husband stopped paying her alimony when he learned of her remarriage. The Former Wife filed a petition to enforce the alimony provision and the Former Husband responded by filing a motion to terminate alimony and for the return of the alimony he paid after the date she remarried.

The trial judge entered orders terminating the Former Husband's alimony obligation, establishing his overpayment of alimony and setting off the Former Wife's attorney's fee and cost award against that overpayment. The appellate court reversed because the mediated settlement agreement unambiguously required payment continuing beyond the Former Wife's remarriage and therefore controls over the statutory provision relied on by the trial court.

The trial court held an evidentiary hearing to adduce parol evidence on whether the alimony was in the nature of support or equitable distribution and whether it continued if the Former Wife remarried. At the onset of the evidentiary hearing, the parties stipulated that any evidence regarding discussions at the mediation conference was confidential and would not be adduced. The Former Wife testified that the parties agreed the Former Husband would pay her alimony for her entire life and she could never seek more or get less. The Former Husband testified that his understanding was the alimony would terminate if the Former Wife cohabited or remarried.

The trial judge found the parties' testimony to be "self-serving" and did not consider the parol evidence in ruling on the parties' motions, basing its decision on a legal construction of the mediated settlement agreement. So, the trial court determined that the alimony was in the nature of alimony [undisputed by both parties] and was intended to be permanent alimony governed by section 61.08, Florida Statutes [2011]. This section, subparagraph [8] provides for the termination of permanent alimony "upon the death of either party or upon the remarriage of the party receiving

alimony." The trial judge concluded that the alimony provision of the agreement did not expressly address termination and therefore section 61.08[8] applied.

The appellate court:

It is well-settled in dissolution of marriage proceedings that the parties may enter into settlement agreements imposing obligations the trial court could not otherwise impose under the applicable statutes. [citation omitted]. Thus, if the parties' MSA requires payment beyond the recipient's remarriage, the agreement terms will control over section 61.08 [citation omitted]. If the terms of the agreement are unambiguous, they are treated as evidence of the parties' intention and the agreement's meaning.

In this case the MSA unambiguously addresses the circumstances under which alimony may be terminated by obligating the Former Husband to pay alimony "for the life of the [Former Wife]" and by making it nonmodifiable. While this provision does not expressly address remarriage or cohabitation, it implicitly does so by requiring that payments continue in a specified amount until the Former Wife dies. Because this provision requires payment continuing beyond the Former Wife's remarriage, its terms control over section 61.08[8].

[COMMENT: OOPS! Seriously, what do you think the motivations of the parties were in agreeing to the alimony provision?]

WATCH YOUR LANGUAGE! PART II

Great American Insurance Company of New York v. 2000 Island Boulevard Condominium Association, Inc., 2014 WL 7156894 [Fla. 3rd DCA 2014].

Which of the following statements reflects impartiality or neutrality?

1. Fork over the money.

2. We're not sure," you can "we're not sure" until the cows come home. And, in fact, you won't be sure until the jury speaks, and then you won't be sure until the Appellate Court rules, and then you won't be sure until the Supreme Court rules after that. Then even if they rule against you, you won't be sure that they're right. You'll claim that they're wrong. That's just the nature of litigation. That's how it works. [COMMENT: The agent of reality here?]

3. If I were asked, I would sanction you. . . . This is not rocket science. . . . It's not a big deal. . . .

4. Keep a claim alive and a claim from being paid.

5. If it were me, I would still ask questions of an opinion nature and get the statements regarding privilege on the record. [COMMENT: Legal advice?]

And the answer to the question posed at the beginning of this section is . . . None of them!!!! You knew that, right?!

Although these statements were made by a trial judge during 2 hearings, mediators can learn valuable lessons from the opinion of the 3rd District Court of Appeal.

The appellate court:

It has long been said in the courts of this state that "every litigant is entitled to nothing less than the cold neutrality of an impartial judge [citation omitted]. Regrettably, the trial judge

continued, next page

CASE AND COMMENT from previous page

in this case has abandoned his post as a neutral overseer of the dispute between the parties, compelling us to grant Great American Insurance Company's Petition for a Writ of Prohibition.

A trial judge crosses the line when he becomes an active participant in the adversarial process, i.e., gives "tips" to either side. [COMMENT: Consider, from the mediator's perspective, the Rules for Certified and Court-Appointed Mediators, Rules 10.330, Impartiality and 10.370, Advice, Opinions, or Information, to name just two.]

Trial judges [COMMENT: Mediators too!] must studiously avoid the appearance of favoring one party in a lawsuit, and suggesting to counsel or a party how to proceed strategically, constitutes a breach of this principle [COMMENT: This prohibition also pertains to assistance given by "signalling", Leigh v. Smith, 503 So. 2d 989, 991 [Fla. 5th DCA 1987].

Regrettably, these statements, which sound more like they are coming from a party who is arguing the case rather than from a judge who has not taken a single piece of evidence, lend further credence to Great American's belief that this court has pre-judged the facts of this case, is injecting his personal opinions on causation into the case, and has a bias in favor of the plaintiff.

We acknowledge some of the trial court's comments may have been intended as expressions of wit or erudition on his part. However, the question of disqualification focuses not on what the judge intended, but rather how the message is received and the basis for the feeling. [COMMENT: The latter holds true for mediators – remember, it's not what we say, it's what the mediation party has heard!].

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Perry Itkin, training mediators since 1992, offers certified Circuit Civil, Family and Appellate mediation trainings, as well as Arbitrator training. He is a full-time mediation and arbitration practitioner with a Master of Science degree in Dispute Resolution. Appointed by the Chief Justice of the Florida Supreme Court, Perry served on the Alternative Dispute Resolution Rules and Policy Committee from 2002 – 2011. He is a member of the Executive Council of the ADR Section of The Florida Bar.

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Endnotes

¹ Everyone knows that Ruth's Chris, while open for dinner, is not open for lunch. This is a matter of which the Court may take judicial notice.

² The Court is aware of the penchant of Plaintiff's counsel to take extended cruises during the summer months.

³ Alcoholic beverages may be consumed, but at the personal expense of the consumer.

⁴ The Court suggests that serious discussion occur after counsel have eaten. The temperaments of the Court's children always improved after a meal.



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- Mediator Ethics Advisory Council Ethics Opinions. Several MEAC opinions deal directly with and define the circumstances that create a clear conflict of interest and prohibited mediation.
- Discussion of Vitakis-Valchine v. Valchine. Mediator misconduct can be grounds to set aside a mediated settlement agreement. Is the conduct of a mediation that is prohibited due to a clear conflict of interest mediator misconduct that may impact a settlement agreement?
- Possible Ethics Rules violated if mediation with clear conflict is conducted.
 - Proper screening by an attorney is required.
 - Rule 4-1.1, Rule 4-1.2(a), Rule 4-1.4 (a), Rule 4-1.4 (b).
 - Attorney ethics rules apply to representation at mediations to confirm that a clear conflict does not exist that may impact agreement.
- Suggestions for proper screening and disclosure by mediators and attorneys.

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