

# The Resolution Report

News on dispute resolution trends, laws and ethics

Volume 24, Number 1 • May 2009

Read more from the  
Director - ADR Project  
Update begins on  
page 4.

## Message From the Director

By now most of you have heard the news – it is true – after over 20 years with the Florida Dispute Resolution Center, I will be leaving in mid-June to become the Director of the Dispute Resolution Institute at Hamline University School of Law in St. Paul, Minnesota. It is a wonderful opportunity and I am very excited about the new challenges, but there is no doubt that leaving my friends and colleagues will be quite difficult (not to mention the prospect of real winter!).

I am fortunate that I will have had nearly six months from my acceptance of the position to my departure and during that time, I am looking to complete many of the projects which are in progress. Please see page 4 for a description of these projects.

Recently, I had the privilege of speaking to a joint conference of the Association of South Florida Mediators and Arbitrators and the Academy of Florida Mediators. At that meeting I shared some thoughts on the past 20 plus years that I have been employed at the Dispute Resolution Center (initially as the Associate Director to Mike Bridenback, Director, and Jim Alfini, Director of Education and Research, and since 1990 as the Director). I analogized my time here to the launching of a hot air balloon. While there was already lots of mediation activity when I arrived in Florida in 1988, the effective date of the comprehensive legislation which coincided with my arrival was a pivotal time for great expansion – thus the image of a hot air balloon. I was fortunate to jump into the basket and provide some steering as the balloon took off, but make no mistake, the balloon was going to rise whether I was in the basket or not. The ADR Programs in Florida were taking off in 1988 and what an incredible ride it has been. My successor, whoever s/he is, will not be as lucky as I have been. We are heading for a patch of stormy weather and navigating through it will be difficult. I hope you will be patient and understanding of the change in circumstances...and I hope that the rough weather is short lived and that the program once again returns to its ability to soar.

Please feel free to send me comments on any of the projects I have detailed and thanks to all of you for making my service here in Florida so rewarding.

*Sharon*

## Contents

Advisory Opinion Index .	2
MQB Update .....	12
Case and Comment ....	16
Short Takes .....	22

## Mediator Ethics Advisory Opinions

### 2007-004 Summary

Following a judicial requirement limiting the participants in the mediation to the named parties, and their counsel, if any, would not require the mediator to commit an ethical violation, and therefore, may be complied with without conflicting with the opinion rendered in MEAC 2006-007.

Link to full opinion:

[http://www.flcourts.org/gen\\_public/adr/bin/MEAC%20opinions/MEAC%20Opinion%202007-004.pdf](http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEAC%20Opinion%202007-004.pdf)

**Questions...** about the standards of conduct contained in the Florida Rules for Certified and Court-Appointed Mediators should be addressed to:

Mediator Ethics Advisory Committee  
c/o Dispute Resolution Center  
Supreme Court Building  
500 South Duval Street  
Tallahassee, Florida 32399

### 2007-005 Summary

It is not ethically proper to prepare retirement orders after having served as mediator for the case regardless of whether the parties have waived any conflict of interest.

Link to full opinion:

[http://www.flcourts.org/gen\\_public/adr/bin/MEAC%20opinions/MEACOpinion2007-005.pdf](http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEACOpinion2007-005.pdf)

**Opinions...** are rendered pursuant to the authority of rule 10.900, Florida Rules for Certified and Court-Appointed Mediators and are based on the specific facts outlined in the question. They are based on the Committee's interpretation of the rules in effect on the date the opinions were rendered.

The summary has been prepared for quick reference. Any inconsistency between the summary and the opinion should be rendered in favor of the opinion.

### 2007-006 Summary

A mediator who was a former judge may include the referenced information in marketing material if the information is accurate and honest and is not false or misleading.

Link to full opinion:

[http://www.flcourts.org/gen\\_public/adr/bin/MEAC%20opinions/MEACOpinion2007-006.pdf](http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEACOpinion2007-006.pdf)

### 2008-001 Summary

It is ethically inappropriate for a mediator to make the determination as to whether a party has complied with a judge's discovery order. It would be inappropriate for a mediator to cancel mediation merely because of the assertion that one party has not complied with a discovery order.

Link to full opinion:

[http://www.flcourts.org/gen\\_public/adr/bin/MEAC%20opinions/MEACOpinion2008-001.pdf](http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEACOpinion2008-001.pdf)

### 2008-002 Summary

Although the rules do not explicitly contain such a prohibition, a mediator of a credit card case should not tell anyone who feels they have been treated unfairly, to contact their elected U.S. representatives regarding interest rates.

Link to full opinion:

[http://www.flcourts.org/gen\\_public/adr/bin/MEAC%20opinions/MEACOpinion2008-002.pdf](http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEACOpinion2008-002.pdf)

### 2008-003 Summary

A mediator is not prohibited from including accurate information in marketing material so long as it is not misleading; therefore, the mediator may use the *Martindale-Hubbell* AV rating and/or logo, if it is clear that the rating relates to the attorney-mediator's law practice (as opposed to his/her mediation practice).

Link to full opinion:

[http://www.flcourts.org/gen\\_public/adr/bin/MEAC%20opinions/MEACOpinion2008-003.pdf](http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEACOpinion2008-003.pdf)

## ADR Project Update

by Sharon Press

**Dependency Mediation Assessment.** In 2007, the DRC engaged the services of the University of South Florida to perform an 18 month cross-sectional study to assess the effectiveness of dependency mediation in Florida. The study included the collection of data via interviews, surveys and records review for both a prospective and retrospective assessment. In addition to looking at objective measurements such as cost and time to permanency, the study looked at stakeholder satisfaction and compliance with agreements. The final report should be available in mid-May.

**Appellate Mediation.** In January, the ADR Rules and Policy Committee submitted a petition containing its recommendations for a certification process and rules of procedure for appellate mediation. You can see the petition and proposed revisions at:

[www.floridasupremecourt.org/clerk/comments/2009/index.shtml](http://www.floridasupremecourt.org/clerk/comments/2009/index.shtml) (select SC09-118).

Comments will be accepted until May 15, 2009.

**Mediator Advertising/Public Awareness.** The ADR Rules and Policy Committee will be submitting a rules petition to the Florida Supreme Court soon containing the following proposed revision to rule 10.610, Florida Rules for Certified and Court-Appointed Mediators.

### Rule 10.610. Advertising Marketing Practices

**(a) False or Misleading Marketing Practices.** A mediator shall not engage in any marketing practices, including advertising, which contains false or misleading information. A mediator shall ensure that any advertisements of marketing of the mediator's qualifications, services to be rendered, or the mediation process are is accurate and honest.

**(b) Supreme Court Certification.** Any marketing practice in which a mediator indicates that such mediator is "Florida Supreme Court certified" is misleading unless it also identifies at least one area of certification in which the mediator is certified.

**(c) Other Certifications.** Any marketing publication that generally refers to a mediator being "certified" is misleading unless the advertising mediator has successfully completed an established process for certifying mediators that involves actual instruction rather than the mere payment of a fee. Use of the term "certified" in advertising is also misleading unless the mediator identifies the entity issuing the referenced certification and the area or field of certification earned, if applicable.

**(d) Prior Adjudicative Experience.** Any marketing practice is misleading if the mediator states or implies that prior adjudicative experience, including, but not limited to, service as a judge, magistrate, or administrative hearing officer, makes one a better or more qualified mediator.

(e) Prohibited Claims or Promises. A mediator shall not make claims of achieving specific outcomes or promises implying favoritism for the purpose of obtaining business.

(f) Additional Prohibited Marketing Practices. A mediator shall not engage in any marketing practice that diminishes the importance of a party's right to self-determination or the impartiality of the mediator, or that demeans the dignity of the mediation process or the judicial system.

#### Committee Notes

200X Revision. Areas of certification, in subdivision (b) include county, family, circuit, dependency and other Supreme Court certifications.

The roles of a mediator and an adjudicator are fundamentally distinct. The integrity of the judicial system may be impugned when the prestige of the judicial office is used for commercial purposes. When engaging in any mediation marketing practice, a former adjudicative officer should not lend the prestige of the judicial office to advance private interests in a manner inconsistent with this rule. For example, the Committee believes that the depiction of a mediator in judicial robes or use of the word "judge," with or without modifiers, preceding the mediator's name would be inappropriate. However, an accurate representation of the mediator's judicial experience would not be inappropriate. This rule is not intended to prohibit appropriate reference to prior adjudicative service by use of such terms as "circuit judge retired," "former judge of compensation claims," and "former general magistrate."

In addition, to the rule revision, the Committee is also developing an informational website with the goal of creating educated consumers. The Committee believes that there will be fewer concerns about "misleading" advertising if the public is better informed about mediation and the role of the mediator.

**Miscellaneous Rule Petition.** The ADR Rules and Policy Committee will also be submitting a petition with a variety of proposed rule revisions.

- **Reinstatement Requirements.** When an individual is decertified as a Florida Supreme Court mediator, the Rules for Certified and Court-Appointed Mediators contain provisions for reinstatement. See Rule 10.830. The current rule has not been revised since it was adopted in 1992. Since that time, however, the requirements for renewal have been enhanced to require completion of continuing mediation education. In addition, if an individual lapses as a certified mediator for more than 365 days, the individual must complete all of the requirements and apply as a new mediator. Given these major changes, the Committee is suggesting an amendment to the rule which would require one who has been suspended or decertified as a mediator to complete a training program of the type of certification for which reinstatement is sought so that someone who lapses is not required to do more than someone who has been decertified.

(h) Reinstatement after Suspension. Except if inconsistent with rule 10.110, a mediator who has been suspended shall be reinstatement as a certified mediator upon the expiration of the imposed or accepted suspension period and completion of any pending renewal obligations.

~~(h)~~ i) Reinstatement after Decertification. Except if inconsistent with rule 10.110, a mediator who has been ~~suspended~~ or decertified may be reinstated as a certified mediator. Except as otherwise provided in the decision of the panel, no application for reinstatement may be tendered within 2 years after the date of decertification. The reinstatement procedures shall be as follows:

(1) A petition for reinstatement, together with 6 copies, shall be made in writing, verified by the petitioner, and filed with the center.

(2) The petition for reinstatement shall contain:

(A) the name, age, residence, and address of the petitioner;

(B) the offense or misconduct upon which the ~~suspension~~ or decertification was based, together with the date of such ~~suspension~~ or decertification; and

(C) a concise statement of facts claimed to justify reinstatement as a certified mediator.

(3) The center shall refer the petition for reinstatement to a hearing panel in the appropriate division for review.

(4) The panel shall review the petition and, if the petitioner is found to be unfit to mediate, the petition shall be dismissed. If the petitioner is found fit to mediate, the panel shall notify the center and the center shall reinstate the petitioner as a certified mediator contingent on the petitioner's completion of a certified mediation training program of the type for which the petitioner seeks to be reinstated ; ~~provided, however, if the decertification has continued for more than 3 years, the reinstatement may be conditioned upon the completion of a certified training course as provided for in these rules.~~ Successive petitions for reinstatement based upon the same grounds may be reviewed without a hearing.

- **Authority/Appearance at Mediation.** Party representatives are showing up at court ordered mediations without the authority to settle the case as required by the Florida Rules of Procedure (and Mediation Referral Orders entered by the presiding judge). Procedures to sanction or deter this behavior are frustrated by the *Florida Mediation Confidentiality and Privilege Act*, section 44.401 – 44.406, Florida Statutes which prohibits both the mediator and other mediation participants from revealing communications occurring during mediation, unless the communications fall within one of the exceptions. The fact that a party has thus appeared at the mediation without adequate authority cannot come to the attention of the court.

#### Rule 1.720 Mediation Procedures

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

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

If a party to mediation is a public entity required to conduct its business pursuant to chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity.

(c) Certification of Authority. Unless otherwise agreed by the parties or changed by order of the court, each party wishing to appear through a representative, and each representative of an insurance carrier attending the mediation as required under subdivision (b), shall file a notice with the court, opposing parties, and the mediator, identifying the representative(s) who will be attending the mediation on their behalf, and certifying that each identified representative has the authority required by these Rules.

(d) Sanctions for Failure to Appear. If a party fails to appear at a duly noticed mediation conference without good cause, the court, upon motion, shall impose sanctions, including an award of mediator and attorney's fees and other costs against the party failing to appear. Absent showing evidence to the contrary, a party who appears at mediation via a representative who fails to file the notice and certification required pursuant to subdivision (c) shall be deemed not to have met the appearance requirements of subdivision (b).

(e)(d) Counsel. The mediator shall at all times be in control of the mediation and the procedures to be followed in the mediation. Counsel shall be permitted to communicate privately with their clients. In the discretion of the mediator and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court.

(e)(f) Communication with Parties or Counsel. The mediator may meet and consult privately with any party or parties or their counsel.

(f)(g) Appointment of the Mediator.

(1) Within 10 days of the order of referral, the parties may agree upon a stipulation with the court designating:

(A) a certified mediator; or

(B) a mediator, other than a senior judge, who is not certified as a mediator but who, in the opinion of the parties and upon review by the presiding judge, is otherwise qualified by training or experience to mediate all or some of the issues in the particular case.

(2) If the parties cannot agree upon a mediator within 10 days of the order of referral, the plaintiff or petitioner shall so notify the court within 10 days of the expiration of the period to agree on a mediator, and the court shall appoint a certified mediator selected by rotation or by such other procedures as may be adopted by administrative order of the chief judge in the circuit in which the action is pending.

(3) If a mediator agreed upon by the parties or appointed by a court cannot serve, a substitute mediator can be agreed upon or appointed in the same manner as the original mediator. A mediator shall not mediate a case assigned to another mediator without the agreement of the parties or approval of the court. A substitute mediator shall have the same qualifications as the original mediator.

(g)(h) Compensation of the Mediator. The mediator may be compensated or uncompensated. When the mediator is compensated in whole or part by the parties, the presiding judge may determine the reasonableness of the fees charged by the mediator. In the absence of a written agreement providing for the mediator's compensation, the mediator shall be compensated at the hourly rate set by the presiding judge in the referral order. Where appropriate, each party shall pay a proportionate share of the total charges of the mediator. Parties may object to the rate of the mediator's compensation within 15 days of the order of referral by serving an objection on all other parties and the mediator.

**Revisions to the Mediation Training Standards.** The ADR Rules and Policy Committee will be recommending to the Chief Justice that a revised set of Mediation Training Program Standards be adopted. The Training Program Standards include the requirements for the initial training that all certified mediators must complete. Watch *The Resolution Report* for more details.

**Mortgage Foreclosures.** On March 9, Chief Justice Quince created a Task Force on Residential Mortgage Foreclosure Cases to address the crisis "on a statewide basis with uniform court rules, policies and procedures to manage cases, to protect the rights of homeowners and lenders, and to ease the burden on the courts." Judge Jennifer Bailey, circuit judge in the 11<sup>th</sup> Judicial Circuit, was appointed as chair and the Task Force was charged with developing recommendations which may include "mediation and other alternative dispute resolution strategies, case management techniques, and approaches to providing *pro bono* or low-cost legal assistance to homeowners."

The Task Force was further instructed to submit an interim report and recommendations no later than May 8, 2009, and a final report and recommendations no later than August 15, 2009. If you have comments or suggestions for the Task Force, please feel free to send them to me (I will be serving as staff to the Task Force until my departure) at **[DRCmail@flcourts.org](mailto:DRCmail@flcourts.org)**.

## The Americans With Disabilities Act Amendments Act: Challenges for the Florida Mediator

by Joseph G. Jarret, Esquire\*

**Background.** The Americans with Disabilities Act Amendments Act, or the ADAAA, was signed into law by President Bush and takes effect on January 1, 2009. This Act makes significant changes to the Americans with Disabilities Act (ADA) of 1990, which will pose challenges to employers in avoiding and defending claims of disability discrimination. These challenges will likewise translate into unique challenges for Florida mediators. By way of a refresher, the ADA was designed to protect qualified individuals from discrimination on the basis of disability in all aspects of the employment process, including recruitment, hiring, rates of pay, upgrading, and selection for training. The Act also required a covered employer to provide reasonable accommodations that will allow disabled individuals to perform the essential functions of their job unless it can show that by doing so it would suffer an undue hardship. The ADA Amendments Act of 2008 (**ADAAA**) provides broader protections for disabled workers and turns back the clock on Supreme Court rulings that Congress deemed too restrictive of disabled employees' rights.

**Changes in the Law.** Because of the technical aspects of the Act, coupled with the lack of interpretive case law, mediators are well-advised to read the Act before attempting to mediate claims founded on the Act. For instance, the term "disability" is defined under the ADA to mean "a physical or mental impairment that substantially limits one or more major life activities." Although the ADAAA did not change the definition, it added language that will require courts to interpret the term "disability" differently—and more broadly—than it was interpreted in the past. Further, the ADAAA also outlines with specificity what activities constitute "Major Life Activities."

Previously, the ADA did not identify what activities were and were not major life activities. Instead, such identification was left to the courts. Pursuant to the ADAAA, however, major life activities include the following: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADAAA also provides that a major life activity includes the operation of a major bodily function, including functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. In a nutshell, the days of employers looking askance at "disabilities" for which there were mitigating factors such as prosthetic devices, or medication, are over. In fact, it will be easier for ADA plaintiffs to prove that they are disabled. Whether more plaintiffs will prevail at trial remains to be seen; however, with the lack of case law to guide legal counsel, mediation will, in all probability prove to be a most attractive alternative.

*\*Joseph G. Jarret is a civil mediator and an attorney currently serving Knox County Tennessee as its Chief Deputy County Attorney. He is an award-winning writer and a former United States Army Combat Arms Officer who holds the juris doctorate degree, the masters in public administration degree, a bachelors degree, and a post-graduate certificate in public management.*

**The Disabled Party.** One of the more obvious challenges to ADAAA mediation is the presence of a party with a disability that may translate into diminished capacity to fully participate in the mediation process. If a party's capacity to mediate is unclear, the mediator should determine whether a disability is interfering with the capacity to mediate and whether an accommodation will enable the party to participate effectively. If so, either the employer or the mediator should offer such an accommodation. Further, the mediator should determine whether the party can mediate with support from a third party. It is important to note, however, if a representative is present or participating, that the party with diminished capacity remains the decision-maker in any mediated settlement. Another scenario is the disabled person who may be accompanied by a personal assistant (PA) who is supervised by the person with a disability and who provides physical aid or other assistance. The PA should not speak on behalf of the person with the disability or assist with his or her communication, unless requested to do so by that individual.

**A Word About Disability Awareness.** The mediator should be, and remain, cognizant of "disability etiquette," i.e., appropriate terminology and ways to interact with people who have disabilities. This awareness may require the mediator to address one's own biases about persons with disabilities as well as biases of the opposing parties. Further, when talking with someone who has a disability, the mediator should speak directly to him or her, rather than through a companion who may be along. In the event the mediator determines that a party with a disability requires assistance, the mediator should ask if he or she needs it before acting, as well as listen to any instructions the person may want to give.

**Summary.** By reviewing the specific requirements of the ADAAA—while remaining alert to common disabilities and their impact on a person's everyday functioning, as well as accommodations necessary for the disabled person to fully participate in the mediation session—the mediator goes a long way in insuring her or his credibility, as well as an unimpeded mediation session.<sup>1</sup>

---

<sup>1</sup> For a comprehensive review of other steps the mediator can take when faced with mediating an ADAAA claim, see, *ADA Mediation Guidelines* published by Mediate Resolution Solutions, on the web at [www.mediate.com](http://www.mediate.com).

- Text of the ADA Amendments Act published on the U.S. Access Board's website: <http://www.access-board.gov/about/laws/ada-amendments.htm>
- EEOC Notice Concerning the ADA Amendments Act of 2008; [http://eoc.gov/ada/amendments\\_notice.html](http://eoc.gov/ada/amendments_notice.html)
- EEOC Disability Discrimination web page; <http://eoc.gov/types/ada.html>
- Job Accommodations Network (JAN) Bulletin on the ADA Amendments Act: <http://www.jan.wvu.edu/bulletins/adaaa1.htm>
- National Center for State Courts Issue Brief on the ADA Amendments Act of 2008: [http://www.ncsconline.org/D\\_Gov/IssueBriefs/IssueBrief-ADAAMendments-Sep-08.pdf](http://www.ncsconline.org/D_Gov/IssueBriefs/IssueBrief-ADAAMendments-Sep-08.pdf)

## Mediator Qualifications Board Update

by Sharon Press

At the time of this printing, 121 cases have been filed with the Mediator Qualifications Board (MQB) since the Board was created in 1992. The information from the following cases that have been resolved is provided for educational purposes.

- This hearing arose out of a “good moral character” [rule 10.110] review by the qualifications complaint committee of the MQB. On the applicant’s initial application for family and circuit certification he answered “yes” to the question “Have you ever been sanctioned for a breach of ethics or unprofessional conduct...” Specifically, the applicant reported that he was suspended from The Florida Bar for client neglect in 2002 followed by 3 years supervised probation and was not yet reinstated.

In addition, the applicant had a prior disciplinary history consisting of an admonishment in 1999 and a 90-day suspension in 1995 which were revealed in the Court’s opinion on the then current case which was appended to the application. While the application was pending, the Supreme Court issued an opinion in the pending case for which the applicant received a two-year suspension followed by three years of probation for “failure to timely file income tax returns and to timely pay income taxes.”

The QCC found facial sufficiency and requested additional information from the applicant and permission to speak to FLA. Believing it important to do a more complete investigation, the QCC authorized the hiring of an investigator. After reviewing the investigator’s report, the QCC continued to have concerns and filed the following formal charges:

*“the QCC finds there is probable cause to believe that the applicant fails to possess good moral character as required by rule 10.110... for certification by the Florida Supreme Court as a circuit court and family mediator” based on the applicant’s disciplinary record with The Florida Bar, his current suspension from The Florida Bar based on his failure to pay restitution and failure to demonstrate rehabilitation; and his failure to fully disclose his complete disciplinary history nor update his application with the results of the case that was pending at the time of his application.*

A hearing was held and the Hearing Panel issued the following finding and conclusion:

*“the Hearing Panel cannot find by a preponderance of the evidence that the applicant should not be certified as a mediator.”*

Accordingly, the formal charges were dismissed and the applicant was certified.

\* \* \*

- This grievance was filed by a party in a circuit mediation against a certified circuit mediator. The complainant alleged violations of rule 10.330 (Impartiality) by the mediator allegedly expressing amazement that the complainant found an attorney to represent her and telling the defendant in the underlying case that the complainant was going to lose; rule 10.340 (Conflicts of Interest) because opposing counsel selected him as the mediator; rule 10.370 (Advice, Opinions, or Information) by telling both parties that if this was a horse race and he was placing a bet, he would bet on the defendant and that in this case there will be one complete winner and one loser (pointing at the complainant while saying loser). The complainant also alleged that the mediator spent a full hour explaining the mediation process and stated that since so many cases resolve in mediation, if the case did not resolve, it would reflect poorly on the parties. Finally, the complainant alleged that since judges are too busy to review their cases, the mediator would be sending an opinion to the judge as to the worthiness of the case.

The complaint committee found facial sufficiency and requested that the mediator respond to rules 10.310(a) and (b), Self-Determination; 10.330(a) and (b), Impartiality; and 10.370(c), Advice, Opinions or Information; 10.520, Compliance with Authority as it relates to rule 1.730(a), Florida Rules of Civil Procedure. In the mediator's response he stated that he was sure that he had made comments relating to winners and losers in lawsuits in the context of stressing that mediation provides opportunity for no winners or losers and also to the uncertainty of horse races. The mediator also pointed out to the parties that in this case, the judge referred it to mediation after the plaintiff had rested her case at trial and this was likely a message from the court. The mediator believed that he had been selected by both attorneys. The mediator also acknowledged asking a variety of "reality-testing" questions on the subjects referenced, but denied telling the complainant any of the statements she alleged he made. The mediator also denied saying that he would tell the judge anything about who was correct. After reviewing the response, the complaint committee continued to have concerns regarding all the rules raised at the facial sufficiency stage and directed the DRC to hire an investigator to interview the mediator, the complainant, the complainant's former attorney, the defendant and his attorney, as well as anyone else deemed necessary to complete the investigation. After the investigation, the complaint committee continued to have some questions and decided to meet with the mediator and the complainant in an effort to resolve the complaint. Despite numerous attempts to reach the complainant, the DRC was unable to locate her and as a result, the complaint committee dismissed the complaint without prejudice.

Later, the complaint was re-filed. The complaint committee requested a meeting with the mediator and the complainant to discuss possible violations of rule 10.310, 10.330, and 10.370. At that meeting and prior to a finding of probable cause, the mediator, Charles Carter, accepted the following sanctions: to refund the fees paid by the complainant to the mediator for the mediation held and to send a letter of apology to the complainant.

\* \* \*

- The next resolved grievance was filed by a party in a family mediation against a certified family mediator. The complaint alleged that the mediator failed to disclose a conflict of interest despite being asked about the potential conflict by the complainant's attorney. Prior to the mediation, the complainant discovered that the mediator's office was in a building which was previously owned by a personal friend of the complainant's ex-husband (and his boss). Upon questioning, the mediator confirmed that she had purchased the building from the personal friend but maintained "that she had no other dealings or relationship with him." The complainant alleged that after the mediation, the complainant discovered that the mediator was the attorney for this personal friend in his divorce. The complainant also alleged that her ex-husband's attorney did not attend the second mediation and that indicated bias on the part of the mediator. Subsequent to the mediation, the complainant attempted to talk to the mediator who refused to do so. The complaint committee considered possible violations of rule 10.310(c), Self-Determination; 10.330(a) and (b), Impartiality; 10.340(a) - (c), Conflicts of Interest; and 10.620, Integrity and Impartiality.

The complaint committee found facial sufficiency with regards to rules 10.330, 10.340 and 10.620 and requested a response from the mediator. The mediator acknowledged having been contacted by the complainant's attorney regarding the mediator's relationship with the complainant's ex-husband's personal friend to which she replied that she "did not have a relationship with [the friend] which would create a conflict to [her] serving as mediator in the pending action..." The mediator declined to disclose any details relating to her representation of the personal friend in his divorce because that information was confidential and privileged per instructions from The Florida Bar. One member of the complaint committee conducted the investigation on behalf of the committee by speaking with the complainant's attorney who confirmed the complainant's allegations. The committee requested a meeting with the mediator and the complainant which was handled by telephone conference call. During that call, the mediator, who had obtained permission from the friend, disclosed to the complainant that the mediation had concluded in an impasse prior to her taking on the representation of the friend. The mediator apologized to the complainant that the Florida Bar rules had prevented her from revealing that information prior to the call with the complaint committee. The complaint committee dismissed the complaint for lack of probable cause.

\* \* \*

- This grievance was filed by a party in a family mediation against a certified family mediator. The complainant alleged that the mediator "refused to present a counter offer" and the mediator told the complainant that he "could not ask for that" in violation of rules 10.310, Self-Determination, and 10.370, "Advice, Opinions, or Information."

The complaint committee found facial sufficiency and requested a response from the mediator with regards to rule 10.310 and 10.370. The mediator denied refusing to convey a counter-offer, but did recall that at one point the complainant requested the mediator convey a counter offer which the mediator believed the other party would consider insulting. The mediator discussed this with the complainant and his attorney and recalled stating that the mediator would convey the offer if the complainant wished him to do so because the complainant was “in control.” According to the mediator, the complainant decided not to request that the offer be conveyed. The mediator also stated that the complainant was represented by an attorney. The complaint committee continued to have questions so they opted to conduct an investigation themselves by speaking with the complainant’s attorney. As a result of the investigation, the complaint committee decided to dismiss the case with a finding of no probable cause.

\* \* \*

- This grievance was filed by a party in a parent coordination case against a family certified mediator. The complainant alleged that the mediator did not adhere to the “highest ethical principles” as required by rule 10.200 and the mediator did not exhibit “good moral character while serving as a parenting coordinator for the parties” as required by rule 10.800(a)(1). Specifically, the complainant alleged that the mediator intentionally made multiple untrue and misleading statements while under oath to weaken the complainant’s case for custody of his minor children. The complainant also alleged that the after the mediator was no longer serving in the role of parenting coordinator, she refused to turn over records and the children’s passports and she offered her opinion to opposing counsel regarding the complainant’s medical condition which she was unqualified to do and it was outside the scope of her authority. The complainant also requested a change in venue/ disqualification of the Southern Division. This request was denied.

The complaint committee found facial sufficiency and requested a response from the mediator in relation to rules 10.200, Scope and Purpose; 10.600, Mediator’s Responsibility to the Mediation Profession; and 10.620, Integrity and Impartiality. The mediator responded that she was acting in the role of parenting coordinator, not mediator and in that capacity was not neutral, nor was the process confidential. The mediator further stated that the records had never been requested and the passports were released when the mediator received confirmation from counsel for both parties. The mediator acknowledged that she should not have offered out of date information on the medical condition of the child since she was no longer the pc and not familiar with the most recent condition. After considering the mediator’s response, the complaint committee determined, by majority vote, to dismiss the grievance for lack of probable cause. After the committee’s vote and prior to the complainant receiving the signed copy of the dismissal, the complainant filed additional information. Upon receipt of the dismissal, the complainant filed a request for re-consideration. The complaint committee reconvened and considered all of the information which had subsequently been filed. After determining that it was all in the nature of further argument and not new information, the request for reconsideration was denied.

## Case and Comment

by Perry S. Itkin

### Do The Terms of the Mediation Agreement Mean What Is Written? It Depends. No, Not Necessarily!

In the case of *Marjon v. Lane*, 995 So. 2d 1086 [Fla. 2<sup>nd</sup> DCA 2008], the former husband filed an amended motion to set aside a mediated settlement agreement after the trial court found that an exculpatory clause in the Agreement barred his claims.

The former husband and the former wife had an infant daughter at the time of the dissolution of their marriage. The child and the former wife continued to live in Florida after the dissolution. The former husband moved out of Florida but ultimately returned and thereafter sought to increase his visitation time because of his new proximity to his daughter and to reduce his child support obligations because of changed circumstances.

The court-ordered mediation resulted in the Agreement, which provided in its final section, that “[e]ach party states that no duress, undue influence, fraud or overreaching has been utilized by any party in the negotiation, and that this [A]greement is fair and reasonable to all parties.”

[COMMENT: This is an often used provision in a mediated settlement agreement, but is it something that the parties actually discuss, agree to and understand prior to the signing of the agreement? Remember *Florida Rules for Certified and Court-Appointed Mediators*, **Rule 10.420(c) Conduct of Mediation, 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.]*

Notwithstanding that section of the mediated settlement agreement, the former husband, utilizing *Florida Rule of Civil Procedure* 1.540(b)(3) and *Florida Family Law Rule of Procedure* 12.540, moved to set aside the Agreement due to duress, coercion, and fraud in the inducement. The former wife filed a motion to strike or dismiss, claiming that the final provision of the Agreement barred relief. The trial court agreed with her and dismissed the amended motion **with prejudice**.

The appellate court held “not so fast!” Well, it actually reversed and remanded with directions and held:

*Mr. Marjon correctly argues that the clause at issue does not bar the trial court’s consideration of whether the Agreement was procured by fraud, duress, or coercion.*

*... [w]here a party, such as Mr. Marjon, sufficiently pleads duress, coercion, or fraud in the inducement, he or she is entitled to a hearing on the merits of the motion.*

Wait, you're probably wondering about confidentiality of mediation communications, right?!? [Please say yes!]

Florida's Mediation Confidentiality and Privilege Act, F.S. 44.401 – 44.406, includes certain instances where disclosures, albeit for limited purposes, are permitted by law to be made.

**44.405 Confidentiality; privilege; exceptions.**

(4)(a) . . . . 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:

1. For which the confidentiality or privilege against disclosure has been waived by all parties;
2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;
3. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;
4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;
- 5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation** *[Emphasis added]*; or
6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

[COMMENT: Legally recognized grounds to void a mediated settlement agreement include those where the agreement is proven to have been obtained as a result of fraud, duress or coercion. All to say, you don't want to inform the mediation parties and mediation participants that there is *unequivocal* confidentiality of mediation communications.]

## Do The Terms of the Mediation Agreement Mean What Is Written? It Depends. Yes, Necessarily!

You remember the case that keeps on giving – *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 [Fla. 4th DCA 2001], right?!? Sure you do – that’s the case where the Fourth District Court of Appeal remanded the case to the trial court so that it could make factual findings regarding the wife’s claims of mediator misconduct resulted in a mediated marital settlement agreement [i.e. whether the mediator substantially violated the *Florida Rules for Certified and Court-Appointed Mediators*]. On remand, the trial court found no mediator misconduct and no duress or coercion [COMMENT: Here are those issues again!] and upheld the settlement agreement which trial court ruling was affirmed in *Valchine v. Valchine*, 923 So. 2d 511 [Fla. 4th DCA 2006].

Fast forward to *Vitakis v. Valchine*, 987 So. 2d 171 [Fla. 4<sup>th</sup> DCA 2008]. [COMMENT: Actually, not that fast since the mediation occurred in the last century. OK, it was in 1999!]

The parties’ mediated settlement agreement included a provision that required the wife to “provide” the couple’s frozen embryos to the husband so that he could dispose of them. **The agreement also contained a provision providing that the agreement could not be modified except by written agreement.** [COMMENT: This is another often used provision in mediated settlement agreements and do the parties actually discuss it – do they really?]

After the 2006 opinion upholding the settlement agreement, the husband filed a motion seeking to enforce the provision of the agreement requiring the wife to turn over to him the couple’s frozen embryos. The wife insisted that the settlement agreement should not control because, during the pendency of the appeals, the husband had a “change of heart” and indicated he would turn the embryos over to her. However, the wife acknowledged that *there was no writing, signed by the parties, modifying the terms of the settlement agreement.*

The trial court granted the husband’s motion, finding that the issue was controlled by the terms of the settlement agreement. Accordingly, there was no error in the trial judge’s ruling and the Fourth District Court of Appeal affirmed.

“You Want How Many Bites At The Apple!!!! You’re Kidding, Right?!?”

One – okay. Two – not so fast! Three – that’s crossing the line. Well, how about *ten or eleven?!?*

In *Ayala v. Gonzalez*, 984 So. 2d 523 [Fla. 5th DCA 2008][Clarification of Opinion and Denial of Motion for Rehearing], sanctions against the former wife and her attorney in a divorce case in the form of an award of appellate attorney fees to former husband were warranted according to the Fifth District Court of Appeal.

This case was on appeal from the third denial of the wife's request for relief from a mediated settlement agreement that was incorporated into the Final Judgment of Dissolution of Marriage which was never appealed and never vacated [actually, the wife had brought **ten** prior unsuccessful appeals in this case, one of which involved a request for identical relief] and the wife, through her counsel, had tried, through a variety of unsuccessful means, at various judicial levels on **nine** different occasions to invalidate the mediation settlement agreement.

Ms. Ayala first sought to have the agreement declared void in November 2003, complete with what was to become a recurrent theme of "emergency" motions for relief. That case was eventually resolved against her with prejudice, and she appealed. The judgment was affirmed *per curiam*. She then unsuccessfully sought rehearing, rehearing en banc, and certification to the Florida Supreme Court.

Shortly after the affirmance of that judgment in 2004, Ms. Ayala brought yet another case in the trial forum again seeking to have the mediation settlement agreement voided. The trial court again dismissed the case with prejudice on the basis of the doctrine of *res judicata*. Curiously, Ms. Ayala then sought mandamus relief from the appellate division of the circuit court. [COMMENT: *Res judicata* operates as an adjudication on the merits, barring a subsequent action on the same claim when the previous action was on the merits.]

In 2005, she filed an "Amended Complaint and Motion for Declaratory Relief" in the circuit court once again seeking the identical avoidance of the mediated settlement agreement. This proceeding led to the order by the third circuit judge to enter a final order with respect to this particular matter which is the subject of the present appeal. In that order the trial judge pointed out that this matter had, indeed, been dismissed with prejudice previously, and that the final judgment adopting the mediation agreement was valid and enforceable.

[COMMENT: One more thing - do you think it's a good idea to tell the appellate court that is has "made an absolute muddle of several foundation concepts in the law"? I didn't think so! Neither did the Fifth District Court of Appeal!]

*Appellant's counsel . . . shall within 20 days from the date of this opinion, show cause in writing why monetary or other sanctions should not be imposed upon him for having filed a motion for rehearing and clarification in violation of the Florida Rules of Appellate Procedure.*

*The court reserves jurisdiction to impose such sanctions and to order further response, including the personal appearance of appellant's counsel, should the written response not be deemed sufficient.*

## You Don't Just RSVP [Or Not] To A Court Order - You Comply Or . . . !

In *Mojzsik v. Estrada*, 983 So.2d 699 [Fla. 5th DCA 2008], Appellee's attorney sought relief from the Fifth District Court of Appeal's Order to Show Cause for the attorney's failure, without good cause, to appear at a court-ordered appellate mediation.

Apparently, he:

- failed to appear at hearings without notice;
- failed to file the court ordered mediation questionnaire;
- delayed payment of fees awarded by the court; and
- did not appear at the show cause hearing even after his motion to appear by phone was denied.

This cornucopia of failures to comply continued over the period of September 2007 to May 2008 and resulted in:

- Imposition of monetary sanctions against counsel being deemed appropriate but withheld pending the outcome of counsel's bankruptcy proceedings;
- The clerk being directed to provide a copy of the opinion to The Florida Bar for appropriate action; and
- Withdrawal of the court's mediation order so that the case could move forward with the merits of the appeal.

## "I Was Ignorant!" "Tough!"

*Antar v. Seamiles, LLC*, 994 So. 2d 439 [Fla. 3<sup>rd</sup> DCA 2008] was a case in which one of the parties to a mediated settlement agreement tried to avoid having to make an \$800,000.00 accelerated payment due under the terms of the agreement. The trial judge entered a final order relieving Seamiles, LLC, et al., from further performance of the mediated settlement agreement and the Third District Court of Appeal reversed.

The parties executed a settlement agreement which, in pertinent part, required that Antar and others transfer all ownership interest in Seamiles, along with all of Seamiles' intellectual property, to Seamiles in exchange for \$1,040,000.00 to be paid in installments of \$200,000.00 within thirty days and \$70,000.00 annually thereafter. However, these payments were to be accelerated in the event Seamiles was "sold to a third party for cash," or, alternatively, assumed and guaranteed by a non-cash purchaser:

*If Seamiles is sold to a third party for cash to the members, Antar shall be paid from said cash to satisfy the unpaid balance of the installment payments due hereunder. In any other type of transaction (e.g., sale for equity or merger), the surviving entity shall execute the necessary documents required to assume Seamiles' obligations herein and shall agree to remain under the jurisdiction of the court for the sole purpose of enforcing this Settlement Agreement . . . .*

Antar filed a motion to enforce this portion of the settlement agreement, claiming that Seamiles was being or had been acquired by another entity or entities. Antar asked the court to enforce the settlement agreement by requiring the new owners to assume Seamiles' obligations and by accelerating the settlement payout if a cash buyout had taken place.

One of the signatories to the settlement agreement claimed, in a self-serving affidavit, that he was not bound by the agreement because he had signed without seeing the entire agreement even though he had **twice** signed page nine of nine of the settlement agreement (once while in Iceland and once a month later before a notary while in Miami). No explanation was offered as to why, one month later, the signatory did not secure a copy of the entire agreement or why he *again* signed page nine of nine of a document, this time in the presence of a notary, without seeing the entire agreement. [COMMENT: Even if true, is this believable?!? By the way, in drafting the mediation agreement, do you think it would be good practice to number each of the pages as was done in this case, i.e. page *x of y*?]

Incidentally, the notary, in an uncontradicted sworn statement, said that he would not notarize only a signature page without the remainder of the document that it acknowledges.

The appellate court determined that Seamiles could not avoid the payments due under the agreement based on the signatory's assertion that he should not be bound to this agreement because: (1) he saw only the signature page of the agreement (which he signed while in Iceland visiting his son); (2) Antar told the signatory that he needed that signature to continue settlement negotiations; and (3) Antar told the signatory that he would be provided with the entire agreement when he returned to this country.

[COMMENT: A fundamental principle in contract law is that a party to a written contract cannot defend against its enforcement on the ground that he signed it without reading it, unless he avers facts showing circumstances which prevented his reading the paper, or was induced by the statements of the other parties to desist from reading it.]

### Case and Comment

by Perry S. Itkin, Esquire  
Dispute Resolution, Inc.

2200 NE 33rd Avenue, Suite 8G  
Fort Lauderdale, FL 33305-1889  
(954) 567-9746

E-mail: [PerryItkin@MediationTrainingCenter.com](mailto:PerryItkin@MediationTrainingCenter.com)

### The Association of Family and Conciliation Courts

The Association of Family and Conciliation Courts (AFCC)'s 46<sup>th</sup> annual conference will be held at the Sheraton New Orleans, May 27-30, 2009. The conference, titled *Children, Courts and Custody: Back to the Future or Full Steam Ahead?* will examine how family law research, practices and processes have evolved over the years, paradigms have shifted, controversies have arisen and myths have been debunked. How sure are we about what we think we know now? Join AFCC in New Orleans and find out!

The program features 70 workshops, including three-hour advanced sessions, three plenary sessions and your choice of six day-long pre-conference institutes. There will be nearly 200 world class presenters and conference sessions will cover a range of topics examining challenges to conventional child custody wisdom including assertions about 50/50 parenting, the child's role in the process, the resiliency of children after divorce, the changing role of court systems in resolving family disputes and many more.

Where better to explore new research, share ideas, sharpen your skills, network with colleagues and meet up with friends than New Orleans? The Sheraton New Orleans is located on Canal Street at the edge of the French Quarter. You will be within walking distance to some of the best music, cuisine and entertainment the city has to offer.

For more information, to view the conference brochure or to register visit AFCC online at [www.afccnet.org](http://www.afccnet.org).

### The University of Texas at Austin School of Law

The University of Texas at Austin School of Law Center for Public Policy Dispute Resolution presents *Innovations in Collaboration and Conflict Resolution Skills Enrichment Institute* on July 29-31, 2009 in Austin, Texas. Program options include *Staying with Conflict: Working with Ongoing Disputes* by Bernie Mayer, Ph.D. and *The Next Generation of ADR: Utilizing Technology to Effectively Resolve Disputes* by Colin Rule, M.A. For more information visit [www.utexas.edu/law/cppdr](http://www.utexas.edu/law/cppdr) or call (512) 471-3507.

### 4th National Conference for Minority Professionals in Alternative Dispute Resolution

The 4th National Conference for Minority Professionals in Alternative Dispute Resolution, *Broadening Opportunities for Minority ADR Professionals: In Search of New Horizons*, will be held on May 18-20, 2009. For more information, visit [www.law.capital.edu/ADR](http://www.law.capital.edu/ADR).

## Federal Mediation and Conciliation Service Institute

*Mediation Skills in the Workplace* will be held in Orlando, Florida, on October 26-30, 2009. Integrating theory and practice, this workplace mediation course focuses on developing a conceptual understanding of the mediation process as applied to workplace issues. For more information, please visit our website [www.fmcs.gov](http://www.fmcs.gov) or contact Lynda G. Lee, FMCS Institute Program Coordinator at (206) 553-2773 or fax at (206) 553-0722.

*Save the Date!*

18th Annual DRC Conference  
for Mediators & Arbitrators  
August 20 - August 22, 2009  
Rosen Centre Hotel  
Orlando, Florida

*Hats off to...*

**Judge Tom Bateman**, retired as circuit judge and resigned from the Northern Division of the Mediator Qualifications Board.

**Judge Robert Doyel**, resigned from the ADR Rules and Policy Committee (effective April 2008).

**Judge Wilfredo Martinez**, resigned from the ADR Rules and Policy Committee (effective March 2009).

**Kathy Reuter**, retired as ADR Director for the Ninth Judicial Circuit and resigned from the ADR Rules and Policy Committee (effective November 2008).

Many thanks to each of them for their contributions. Tom Bateman continues to serve on the ADR Rules and Policy Committee and Kathy Reuter continues to serve on the Advertising/Public Awareness Subcommittee.

short Takes

Takes

short

Takes

short

short Takes short Takes short Takes

## Two-Year Training Reminder

If you have completed a certified mediation training program, but have not yet applied for certification, this serves as a reminder that the administrative order governing certification of mediators (AOSC08-23) requires individuals to apply for certification within two years of the completion of such training.

Please call or e-mail the DRC if you have a question about when you completed mediation training, or if you need a current application package. We will be happy to assist you with that information.

---

## The Resolution Report

---

### NEWSLETTER

---

Dispute Resolution Center  
Supreme Court Building  
500 S. Duval Street  
Tallahassee, Florida 32399  
(850) 921-2910  
DRCmail@flcourts.org



Sharon Press  
Director and Editor

Kimberly Ann Kosch  
Court Operations Consultant

Earnestine Reshard  
Senior Court Analyst II

Sherry Waites  
Administrative Assistant II

Elizabeth Roach  
Administrative Assistant II

Dawn M. Burlison  
Production Editor