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ALTERNATIVE DISPUTE RESOLUTION SECTION
News & Tips

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Karen Evans, Chair • Michael Lax, Chair-elect

Chair's Message

Karen Evans

It has been an exciting few months for the ADR Section and I want to thank everyone who has committed their time, and their energy to our Section! Our CLE seminar at the annual Florida Bar Annual Convention was standing room only. Many thanks to Rodney Romano, Perry Itkin, Sandy Upchurch and John Upchurch for wowing the crowd. On Monday, November 18, 2013, we will be presenting a two hour webinar in conjunction with the Business Law, Appellate Practice and Real Property, Probate & Trust Law Sections of The Florida Bar. The Revised Florida Arbitration Act will be the subject along with recent arbitration case law. You received an e-mail blast about this event. Please spread the word amongst your colleagues as it is important to be aware of significant changes in the statute; and, the ADR Section will receive a quarter of the profits from this CLE.

Jesse Diner is chairing the Arbitration Committee and I invite anyone interested in getting involved to please contact me, Jesse, or Lani Fraser at The Florida Bar.

Brian Spector is chairing a committee on Early Neutral Evaluation. His committee will be gathering and analyzing information on Early Neutral Evaluation programs already in existence in other parts of the country. Again, I invite anyone interested in getting involved on the ground floor of this project to please call me, Brian, or Lani.

We are anxious to get more of our members involved in committees and projects that are of interest to our membership. Please give a call and let us know how we can work together!

Karen Evans
Chair, ADR Section

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TIPS FOR MANAGING THE "MEGA-MEDIATION"

David R. Carlisle and Bruce A. Blitman[*]

There is no such thing as a simple or typical mediation. Every case you mediate will present unique challenges since the personalities and negotiating styles of the parties, their counsel and other participants in the process and the attendant interpersonal dynamics, will be different. Just like snowflakes and fingerprints, no two mediations, whether involving personal injury, probate, commercial or malpractice disputes, will be the same. This is what makes each mediation fun, interesting and challenging.

A mega-mediation can be a dispute with many complex facts and/or issues, a dispute involving a huge amount of money, or a dispute involving multiple parties. What should be recognized is that everything that is true of a two-party mediation is also true of a mega mediation. In other words, a mega-mediation is a small mediation multiplied many times over. Thus, for example, if there are more parties, there will be more attorneys, more personalities, more opinions and possibly more obstacles to settlement. Motivating the parties to negotiate and agree on terms of a mutually acceptable settlement in a two-party dispute can be an arduous process under the best of circumstances. Imagine how much more challenging it is to accomplish the same goal in the mega case. For this reason it can be nerve-wracking for the mediator who may worry about how he or she is going to manage such a large dispute with so many issues and parties. This article offers some tips that can help mediators safely navigate the many obstacles in a "mega-case."

Before getting to those tips, it is important to note that the essence of the process of mediating is essentially the same whether the case is large or small, complex or straightforward. Typically, the parties must go through certain steps in order to develop the frame of mind to negotiate and find common areas of agreement. One of the conditions of this frame of mind is that the parties' representatives must feel good about what they are trying to accomplish. Mediators must help the parties reach this positive state of mind. They need to understand body language, be able to read between the lines of verbal communications, and have antenna that are sensitive enough to uncover the concerns, interests and needs of the party representatives.

For example, is the vice president of human resources at Party A, who is at the mediation, worried about what her boss, who is not present, will think of her handling of the dispute and/or the mediation? (Constituencies of party representatives can play a key role in mediation, even when they are not physically present.) Money is often a symbol of some deeper resentments or hurts, so mediators must be able to identify the issues underlying the monetary demand. In addition, mediators must know how to help party representatives save face and back away without appearing weak.

It is well known that in certain kinds of disputes, the giving of an apology—which can reduce negative emotions, including anger and resentment, in the recipient—is often what the claimant wants more than anything else. Because mediation communications are not subject to disclosure under most mediation laws and rules, an apology will be considered confidential, which can make the respondent more inclined to apologize.[2] A much-desired apology can set the stage for, or be a component of, a settlement that satisfies the claimant's needs.

The mediator must also understand the interpersonal dynamics between attorney and client. Since attorneys do not like to be the bearers of bad news, they often look to the mediator to make the client aware that its case is not as strong as the client thinks.

Attorneys who are not experienced in mediation may expect to speak for their clients in the joint and private mediation sessions. Mediators, however, consider participation of the party representatives to be essential in mediation and they must know techniques to involve them in the process.

Next we provide some practical guidance to help mediators safely navigate through the many obstacles presented when mediating the "mega-case."

1. DON'T PANIC

Mediating a mega-mediation can be scary. What you need to know is that the role of a mediator is essentially the same as in a two party mediation, except that you will be dealing with many more people and personalities. You have a skill that you can count on, just like you can count on knowing how to swim, whether you are in a swimming pool or the deepest waters of the Marianas Trench, the deepest point in the Pacific Ocean. In the classic movie "Hoosiers" there is a wonderful scene in which an underdog basketball team arrives at the huge arena in which the Indiana state championship game is to be played. Gene Hackman plays the coach and he asks the players, who are clearly awed by the cavernous arena, to measure the height of the basket from the floor to its rim and the distance from the free throw line to the basket. The players are relieved to learn that these dimensions are the same as those in their small gymnasium back home. It is important not to panic because panic can cause a person to "choke" which does not lead to a good solution.

2. LOGISTICS ARE CRITICALLY IMPORTANT

Organization of the mediation session is essential. Attention must be paid to every detail. The who what where when and why questions that make up a well-written news

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"The Main Object of Conciliation Lies in Reaching a Solution to a Case based upon Morals and with a Warm Heart"

Confucius Analects c. 500 B.C.

By Geoffrey C. Curreri, Esq., Fort Lauderdale

That's a very powerful statement from a well-known historical figure. So, are these words of wisdom uttered so many years ago still useful today? One may think not in today's society but as the author of these words was a person, the answer lies within each of us who faces a situation of conflict with another person.

First off, what is Conciliation? Conciliation means bringing two opposing sides together to reach a compromise in an attempt to avoid taking a case to trial. It is not limited to the legal field; although it is very common in legal cases. There are many simplistic axioms, such as, *"You get what you give",* or *"Do onto others as you would have done to you",* that one could cite as support for a productive conciliation, but the simple fact of the matter is that it's the people who are involved in the dispute, who control the process and the outcome.

As you read this article what you should know about its author is that he is an attorney and a certified mediator. I know what you're thinking: "I don't like attorneys because they are expensive and aren't very helpful in the long run". Frankly, I agree. I don't like attorneys either because they have the incorrect mind set, which is; "This is how much I can get you." The better approach is to ask, *"What do you want and are you willing to do what it takes to obtain it?"* This principle holds true for, not only attorneys and the legal profession, but also psychotherapists and the mental health counseling field.

Ask attorneys representing clients in mediation today what their goal is, most will say "settlement." Some will say they are there to satisfy the courts or a contractual requirement to attend a mediation session. Few if any will say that their goal is to reach a mutually beneficial outcome in which all parties achieve a result that is as good as possible at this point in time. The notion of win-win is all but gone today in disputes, even if a realistic interpretation of this concept is simply getting the best you can under the circumstances presented; a concept that is almost always possible to achieve.

"What do you want…?" places the person involved in the dispute in control of his or her own destiny. Each individual person must then proceed with a warm heart and society-friendly morals, to obtain a reasonably acceptable and relatively stress-free solution. So what exactly is a warm heart? I think the best way to answer this question is to first decide what it is not. A warm heart is not vengeful, vindictive, hateful or closed-minded. It is open to the other person's opinions, ideas and feelings. It is understanding, caring and reasonable.

Okay, so now what are society-friendly morals? Morality is not something that can easily be defined. The English Philosopher Herbert Spencer wrote the following in his 1863 Essays: Scientific, Political and Speculative: *"Absolute morality is the regulation of conduct in such a way that pain shall not be inflicted."* What one person considers to be moral may not be so by another. This is why I have used the term "society-friendly" for the purposes of this discussion. When engaging in communication with an adverse party to a conflict the principles of honesty, fair-play and openness should be utilized if a solution of the dispute is going to be attained in a reasonable manner and timeframe. If your plan is to be deceitful so you can cheat the other person out of a fair resolution, then your plan is not of good moral character. If your plan is to inflict pain on the other person, then you plan is not of good moral character.

Whether resolving a legal dispute, relationship counseling or whatever form of human conflict, always remember that those involved are people with feelings, short-comings, and insecurities. These humans tend not to look objectively at their situation or with a long-reaching eye to the consequences of their immediate desires. Reaching a solution to a dispute requires morals and a warm heart.

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ADR Section
Case and Comment!

By Perry S. Itkin, Esquire, Fort Lauderdale

IF IT LOOKS, WALKS AND QUACKS LIKE A DUCK – IT'S NOT MEDIATION! IT'S JUST A DUCK!

There is a myriad of alternative dispute resolution processes. You know them – negotiation, conciliation, facilitation, mediation [of course], early neutral evaluation, ombudsman, fact-finding, mini-trial, summary jury trial, arbitration, voluntary trial resolution [private judging] and then there's always litigation. There are combinations of these and other processes [we are very clever thinkers!]. There are also other ADR processes as well. All to say, the **most visible** are negotiation, mediation, arbitration and litigation. What happens sometimes [and sadly so] is that some of the other ADR processes are called mediation when, in fact and practice, they are not mediation at all. So, what on earth is "binding mediation?"

In the California case of *Lindsay v. Lewandowski* [2006], 43 Cal.Rptr.3d 846, 139 Cal.App.4th 1618, the court explored the differences between mediation and arbitration and "binding mediation". In the case on appeal, the parties reached a mediated settlement on all but two terms. The payment terms were left up in the air and the parties also agreed "in the event of a dispute as to the terms of the settlement the parties agree to return to the mediator for final resolution by . . . ." Here is where the communication broke down. One version said binding arbitration, but had a line through it, and was replaced by the word "mediation."

Here's how the mediator described the procedure he intended to use to resolve the parties' disagreement [this was not a good mediator move] over the payment terms of the settlement he had mediated: "[T]he parties have agreed in advance that in the event the parties fail to agree, I then decide these terms and conditions, typically by asking the parties to each submit to me their final offers, accompanied by their oral argument as to why I should select their version over all others. I then select as the final binding provision the term or terms of either one party or the other." [Sounds like arbitration to me – baseball arbitration, actually!]

There are significant problems with the concept of "binding mediation." Among them are:

- What rules apply – the arbitration rules, the court-ordered mediation rules, the mediation confidentiality rules, or some mix?
- If only some rules, how is one to chose?
- Should the trial court take evidence on the parties' intent or understanding in each case?

Three justices on the Court of Appeal were flabbergasted, and one of the concurring justices, Presiding Justice Sill, called the term "binding mediation" oxymoronic [I agree!]:

I can think of nothing more self-contradictory than "binding mediation." Mediation by definition is a voluntary process which achieves a voluntary result, and is meaningful in distinction to "arbitration" in its very voluntariness. Or, to put it with more bite – mediation is distinctive from arbitration in its inherent lack of consequences. You go to mediation, you like it, you don't, you settle, you don't, no big deal.

All to say, call the process what it really is – arbitration; it is not mediation, just a duck! [You know if it looks, walks and quacks like a duck - it's just a duck!]

Wait . . . . There's more!!

Fast forward [well, maybe not so fast] to 2012. In *Bowers v. Raymond J. Lucia Companies, Inc.* [2012] 142 Cal.Rptr.3d 64, 206, Cal.App.4th 724, the same appellate court [different panel, though] concluded that there was substantial evidence to support the trial court's determination that the defendant agreed to the "binding mediation" procedure used in this case, that the "binding mediation" provisions in the parties' settlement agreement were not too uncertain to be enforceable and that "binding mediation" is not a constitutionally or statutorily prohibited means of waiving jury trial rights where the parties have agreed to settle their dispute in a non-judicial forum.

Here's what happened. Plaintiffs sued Raymond J. Lucia and other entities for defamation and other business torts. The lawsuit proceeded separately. Lucia filed an arbitration proceeding against the Plaintiffs asserting similar claims. After several days of arbitration, the parties agreed to settle their dispute before the arbitration panel reached a decision [So far, nothing out of the ordinary.]

Defense counsel informed the panel that the parties agreed to "bring the case to binding mediation with a component which, if not resolved at mediation, rolls over to arbitration – I guess it's mediation with a binding arbitration component following."

The Chairman responded with "Med/Arb". [This is a correct statement of the hybrid process.]

Plaintiff's counsel explained "The mediator has the ability to decide the case at the end of the day." [In my opinion, not such a good idea for the mediator to serve in that dual capacity for a variety of ethical concerns although other ADR professionals may have an opposite view.]

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CASE AND COMMENT *from previous page*

More from defense counsel: "And to the extent we don't resolve it that day, it becomes a mediat[ion] – an arbitration with a range of between $100,000 and $5 million as the range that he will then have the freedom to choose after we present our cases to him or her during mediation."

The Chairman summarized: "So your agreement encompasses dismissal with and of the arbitration and the Superior Court case based on the terms that you've agreed to, to mediate in a Med/Arb, baseball high-low atmosphere with a mediator of your own choosing . . . ." [Again, good for the Chairman!].

The parties signed a "Settlement Agreement and Release". Paragraph II.2 of this agreement provided that this case

shall be placed on the Superior Court dismissal calendar. The parties shall then proceed to a mediation/binding baseball arbitration with a mutually agreed-upon neutral within sixty days of the execution of this agreement. To wit, the Parties shall participate in a full day mediation. If, at the end of that mediation, the Parties have failed to reach an agreement, the mediator shall be empowered to set the amount of the judgment in favor of Plaintiffs against Raymond J. Lucia Companies, Inc. at some amount between $100,000 and $5,000,000, such bind mediator judgment to then be entered as a legally enforceable judgment in San Diego Superior Court without objection of any Party.

At the request of the mediator, the parties modified the above paragraph to provide:

To wit, the parties shall participate in a full day mediation. If, at the end of that mediation, the Parties have failed to reach an agreement, the Plaintiffs [Bowers, Seward, and LaBerge] shall provide to the mediator their last and final demand, which demand shall be some amount between $100,000 and $5,000,000, and the Defendants [Companies, Wealth Management, and Enterprises] shall provide to the mediator their last and final offer which shall be some amount between $100,000 and $5,000,000. The mediator shall then be empowered to se the amount of the judgment in favor of Plaintiffs against Raymond J. Lucia Companies, Inc. by choosing either Plaintiffs' demand or Defendants' offer, such binding mediator judgment to then be entered as a legally enforceable judgment in San Diego Superior Court without objection of any Party.

[If you were the mediator, how would you feel about being in, or putting yourself in, the above described position? I'm just asking.]

At the end of a full day of mediation the parties were at an impasse. Plaintiffs demanded $5,000,000 and the Defendants offered $100,000. The "med/arber" [I just made up that term!] selected the $5,000,000 amount.

Defendants obtained new counsel to defend against Plaintiffs' petition to the court to confirm the award. The trial court enforced it as settlement agreement rather than an arbitration award. [This is starting to get confusing – maybe it wasn't a duck after all!]

The appellate court affirmed finding the settlement agreement was enforceable and determined that the *Lindsay* case was distinguishable in two key respects.

First, unlike the appellants in Lindsay, who demonstrated the absence of a meeting of the minds by objecting to binding mediation at the outset, defendant in this case never objected to binding mediation or insisted it was entitled to a postmediation arbitration hearing until after the mediator made an award in plaintiff's favor. Second, unlike the parties in Lindsay, the parties in this case elaborated on what they meant by the alternative dispute resolution method they chose.

Clearly the parties can craft a combination of dispute resolution processes – just call it what it is and not cultivate an oxymoron!!! A duck is still a duck, not a cow nor a pony, nor . . . . If it quacks it's a duck – just ask Donald or Daisy. By the way, do you think it's a good idea for the same third party neutral serve in the dual role of mediator and arbitrator in med/arb or arb/med? I don't and . . . you knew that, right?!?

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"MEGA-MEDIATION" *from page 3*

story, can help you accomplish this:

(a) "Who?" refers to who will be participating in this mediation session? You must know the names of everyone who will be attending the mediation, including the party representatives, the parties' attorneys, and insurer representatives. Before the session you should have a joint conference call with the case manager and the attorneys. In most mega-cases you should contact the attorneys directly, introduce yourself to the attorneys and their legal assistants, and ask for their assistance in identifying all of the "players", including which parties they represent and any other people who will be—or should be—participating in the mediation process. This information will also help you determine where the mediation conference will need to be held. This is a critical initial step because it may not be immediately obvious that you are being asked to conduct a "mega-mediation". Beware of pleading captions that use the catch-all "et al." It might be shorthand for the involvement of many more parties than is initially apparent. This is also important in determining who will be bound by the mediation settlement agreement, as well as the existence of others who are not represented at the mediation but may be impacted by the result. Minors, persons under a disability and heirs are just a few examples of persons whose interests may be impacted but are not represented at the mediation conference.

(b) "What?": In order to effectively mediate any case, it is important that the mediator ascertain answers to the following questions:
   (1) What is this case about from the party's perspective?;
   (2) What are the issues of each party?;
   (3) What are the (hidden) agendas of each party?;
   (4) What does each party really want out of this process?;
   (5) What issues do the parties have in common?; and
   (6) What interests do the parties have in common? In the multiple party mediation, in which there will be so many disparate answers to these questions, it is especially important that mediators begin the quest to learn the answers to these questions as soon as possible.

(c) "When?": Determining when the mediation conference will be held can be an especially vexing challenge when mediators are attempting to coordinate the hectic calendars of many busy attorneys, parties and other interested participants. Be patient and persistent. If you attempt to do this yourself, you will get to know the attorneys' legal assistants, paralegals and other support staff quite well, which can also facilitate the mediator's understanding of the case. Always be pleasant, polite and professional during these conversations.

(d) "Where?": The location of the mediation conference will be determined by the number of people who will be participating in the mediation process. You must honestly assess whether your mediation facilities can comfortably accommodate all of the people who will be coming to the mediation. Is your main conference room large enough to comfortably seat all of your guests for an opening joint session? Will you have enough "break out" rooms in which you will be able to conduct private meetings with different parties and their counsel and representatives? Are your walls sufficiently thick and insulated so that parties will not be able to "listen" to private conversations in adjacent rooms? Can your facilities physically accommodate the special needs of any individuals who will be attending? As the mediator you are also the "host" and you should be concerned about the comfort and welfare of all of your "guests" throughout the duration of your mediation process. It is best that mediators carefully review these considerations well in advance of the scheduled mediation conference. Learning that your facilities are inadequate to meet the needs of your guests on the day of the mediation conference may have disastrous consequences. As the late Karl Malden used to caution at the end of those old commercials for travelers checks: "don't let this happen to you." In the event you determine that you will need to schedule the mediation for another location, it is imperative that this matter be discussed with the parties' counsel as soon as possible to explore options for alternative venues. Perhaps they can suggest a hotel which will have rooms with ample space for joint sessions and multiple "breakout" rooms for the different parties, their counsel and representatives, as well as restaurants and recreational facilities for parties when they are not actively engaged in discussions with the mediator or other participants. As always, the specific arrangements surrounding the selection of the hotel and responsibility for paying for the use of the facility must be discussed with and agreed upon by the parties and their counsel well in advance of the mediation process, and should be included in the mediator's engagement letter. Selecting an alternate site for the mediation impacts the mediator's control over the mediation environment. If you are mediating in an executive suite or a hotel that is being used by members of the public during the time you are conducting your mediation conference, please pay special attention to protecting the parties' privacy and the confidentiality and integrity of the mediation process. Make sure that the hotel does not reserve rooms prominently featuring the names of the parties. Similarly, please remember that the "walls have ears" so it is important that private business and discussions not be held in public areas like restaurants, lobbies and restrooms.

(e) "How?": There are two very important questions which must be answered long before the date of the mediation conference:
   (1) "How long will the mediation conference last?" and
   (2) "How will the parties be appearing at the mediation conference?" It can take a long time to discuss and understand the interests, needs, motivations and concerns of multiple parties, attorneys and represen-

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tatives. It is essential that an appropriate amount of time be set aside for this important process so that the mediator and the parties will have sufficient time to voice their positions and listen to one another. Since the mediation conference provides a unique opportunity for all of the parties and decision makers to sit down in one place at the same time, it is essential that "attention must be paid" to everyone. Although mediation is a voluntary process in which no one can be compelled to remain against their will, it is extremely important that everyone understands how much time has been allocated for the mediation conference and that they make a commitment to being actively engaged in the mediation process for its duration. Similarly, mediators should contact the parties' attorneys well in advance of a scheduled mediation conference to confirm their participation in the mediation process and also to make sure that the parties' representatives with "full settlement authority" as required by the new provisions of Rule 1.730 of the Florida Rules of Civil Procedure, if applicable, will be attending the mediation conference.[3] In the event the parties and their counsel have consented to the appearance of a party representative by teleconference or excused the appearance of a party altogether, this should be confirmed in writing and shared with everyone well in advance of a scheduled mediation conference.[4] In the absence of the parties' stipulation waiving the appearance of a party or a court order excusing same, the failure of a party with full settlement authority to appear can be treated as a non-appearance, which could subject that party to the imposition of sanctions by the court. As a practical matter, this could effectively shut down a mediation process in which many busy professionals from throughout the state, country or beyond had cleared their busy schedules just for this important event. The chances of them agreeing to do so again are likely to be slim and none.

3. CONFIRM, CONFIRM, CONFIRM

Confirm the date, time and location for the mediation conference with everyone multiple times. Make sure everyone knows where they are supposed to be and when. If the mediation conference is not at your office, make sure that you and everyone else has current and accurate directions to the locations so that they know how to get to this destination. Don't rely exclusively on GPS navigation systems. Do not leave anything to chance. You want to make sure that everyone arrives punctually for this important appointment and at the same place.

4. CREATE A "SCORECARD" FOR ALL OF THE PLAYERS

In the multiple-party mediation, it can be extremely difficult to keep track of all of the participants without a scorecard. Create a list which contains the names of all of the attorneys together with the names of their clients and their representatives with full settlement authority. If possible, try to obtain a cell phone number for each of these participants as well as an e-mail address, in the event that you need to contact them if there is an emergency or if you need to speak with them during the mediation process when the participants are scattered throughout the mediation facility. In a case involving many parties, lawyers and representatives, create your own name cards so that you and everyone else will know the names of the participants. It is helpful to learn the names of all of the participants and to refer to them by name throughout the mediation process.

5. BE A PROFESSIONAL

Be on time! Demonstrate to the participants your commitment to the process and to them by being punctual. It is your privilege to serve as their mediator. Don't ever make the parties wait for you.

6. THE IMPORTANCE OF MEDIATION SUMMARIES

In the multiple-party mediation, case summaries can be extremely helpful to the mediator as well as the parties and their lawyers. This is an excellent way for mediators to learn about the case and understand the parties' interests and positions. It provides the mediator with valuable context for the dispute and provides valuable background information. The drafting of a mediation summary also allows the attorneys to focus on the case and articulate the client's perspective on the subject dispute. A review of multiple mediation summaries will also help the mediator identify areas of agreement and commonality between the participants. If an attorney does not want to provide a mediation summary, mediators may request a copy of pertinent pleadings and memorandum of law that have already been filed in the case. Attorneys should be encouraged to provide mediation summaries.[5] A thorough mediation summary not only prepares the mediator, but also prepares the lawyer for mediation. Sometimes, an attorney who chooses to send the pleadings instead of a summary may not be truly prepared to mediate. Likewise, the bare pleadings do not inform the mediator of any emotional or non-economic drivers or impediments to settlement. Where are the parties in the process? Are they at the pleading stage or on the eve of trial? Have they engaged in discovery? Sometimes the biggest impediment to settlement is that the parties have not learned enough about the strengths and weaknesses of their case to properly evaluate settlement. It is appropriate for mediators to charge the parties for time expended in reviewing these summaries as the reading of the summaries will enhance the mediator's understanding of the case. However, the mediator's compensation for such services must be clearly spelled out in the mediator's engagement letter to the parties and their counsel.

7. CONSIDER USING PRE-MEDIATION PRIVATE SESSIONS

In a multiple party mediation, mediators should consider, only with the permission of the parties and their counsel, meeting privately with the parties and their counsel, if any,

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prior to the scheduled mediation conference for the purpose of understanding the history of negotiations (if any) between the parties and learning more about the dispute. Similarly, with the permission of the parties and their counsel, mediators should also consider the use of telephone conversations with the parties and counsel for the purpose of understanding their issues, conference calls with only the attorneys to discuss potential ways to structure the upcoming mediation conference as well as conducting private telephone conversations with the parties' attorneys to explore approaches that might best facilitate a successful outcome to the dispute. In a mega-mediation, such pre-mediation caucusing can be invaluable in learning the issues and the needs of the parties. It is also a time saver when the day arrives for plenary mediation. The mediator should stress to the attorneys and to the parties that such pre-mediation caucuses are part of the mediation process and therefore clothed with the same confidentiality as the plenary session.[6] While mediators may also charge for these services, the specific terms of the mediator's compensation for providing these services must again be clearly enumerated in the mediator's engagement letter to the parties and their counsel.

8. ENGAGE ALL PARTICIPANTS IN THE MEDIATION PROCESS

A popular performer on the old "Ed Sullivan Show" was a juggler. During his act, he would slowly spin a long line of dishes that were carefully balanced on their sticks. He would meticulously get each plate spinning. As he reached the end of the line, the first dishes began to slow down and wobble precariously, on the verge of falling and shattering on the floor. However, the juggler had an amazing ability to keep all of the plates spinning, paying enough attention to each of them so that they avoided disaster. Mediators in multiple party cases must possess this same talent. Mediators must keep all of these different people interested, involved and actively engaged in the entire mediation process. Mediators must strive to make all of the parties, their attorneys and their representatives feel as if they are active participants, and that their interests and concerns are not being neglected or ignored. One way of accomplishing this is to "bundle" parties with like interests together for joint private caucus. Of course, this must be done only with the approval of all of the parties and their attorneys in advance. Care should be taken to emphasize that such joint sessions are confidential and that any party who desires a private caucus with the mediator will be accommodated. This helps streamline and simplify the mediation process for all concerned.

9. SCHEDULING APPROPRIATE AMOUNTS OF TIME WITH PARTICIPANTS, ATTORNEYS AND REPRESENTATIVES

In the multiple party mediation, mediators should consider developing a schedule which designates certain times for the mediator to meet with some of the parties and their counsel, and other times for the mediator to meet with other parties, counsel and representatives. These times can be discussed, scheduled and posted for all of the participants to see. This enables the parties to know when they will need to be available to meet with the mediator and when they can use the remaining time for other activities, whether meeting with other participants, relaxing or conducting other activities. The parties will not all require the same amount of time to meet with the mediator, but it is important that they all feel as if they are involved in the process. During a multiple party case, it can be challenging for the mediator to find the time to meet with everyone. Sometimes, parties may go many hours or even days without ever speaking with the mediator. If parties feel that they are being ignored by the mediator, it is difficult for them to be receptive to the mediation process and the potential resolutions that may be generated by the other participants.

10. SIMPLIFY, SIMPLIFY, SIMPLIFY

When in doubt, mediators should try to break down and simplify the dispute. It is often helpful to meet with all of the defendants together at the same time in a private session

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and get a sense of how they interact with each other. Are they all united or do any of them seem to want to make separate deals? Afterwards, the mediator may consider meeting separately with each of the defendants (even if only briefly) or a group of defendants (even if only briefly) to explore their commonality of interests and goals. Sometimes, they may be very united in their interests. Sometimes, they may be very polarized in their views. The mediator should always strive to simplify the case and identify the issues, interests and concerns of the parties. A veteran mediator once suggested that mediators must "peel away the layers of the onion" to get to the real heart of the dispute. Henry David Thoreau eloquently stated: "Simplify. Simplify. Simplify."

11. CONSIDER THE USE OF CO-MEDIATION

Sometimes, depending upon the size and complexity of the dispute, mediators may suggest to the parties and their counsel the possibility of using a team approach to mediation. This is frequently used in family mediation, in which one mediator (usually a mental health professional with expertise in managing emotional issues) focuses on the psychological aspects of the dispute and the other mediator (usually an attorney) addresses the legal elements of the dispute. A multiple party case may warrant the investment of two dispute resolution professionals in the same case. However, the mediator should never retain the services of a second "co-mediator" without the permission of the parties and their counsel. Similarly, the terms of this co-mediation partnership must be clearly enumerated in the mediators' engagement letter and clearly understood by all of the participants.

12. MEDIATOR'S COMPENSATION

As has been mentioned several times in this article, the terms of the mediator's engagement must be clearly spelled out in the mediator's engagement letter. The challenges of mediating a multiple party case may be exponentially greater than those of mediating the more typical "two party" case. Accordingly, mediators should carefully consider how much they should charge for their services in such a case. Mediators should also consider whom they will be billing for their mediation services: will they bill each individual party named the same fractional amount for their services? or will they divide the bill by the number of attorneys representing the various parties in the case? or in some other way that is agreed upon by the parties? It is important that this be addressed well before the mediation conference so there is no confusion and so that it can be clearly enumerated in the mediator's engagement letter. Similarly, if the mediator is going to request a retainer deposit from the parties before the mediation, the amount requested from each party and the date by which it should be paid should also be spelled out in this agreement. When in doubt, spell it out.

13. BASIC HOSPITALITY

Mediators should strive to be the consummate hosts. Throughout the mediation sessions, remain sensitive to the comfort of your guests. If the mediation is held in your offices, refreshments such as water, coffee, tea, soft drinks and snacks should be readily available and plentiful. In some instances, it may be appropriate to provide lunches and dinners for all of the participants. Sometimes, depending upon the circumstances, the ceremonial act of "breaking bread" with one another can be a powerful and effective way for parties to bridge their differences and come to resolution. At other times, the parties may need to take periodic breaks so they can meet privately and strategize with their counsel and representatives. In multiple party mediations, there is often a great deal of "down time," in which the parties are simply waiting to meet with the mediator. Providing magazines, newspapers, board games and even a deck of cards can sometimes keep the parties entertained and occupied while they are waiting for their time with the mediator. Check in with the parties periodically to see if they need anything and let them know you have not forgotten about them. Let them know how you are progressing with the mediation process. Common courtesy and gracious hospitality will help the participants feel welcome and valued throughout an arduous mediation process.

14. PAY ATTENTION

As mediators, we must always be aware of what's going on around us during the entire mediation process. Be sensitive to the dynamics between all of the participants. Are there certain groups of parties, attorneys and representatives who seem to cluster around each other? Are there other factions which seem to have distanced themselves from the other participants or have other groups seemed to have consciously (or unconsciously) separated from them? How do the parties speak to one another? Are they civil or is there disdain between them and their representatives? Where do the participants position themselves when they are seated at the mediation table for the initial joint session? Are they sitting closer to the mediator or are they sitting as far away from the "action" as possible as if in a hurry to exit? Sometimes, but not always, this may suggest how much they may be willing to contribute to any settlement proposal. Do some parties and their representatives seem to speak a disproportionate amount of the time? Sometimes, but not always, it may seem like the parties with the most to say may have the most to contribute to a resolution. However, at other times it may seem like the parties' desire to contribute is inversely proportional to how much they have to say! It will be up to you to figure out what all of this means. As stated previously, every case will be different

15. USE INITIAL MEDIATION TO ESTABLISH A STRUCTURE/FRAMEWORK FOR FUTURE SESSIONS

Sometimes, it may take more than one mediation session in order for the parties to resolve their disputes. Use the initial mediation as a foundation for future sessions. Depending upon the circumstances, you may need to schedule separate sessions with different groups of parties who have different interests so that other groups of parties are not just waiting around impatiently. Encourage the parties by focusing on the progress they have made during their session. Remind them that not every case will be settled at the first media-

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tion session. Explain to them that it often takes time for the "seeds of settlement" to germinate. At the conclusion of your mediation session, gather all of the participants and review with them what was accomplished during your time together and what work still needs to be done. In the event that the parties agree to participate in future mediation sessions, give the parties "homework assignments" so they know what they will need to do in order to prepare for their next sessions. Ask them about such things as:

(a) Expert reports from doctors, economists, etc.;
(b) Production of records and documents such as tax returns;
(c) Whether the parties can agree to an expert whose opinion will be dispositive of a certain issue (for example, an appraiser for a home or business in a dispute involving the value of property or tax ramifications of certain settlement structures); and
(d) Who will agree to serve as "lead attorney" for the purpose of contacting the mediator when everything is gathered and the parties are ready for the next mediation session?

Wherever possible, it is recommended that you attempt to secure a specific date for your follow-up mediation sessions at the conclusion of the initial session, when the participants and key decision makers are still in the same room at the same time. Once the parties have left the mediation and scattered in their separate directions, a certain amount of momentum can be lost and it can be challenging to get the participants back together again.

16. ASK THE PARTIES AND THEIR REPRESENTATIVES FOR HELP

As mediators, we usually know much less about the parties' disputes than anyone else. The parties, their lawyers and their representatives have lived with their cases for months, years and, sometimes, even decades. We should ask the parties how we can help them resolve their disputes. We should ask them whether there is any information they might need in order to help them better understand or evaluate their case or the other parties' positions in the case. Frequently, parties must have several reasons to justify changing their evaluations of their case. Sometimes, "new" or "different" information can provide them with the rationale to support such a change.

17. TAKE EXCELLENT NOTES

During multiple party mediations, mediators will be challenged to carefully listen to all of the parties' interests, needs, motivations, concerns and settlement proposals. During private sessions, they will be asked to share certain information with other parties and keep other communications private and confidential. They will be asked to keep track of every settlement proposal and counter-proposal. At times, this can be quite confusing and exhausting. Relax. Take a deep breath. Take your time. Carefully review every proposal you are authorized to make with the parties and their counsel. Carefully review with them what you are authorized to share with others and what is not to be disclosed to anyone else. Repeat these steps every time in every private session. When in doubt, do not be embarrassed to ask the parties and their counsel for help and for clarification. Make sure you completely understand every settlement proposal you are authorized to communicate. If you do not understand the proposal, how can you accurately communicate it to someone else. There is a well-known maxim in the construction industry: "Measure twice. Cut once." This is also sage advice for mediators. Develop a note-taking system that will work for you. Whatever works for you is fine. Just do it.

18. WRITE IT UP

Helping the parties in a multiple party mediation can be a frustrating, challenging and exhausting process. Helping the parties in a multiple party mediation memorialize the terms and conditions of their mediated settlement agreement can be just as challenging, exhausting and frustrating. Mediators must make sure that they and the parties take as much time as is necessary to write up their agreement correctly. The process of drafting a mediated settlement agreement can sometimes take even longer than the negotiation stage of the mediation process. Anticipate this when you schedule the mediation conference. With respect to drafting mediated settlement agreements, technology can be a great ally. During your pre-mediation communications and conferences with the parties' attorneys, encourage them to bring their laptop computers with them to the mediation. Ask the attorneys (or one of them) to come with a template for the settlement agreement itself. While the precise terms of the settlement may be unknown prior to mediation, certain standard language and clauses are known in advance: identification of the settling parties, identifying the dispute being settled, preferred release language, governing law, binding

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effect and opportunity to confer with counsel and stipulations to venue for enforcement of the agreement, to name a few. Caution the attorneys that if they want the written settlement agreement to be confidential it must say so in the agreement. No confidentiality attaches to the written agreement unless the parties agree otherwise. § 44.405, Fla. Stat. If the parties are able to reach a full or partial agreement, their counsel can modify their existing settlement agreement forms and create draft agreements containing proposed language for the new mediated settlement agreement. The parties can then exchange these drafts with each other and review with their respective clients. The parties and their counsel may require numerous drafts to get it right, but it is worth taking the time to do it right. Mediators should also encourage attorneys to bring with them to mediation their preferred language for Releases. Through the years, there have been many cases in which parties settled their disputes at mediation, only to have the settlements collapse when they could not agree upon the language to be contained in the "Standard Release." Please don't let this happen in your mediation.

There is nothing wrong with helping the parties reach partial resolutions. Sometimes, it may be too difficult to resolve all of the issues involving all of the parties in a multiple party mediation. However, mediators can often help the parties streamline their dispute by resolving some of the claims against some of the parties. When this happens, mediators should encourage the parties to memorialize their partial agreements contemporaneously, so they are able to terminate their participation in the mediation process as quickly as possible without incurring additional expenses. Mediators can then focus their attention on assisting the remaining participants in the multiple party mediation.

19. PUBLICITY AND DEALING WITH THE MEDIA

Multi-party mega mediations increase the probability that the dispute has drawn the attention of the media. Discuss this possibility in advance with the parties and their counsel. Confidentiality must be maintained at all costs. This may include parties who do not wish to be photographed or videotaped walking into the location where the mediation will be held. There is little that can be done to prevent the press from showing up at the mediation even though they are not permitted into the mediation room itself. This situation is exacerbated if mediation is being held at a location such as a hotel, that neither the parties, their attorneys nor the mediator control.

However, the reaction to the press can be planned for and should be discussed with the parties and their counsel. One solution is simply to shut the mediation session down altogether. Another is to recess the session so that the parties can seek an order from the court if the press refuses to leave. Again, dealing with the media is a subject that should be thoroughly discussed with the parties and their attorneys and the solutions agreed to in advance. Obviously, each situation will be different so be flexible and creative in your solutions.

20. FOLLOW UP

Sometimes, for a variety of reasons, your case may not be resolved at the conclusion of the allotted time for the mediation session. We strongly encourage mediators to be pleasant, polite, patient and persistent. We encourage mediators to call or e-mail the parties' counsel and inquire about the status of their case. Sometimes, things may have changed since your last mediation session. Perhaps some of the "seeds of resolution" have germinated and the parties, their attorneys and their representatives are changing their evaluations a little bit. It never hurts to ask if you can be of any further assistance. Following up is an excellent way for you to demonstrate your concern and interest for the participants, your commitment to the mediation process and your devotion to professionalism.

We hope that you will have many opportunities to mediate multiparty cases during your mediation career. As you can see, these cases can present many challenges to unwary mediators. However, these cases can also be rewarding and exciting to the savvy mediator who enjoys such challenges. We hope this article will provide you with the tools you will need to effectively mediate these cases. One final bit of advice: "Do your best. Angels can do no more." We wish you much good health, good luck and good mediation.

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Endnotes

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1. Since mediation laws and rules may vary from jurisdiction to jurisdiction, it is imperative that mediators and advocates be intimately familiar with the applicable state and federal mediation laws, statutes and rules of procedure where they practice, and which may come into play in a complex, multi-party, multi-jurisdictional dispute.

2. In the event the case has been ordered to mediation by a trial court, the court must approve of the appearance of a party representabtive by teleconference or excuse the appearance of a party. The court's permission should be secured well in advance of the scheduled mediation conference.

3. *See also, e.g.* Rule M-3, American Arbitration Association Commercial Mediation Procedures (2012).

4. In some jurisdictions, attorneys may be required to provide copies of their mediation summaries to opposing counsel. This may significantly influence the amount of information they will include in their summaries. Counsel should be aware of this requirement.

5. *See* § 44.403, Fla. Stat.; Rule 1.720(i), Fla. R. Civ. P.; *see also* Rule M-10 Confidentiality, American Arbitration Commercial Mediation Procedures (2012).

8221001 Item Number

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The Florida Bar
Alternative Dispute Resolution (ADR) Section

Alternative Dispute Resolution (ADR) Section

Organized 2010

The Alternative Dispute Resolution (ADR) Section was designed to provide a forum for lawyers interested in alternative dispute resolution and to share common interests, ideas and concepts. The Section will provide continuing legal education as well as be a central source for either advocacy or communications and deal with all forms of alternative dispute resolution.

Membership Eligibility:

Any member in good standing of The Florida Bar interested in the purpose of the Section is eligible for membership upon application and payment of this Section's annual dues. Any member who ceases to be a member of The Florida Bar in good standing shall no longer be a member of the Alternative Dispute Resolution Section.

Affiliate Members. The executive council may enroll, upon request and upon payment of the prescribed dues as affiliate members of the section, persons who are inactive members of The Florida Bar and who can show a dual capacity of interest in and contribution to the section's activities. The purpose of affiliate membership is to foster the development and communication of information between arbitrators, mediators, and the people who often work with arbitration and/or mediation lawyers. Affiliate members must not encourage the unlicensed practice of law. The number of affiliates will not exceed one-half of the section membership. "Affiliate" or "affiliate member" means an inactive member of The Florida Bar. Affiliate members have all the privileges accorded to members of the section except that affiliates may not vote, hold office, or participate in the selection of officers or members of the executive council, or advertise affiliate membership in any way. Affiliates may serve in an advisory nonvoting capacity which the executive council may from time to time establish in its discretion. Affiliate members will pay dues in an amount equal to that required of section members.

The purposes of the Section are:

a. To provide an organization within The Florida Bar open to all members in good standing in The Florida Bar who have a common interest in Alternative Dispute Resolution.

b. To provide a forum for discussion and exchange of ideas leading to an improvement of individual ADR skills and abilities, both as a participant and as a neutral.

c. To assist the Courts in establishing methods of expeditious administration of mediations by making formal recommendations to the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy.

d. To assist members of The Florida Bar who generally desire to increase their effectiveness as ADR participants.

e. To keep the membership informed and updated regarding legislation, rules, and policies in connection with mediation and other ADR processes and the responsibilities they impose on mediator and arbitrator members (as well as other ADR professionals who may ultimately be included).

f. To provide a forum for the educational discussion of ethical considerations for ADR participants.

Membership Information:

Section Dues $35

The membership application is also available on the Bar website at www.floridabar.org under "Inside the Bar," Sections & Divisions.

8221001 Item Number

Rev. 02/13

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

A.I.M. Mediation: Advocacy Impasse & Marketing

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Recorded at:
Annual Florida Bar Convention • Boca Raton Resort & Club • Boca Raton, FL

Course No. 1597R

2:00 p.m. – 3:00 p.m.
Perry Itkin, Fort Lauderdale
The Fallacy of Impasse
Style: Interactive

1. Define the elements of impasse.
2. Identify why impasse occurs.
3. Debunk negotiation myths.
4. Identify threats to effective ethical problem solving and creativity.
5. Develop tools for overcoming impasse in mediation, i.e. use of pre-mediation conference attorney contact; use of control theory; lateral thinking; blind bidding; attribution bias; malevolent utility function.
6. Review and discuss the Standards of Conduct for Certified and Court-appointed Mediators applicable to properly influencing parties while honoring party self-determination.

3:00 p.m. – 4:00 p.m.
John J. Upchurch, Daytona Beach
Mediation Advocacy - What Works and What Doesn't

The goal of mediation is to manage or resolve a problem that has escalated into litigation. At some point litigation takes on an ugly and seemingly independent life of its own. Mediation is an opportunity to put the conflict into a broader and healthier context. This presentation will focus upon the attitudes, skills and approaches that subtly convert the exercise to realizing the other side is really a partner in resolving a dispute. Both parties have an interest in avoiding the commitment of years to lawyers, costs, anger and uncertainty. We will focus on appropriate mediation objectives, preparedness and communication skills; assessment of external factors; influence of outside relationships; case analytics; and developing habits of thinking that will provide a template for effective mediation advocacy.

4:00 p.m. – 5:00 p.m.
Rodney Romano, West Palm Beach
Marketing Your Mediation Practice Ethically
Style: Interactive Lecture/Case study

Material covered – The presentation will consist of a number of marketing techniques beginning with self/skills/product evaluation, market identification and then covering the effective and cost efficient marketing techniques. Applicable ethics opinions will be discussed.

Q&A period will be reserved at the end of the formal presentation.

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COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Webcast Only Presentation:
Monday, November 18, 2013 • 1:00 p.m. – 3:15 p.m. EST

Webcast Only

Course No. 1755R

In 2013, the Florida Legislature amended the Florida Arbitration Code when it enacted the Revised Uniform Arbitration Act approved by the National Commission on Uniform State Laws and the American Bar Association. Now called the Revised Florida Arbitration Code, Florida has substantially rewritten the statutes governing arbitration. During the amendment process, the United States Supreme Court has decided cases dealing with arbitration under the Federal Arbitration Act, which would preempt the Revised Florida Arbitration Code. This CLE addresses the substantive changes to Florida statutes dealing with arbitration and the decisional law recently handed down by the high court.

Panelists include Jon Polenberg, Gerald Cope, Karen Evans, Michael Higer, Larry Leiby and Donna Greenspan Solomon.

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New Arbitration Code

2:10 p.m. – 3:15 p.m.
Recent Developments in Arbitration

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