FLORIDA MEDIATION BEST PRACTICES HANDBOOK

Dedicated to the litigants, lawyers, mediators and judges of the State of Florida.

THIRD EDITION

INTRODUCTION

Mediators and trial lawyers of the Hillsborough County Bar Association (HCBA) engaged in a historic collaboration to create the first *Florida Mediation Best Practices Handbook* to make mediation more efficient and productive. This collaboration occurred during a world-wide pandemic where jury trials came to a halt for over a year and judges and court administrators struggled to find a proper balance between public health and the right to a jury trial. Nearly all legal proceedings quickly transitioned to "virtual" events, including mediation. With civil jury trials suspended, the resulting backlog of over 1.5 million cases in Florida made mediation more critical than ever to protect the rights of litigants and preserve the continued administration of justice.

These unprecedented challenges have led to a need for more productive approaches to mediation. In response, mediators and trial lawyers of the HCBA created *the Florida Mediation Best Practices Handbook* for lawyers and mediators to become better partners with each other and their clients. A survey was circulated to collect the best ideas available, and over 200 lawyers, mediators, judges and legal assistants from across the country contributed their advice for improving mediation outcomes.

The survey was followed by the first ever "Mediator Litigator Forum" to discuss ways to improve the mediation process. Thereafter, a panel of six persons, three mediators and three trial lawyers, including a former judge, assembled the *Florida Mediation Best Practices Handbook*. When contested issues arose, they were resolved by a majority vote. The panel's work was guided by the ethical rules and statutes of the State of Florida governing mediation. (Unless otherwise indicated, the term "Rule" applies to the Florida Rules for Certified and Court-Appointed Mediators.)

This project could not have been accomplished without significant cooperation. Thanks go out to the members of the panel for their outstanding commitment: Judge Martha Cook, Chad Moore, Harold Oehler, Cory Person, Tom Scarritt, and Dale Sisco. Many thanks to HCBA President Paige Greenlee and Executive Director John Kynes, and his staff, for their leadership and support. Special thanks also go out to Kim Joyner-Diaz, Greg Kehoe, Bobby Santos, Ellen Shulman, The Honorable Judge Rex M. Barbas and The Honorable Chief Judge Ronald Ficarrotta, who provided insight during the creation of the Handbook. The greatest thanks, however, go to the more than 200 legal professionals who contributed their ideas to empower litigants to choose their own outcomes by resolving their disputes through mediation.

Our vision is that you will play a unique role in the development of the *Florida Mediation Best Practices Handbook*, which will continue to be updated with suggestions and insights which we hope you will continually share with us. Your suggestions may be submitted to the Chair of the HCBA Section for Mediation and Arbitration who will collect recommendations throughout the year for the Handbook's periodic revision. In that way, the *Florida Mediation Best Practices Handbook* will continue to be a living document that we believe will provide the most

contemporary insights and benefits to mediators, lawyers and litigants throughout the State of Florida.[1]

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Harold Oehler, Chairman
Mediation & Arbitration Section
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Paige Greenlee
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September 10, 2021

[1]The guidelines and suggestions contained in this Handbook are intended to be used and/or implemented in a manner consistent with the rules and statutes governing mediation. To the extent any of the guidelines contained herein are inconsistent with a rule or statute, the rule or statute is to be followed.

SECOND EDITION ACKNOWLEDGEMENTS

In the past, trial lawyers were defined by their skill in the courtroom. As over 90% of cases now settle prior to trial, and most of those cases settle during mediation, trial lawyers are now also defined by their skill at achieving their client's objectives in the mediation room. Trial lawyers and mediators came together to create the Florida Mediation Best Practices Handbook to collaboratively improve the mediation process and to provide each other the tools to practice *mediation advocacy*, as defined on these pages, at an elite level.

This partnership between trial lawyers and mediators, which began in Hillsborough County, Florida, expanded to the entire State of Florida in 2022. The Florida Bar's Trial Lawyers Section and Alternative Dispute Resolution (ADR) Section collaborated to host the first state-wide Litigator Mediator Forum at the 2022 Florida Bar Convention. The Florida Bar chose the Forum as its "Florida Bar President's Showcase" CLE for the Convention and trial lawyers and mediators from around the State came together to share their knowledge both live and virtually. Suggestions for improving the mediation process were collected from the live and online audience and shared with the editors of the Second Edition of the Handbook. After the Forum, the Trial and ADR Sections co-hosted a reception to continue the conversation between trial lawyers and mediators regarding how they may improve the mediation process together.

Viola Clark, a graphic facilitation artist, monitored the audience's ideas for improving mediation during the Forum and created a work of art depicting the ideas the audience shared. This work of art was commissioned to adorn the cover of the Second Edition. The art symbolizes the new state-wide partnership between trial lawyers and mediators to collaboratively improve the mediation process.

Special thanks to the staff members of the Florida Bar, the Executive Committees of the Trial Lawyers and ADR Sections and to the panel members of the Florida Bar's Forum: Tad David, Geddis Anderson, Mark McLaughlin, Shirin Vesely, Christy Foley, The Honorable Retired Judge Frederick J. Lauten and Harold Oehler. Cristina Maldonado, Kim Torres, Sheridan Hughes and Jennifer Dorminy were also instrumental in planning the Florida Bar's first state-wide Litigator Mediator Forum. Special thanks to all participants who participated in this historic meeting, including all Table Hosts and Table Recorders who collected the audience's recommendations. The Florida Dispute Resolution Center, especially Tad David and Kim Kosch, are invaluable partners in encouraging all mediation participants across the State to join this growing collaboration to improve mediation and raise awareness regarding the ethical responsibilities of the mediation process.

Special thanks to the Editors of the Second Edition: AnnMarie Davis, Erin Jackson, Anthony Palermo, Kim Joyner-Diaz, the Honorable Retired Judge Gregory P. Holder, and Harold Oehler. Also instrumental were the Trial and Litigation Section and the Mediation and Arbitration Section of the Hillsborough County Bar Association (HCBA) and the HCBA's staff, particularly Executive Director John Kynes, Monique Lawson, Derek Jardeleza as well as HCBA President Cory Person. The Editors thank ADR Section President Kathleen McLeroy and Amber Boles for authoring the E-Discovery supplement and the Marital and Family Law supplement, respectively.

The editors also thank former Florida Bar ADR Section President Bob Hoyle, Lynette Mancuso and Tammie Shirey Bellerose who also made significant contributions to the Second Edition.

Most importantly, thank you to the more than 400 trial lawyers, mediators, corporate counsel, judges, litigants, paralegals, legal assistants, adjusters, risk managers, etc., who contributed the ideas on these pages to help Florida trial lawyers and mediators mediate at the highest level for the benefit of their mutual clients. The purpose of this Handbook is to provide every person who relies on mediation an ongoing platform to share their ideas to improve the mediation process.

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September 1, 2022

THIRD EDITION ACKNOWLEDGEMENTS

The partnership between trial lawyers and mediators to improve mediation, which began in Hillsborough County, Florida, expanded across the country in 2023. The American Bar Association (ABA) hosted the first nation-wide Litigator Mediator Forum. Special thanks to Porscha Boyd, Jeff Kichaven and the ABA panel (Kelly Overstreet Johnson, Harold Oehler, Effie Silva and Conna Weiner) for organizing this historic event.

Forums were held across Florida to engage trial lawyers, mediators and client representatives, such as in-house counsel, to improve the process together. The Florida Dispute Resolution Center, including Tad David and Kim Kosch, continued to support this statewide initiative by making the Handbook available throughout Florida and sharing expertise on ethical issues. Universities and law schools utilized the Handbook to teach undergraduate and graduate students mediation advocacy and negotiation skills.

Special thanks to the Editors of the Third Edition and the panelists for the Hillsborough County Bar Association (HCBA) Forum: Jerry Albrecht, Anitra Clement, Patricia Huie Harold Oehler, Rania Shehata, Alyssia Totten and Ken Turkel. Also instrumental were the HCBA Trial & Litigation Section, chaired by Kristin Norse, and the Mediation & Arbitration Section, chaired by Amber Boles and Jerry Albrecht. The HCBA's staff, particularly Executive Director John Kynes, Monique Lawson, Derek Jardeleza, as well as HCBA President Jacqueline Simms-Petredis, provided crucial support. Thanks also to the Florida Bar's ADR Section for their contributions to the Handbook. Thank you to the authors of the *Employment Mediation* supplement (Shane Munoz, Donna Smith) and the *Securities Mediation* supplement (Peter King and Steven Gard) and to those who contributed to those supplements: (Mary Lou Cuellar, Patricia Huie, Harold Oehler and Chris Shulman.)

Most importantly, thank you to the more than 800 trial lawyers, mediators, in-house counsel, adjusters, etc., who contributed the ideas on these pages. The purpose of this Handbook is to provide every person who relies on mediation an ongoing platform to share their ideas to collaboratively improve the mediation process.

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Florida Mediation Best Practices Handbook

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I. MEDIATION BEST PRACTICES FOR THE MEDIATOR

A. PRE-MEDIATION

1. Scheduling

- Ensure that your website contains an up-to-date calendar, biography or resume, and rates and terms.
- Periodically review MEAC opinions regarding conflicts of interest. Disclose and resolve any potential conflict of interest immediately. (Rule 10.340)
- Decline an appointment, withdraw, or request appropriate assistance when a case is beyond your area of expertise or experience. (Rule 10.640)
- Confirm who will be filing the Notice of Mediation.[2]
- Promptly deliver the documents confirming the mediation and describing your rates and terms.[3] Provide clear terms and instructions regarding any deposit, cancellation, postponement, fee split, payment terms, etc. (Rule 10.380)
- In your correspondence accepting the assignment, courteously remind counsel to file a Certification of Authority as required by Rule 1.720(e) of the Florida Rules of Civil Procedure.
- Promptly respond to emails and telephone messages.
- Communicate to attorneys and legal staff in a courteous and professional manner. (Rule 10.350)
- Do not schedule more than one circuit court mediation during a morning and one in an afternoon in the same day. (Rule 10.430)
- It is generally not advisable to state an end time for a mediation. (Rule 10.430)
- Be flexible and client friendly regarding rescheduling and cancellation fees.
- For virtual mediation, the mediator should set up and control the virtual platform. Send invitations, including log-in instructions, as early as possible.

2. Preparing for Mediation

- Approach the mediation with the attitude that your role is to serve the participants. Be curious about the needs and objectives of the parties, besides the money, and help the parties find mutually beneficial solutions to fulfill those needs.

[2]See Attachment 1: "Notice of Mediation – In Person" and Attachment 2: "Notice of Virtual Mediation"
[3]See Attachment 3: "Mediation Confirmation Letter and Attachment 4: "Mediation Engagement, Confirmation and Disclosure Agreement.

- Identify and understand the legal and factual issues involved and the applicable law.
- Study all materials submitted by the parties. In addition, review the court file to learn the litigation history, pending motions and deadlines, whether a trial date is set and the identity of the judge. The court file will often provide insight into the intensity of the dispute, the relationship of counsel and the parties and the level of emotion in the case. If a party does not provide a mediation summary, request relevant pleadings, legal authority, discovery responses, medical or damages summaries, etc.
- Call each party's counsel before mediation to discuss the case, the legal and factual issues, the personalities of the parties involved, each party's Best Alternative to a Negotiated Agreement (BATNA), Worst Alternative to a Negotiated Agreement (WATNA), Probable Alternative to a Negotiated Agreement (PATNA), prior negotiations, potential settlement options and obstacles to settlement. Discuss counsel's experience with the judge during the present case or prior cases, the relationships between the parties and between counsel and if there are any client issues that the mediator should be aware of.
- **Opening Statements:** The mediator is statutorily charged with conducting the mediation in a non-adversarial fashion. (Fla. Stat. § 44.1011(2)). This requires the mediator to serve as a "negotiation coach." Prior to the mediation, discuss opening statements with each counsel and determine whether openings should be conducted and, if so, the most productive format and style for counsels' presentations. Encourage counsel to go over strengths and weaknesses in a civil, diplomatic and non-adversarial manner. (Rule 10.210 and Rule 10.410).
- If the parties deem that traditional openings would antagonize the parties, counsel may be encouraged to make "solution-focused openings" where the legal and factual issues in dispute are not reiterated but counsel instead focuses on describing potential settlement options that *the other side* would find attractive.
- Where there is significant hostility between the parties, or if a joint session would create the risk of a confrontation, openings may be waived or replaced with openings made to the mediator in private caucus or in an attorney-only conference or openings may be made in writing by counsel exchanging written mediation summaries.
- If the party is not represented by counsel, conduct the pre-mediation call with the *pro se* party. Special care must be taken to inform the *pro se* party

about the process. Consider providing the *pro se* party a written explanation of the process.[4]

- Confirm with each counsel, or *pro se* party, that an individual with authority to settle the case will attend the mediation. This includes an adjuster if insurance is involved.
- If there are additional documents or other information that would be helpful during the mediation, request that counsel provide the information to the mediator and to the opposing party.
- Take time before the mediation to analyze each party's position and interests. Consider the emotional state of each party and how that might impact their willingness to settle.
- If the value of the claim is at issue, ask the lawyers to provide verdicts from similar cases.
- Ask at least one counsel to prepare a draft settlement agreement prior to the mediation with blanks for the terms to be negotiated. This will serve as the blueprint for settlement, avoid the delay caused by drafting a document during the mediation, help prevent the omission of a material term and allow the parties to execute the settlement agreement before leaving the mediation. Consider providing the draft to opposing counsel prior to the day of mediation in Word, or another editable format, so that counsel may provide redline edits. Reaching agreement on several terms of the settlement agreement will help create early settlement momentum.
- "**Single-Text Negotiation**" is a mediation strategy that employs the use of a single document, i.e. a draft settlement agreement, to capture the wide-ranging interests of stakeholders in a complex conflict. M. Shane Smith, Single-Text Negotiation, beyondintractability.org (July 2005). The parties amend the text of a draft settlement agreement until a consensus is reached on a final document. This process may begin prior to the mediation to create settlement momentum by engaging the parties to begin working together and identify areas of agreement. Blanks are inserted in the sections to be negotiated during the mediation. This process ensures that all issues in a complex case are identified and provides the mediator an outline of all issues to be negotiated. Business people respond favorably to this strategy as the document serves the purpose of a "Closing Checklist" routinely used by transactional attorneys to finalize agreements.

[4]See Attachment 10: The Mediation Process Explained.

- After speaking with counsel for each party, the mediator should develop and utilize an individualized mediation strategy for each party based on the unique interests, needs, circumstances and personalities involved.
- Become a student of negotiation techniques and cognitive biases. Study techniques to encourage cooperation among parties with different personalities and competing interests.[5] (Rule 10.630)
- Make sure meal arrangements are made for in-person mediations to prevent the participants from becoming hungry and impatient. Encourage the parties to eat during lengthy Zoom mediations as well.
- **Virtual Mediations**: Be well versed in the virtual platform's technology, security settings and the process for handling common problems such as a lost connection. (Rule 10.630 and Rule 10.640). Confirm how the parties will execute the settlement agreement prior to the mediation. (Rule 10.420 (c)). For virtual mediations, offer technology to facilitate remote signing of the settlement agreement during the mediation, such as Adobe or DocuSign, and be skilled with utilizing the technology.

B. BEST PRACTICES THAT APPLY TO THE ENTIRE MEDIATION

- Mediation is an "informal and ***non-adversarial*** process intended to help disputing parties reach a mutually acceptable agreement." (Rule 10.210). (emphasis added). Since the goal of mediation is to reach an agreement with the opposing party, mediation should be conducted like a transactional law event, such as a merger or acquisition, rather than an adversarial proceeding. Mediation participants should approach mediation the same way that transactional lawyers achieve agreement between parties with competing interests: by listening to the needs of the other party, focusing on areas of mutual benefit rather than areas of conflict and by offering solutions that satisfy the interests of both parties.
- **Be a mediator, not a messenger.** The best mediators have great listening skills and are creative problem solvers. The mediator's role includes, but is not limited to, assisting the parties in identifying issues, discussing the strengths and weaknesses of positions, fostering joint problem solving, exploring settlement alternatives, evaluating resolution options and drafting settlement proposals. (Fla. Stat. § 44.1011 (2) and Rule 10.220 and 10.370 and Committee Notes). Consequently, mediation participants expect the mediator to help the parties narrow the issues for trial if the case does not settle.
- **<u>There are three numbers for each party in every mediation</u>**: 1) What they want, 2) What they will take (the bottom of their pre-mediation

[5]See Attachment 11: Recommended Reading List.

negotiating range), and 3) What they won't walk away from. It is the mediator's responsibility to keep the parties negotiating to continue decreasing the gap between their positions until they arrive at the "zone of tension" where both sides are psychologically committed to reaching a settlement and won't walk away.

- **Ethical Canon of Self-Determination:** Mediators are required to help parties ***voluntarily*** resolve their dispute. (See Rule 10.310). A parties' right to self-determination (a free and informed choice to agree or not agree) must be preserved during all phases of the mediation. (See Rule 10.310).
- A mediator must never substitute his/her judgment for the judgment of the parties or coerce a party to make a decision. (Rule 10.310). Likewise, never focus on one solution and abandon all others.
- If for any reason a party is unable to freely exercise self-determination, a mediator shall cancel or postpone the mediation. (Rule 10.310).
- The mediator must also not allow a participant to make a decision based on misrepresented facts made by anyone. (Rule 10.310).
- A good mediator understands the law. A *great* mediator understands the people.
- Be a cheerleader and a referee. The mediator should tirelessly maintain an optimistic, confident and accommodating attitude throughout the mediation. Always remain calm and reassuring. Never lose your patience or composure. (Rule 10.350).
- Always be objective and be careful not to inadvertently give the impression or appearance that one side is favored over another. Be aware of your interactions, conversations and time spent with parties and with counsel. Don't spend a disproportionate amount of time with one side during caucuses or breaks.
- Develop the habit of using curiosity over judgment to better understand the parties. Listen not only to what parties say, but what their body language is telling you.
- Use active listening to understand the goals of the parties and reframe the communication when necessary to promote understanding. Ask questions to allow you to discover the emotional journey the parties are on and help them through it. Two of the most powerful tools every mediator has is *listening* and *empathy*.
- Humor can be the WD-40 of mediation. Know when to use it. It is very useful when testing positions, disarming a difficult or emotional individual or relieving a stressful situation.

- Continuously involve the client representatives, and all participants, in the mediation.
- Be flexible and facilitate communication in the manner the parties wish to promote self-determination. (Rule 10.310).
- Build rapport by speaking to the parties and attorneys when the opportunity arises before or during the mediation. This is particularly important during a virtual mediation where rapport is harder to establish.
- The more comfortable the parties are, the longer they will work to resolve the dispute. Avoid providing the parties with unequal accommodations. Make sure the rooms are sufficiently cool and have adequate WIFI and power outlets. Ensure that WIFI passwords are visible. Make sure that equipment to edit and print the settlement agreement will be available even if the mediation extends past business hours. Provide coffee, soda, water, cookies, snacks, candy, etc. and confirm if there is a desire for lunch or dinner.
- Treat every person during the mediation with civility and professionalism. (Rule 10.350). Engage the parties during caucuses by asking them for their opinions. Ensure that the parties are protected against hostile or unprofessional behavior. (Rule 10.350). Ask the parties to speak up if they are not feeling well or if they need to take a break.
- Don't rush the parties through any portion of the mediation. Don't terminate the mediation due to the time of day or other commitments. This may be the only opportunity for the parties to mediate their case.
- **Virtual Mediation**: Disable the recording function. Encourage all participants to be visible on camera, if possible, while conferring with the mediator and the other party. Provide alternative communication options in case a connection is lost. For example, exchange telephone numbers or utilize a telephone conferencing system, if necessary.

- **Translation Issues**: Ensure that all mediation participants are able to communicate in English or ensure that arrangements for an interpreter, or online translation service if the mediation is virtual, are made. An ethical challenge arises when the mediator and the party speak the same language, but the attorney does not. The mediator cannot ethically serve in the dual role of mediator and interpreter. It is the attorney's responsibility to bring someone to interpret and to help them communicate with their client. The final agreement may be written in any of the languages that were used during the mediation. If the mediation was fully conducted in a language other than English, the settlement agreement should be written in that language. However, the mediator must inform the parties that the Court requires documents that are filed

to be in English, and that it is recommended that they be accompanied by a Certificate of Translation. The parties (or their counsel) are responsible for obtaining the translation. (MEAC Opinion 2021-002 and 2017-002 and Florida Rule of Judicial Administration 2.565).

C. JOINT CAUCUSES AND OPENING STATEMENTS BY THE MEDIATOR AND PARTIES

- Assemble the parties for a joint caucus to begin the mediation, unless there are reasons to avoid bringing the parties together. (This should be discussed with counsel prior to the day of the mediation.). The joint caucus provides the parties the opportunity to speak to each other and start building a working relationship to help them work towards a settlement. Set the tone from the start by advising the parties that they have entered the non-adversarial portion of the litigation. (Rule 10.210). Explain that compromise is very important in every successful mediation. When discussing confidentiality, explain that you will not share information with another party without the disclosing party's consent. (See Rule 10.360).

- During the mediator's opening statement:

    - Discuss the three topics required for the mediator's opening statement by Rule 10.420: 1. Mediation is a **voluntary** process (Self-Determination); 2. It is a **confidential** process and 3. The mediator is **impartial** (Neutrality).

    - Describe your background and experience with the type of case involved, provide an explanation of the process and discuss the certainty and cost savings mediation provides. Avoid telling war stories during the mediation.

    - explain the format and process; explain that Plaintiff traditionally speaks first since Plaintiff initiated the claim.

    - set expectations and encourage compromise by explaining a "good settlement" is one where both sides leave feeling a little unhappy: most parties who settle continue to disagree on many issues but are still able to settle.

    - emphasize that during mediation the parties have the ability to decide their own outcome and that they will relinquish that power if they go to trial.

    - point out that mediation allows parties to choose creative solutions not available at trial which can be implemented immediately and often less expensively than through litigation.

    - encourage the parties and their attorneys to communicate with each other during the mediation when they feel this would be productive.

- encourage each party to listen to the other side, even though they won't agree with everything they hear, so they are prepared for what will be argued at trial.

- Keep the mediator's opening succinct without rushing through it.
- Present the mediator's opening statement in an optimistic, calm and confident fashion.
- Actively listen to the parties' opening statements, and what the parties communicate in each caucus, and search for the answer to the questions: "*What are the priorities for each party*?" and "*What's really driving this dispute?*" Sometimes the answer is as simple as the need to be heard, validated or respected.
- Keep the discussions focused on relevant matters throughout the openings and mediation.
- At the conclusion of the openings, summarize areas of agreement to create early settlement momentum.
- Diffuse the sting from an argumentative opening statement by restating the party's position in a non-emotional fashion. (See Rule 10.410)

- If a party becomes confrontational during joint session, move the parties to separate caucus rooms immediately.

- **Virtual Mediation**: Ensure that each participant's name is included in the Zoom screen rather than a phone number, etc.

D. CAUCUSES

- A good mediator can create a friendly connection with the parties and establish trust, quickly. Look for a connection between you and each lawyer and decision-maker. Sincerely demonstrate to each party that you understand their position, feelings, etc.
- Begin the first caucus with each party by encouraging the party to share what's on their mind after listening to the Openings. Encourage participation by the client throughout the mediation. There is a powerful cathartic effect when a person feels heard. By actively listening to the party so that they feel heard and understood, the mediator may satisfy the party's psychological desire to "have their day in court."
- Each time before you enter a caucus room, pause for a few moments to put yourself in the mindset of the decision-maker you are about to speak to. Communicate the other side's offer in the most productive manner to

keep the parties negotiating, i.e. put the offer in context, help the party understand the other side's perspective, recap the day's progress, etc.

- **Be Curious, Not Judgmental:** The mediator should seek to understand each decision-maker by asking questions to determine each party's unique needs and motivations for settlement beyond the money. Pay attention to the body language of the parties. Assist the parties in exploring settlement proposals that satisfy the needs of the parties. Always communicate in a patient, calm and non-judgmental tone regardless of how anyone else is acting. (Rule 10.350)
- **The Mythic:** Determine who the true decision-maker is in each room. Likewise, determine who is most interested in settling the case in each room and make that person an ally.
- To determine if a party's priorities have changed *during the litigation*, ask:
    - What were you trying to accomplish when you filed this lawsuit?
    - Has that changed?
- Ask each decision-maker to describe a positive outcome to the mediation from their viewpoint and list priorities for settlement. Periodically check with each party during the mediation to confirm whether their settlement priorities have changed.
- In the first one or two caucuses, ask each side how they will get around the strongest points of the other side's case. After that, don't encourage repetitive arguments over disputed issues, but transition the parties into identifying common ground to form the basis for an agreement.
- Be the voice of reality for each party. A mediator should raise issues, discuss the strengths and weaknesses of each party's position and help the parties evaluate settlement options. (Rule 10.370 and Committee Notes). Consider asking each side "How" and "What" questions to gently point out weaknesses, i.e. "What evidence will you use to support this claim or defense?" Go over the challenges the party will face at trial and during efforts to collect any monetary judgment. Be assertive when necessary to help the parties see the reality while never bullying.
- If counsel is relying on a tenuous argument, it is often helpful to ask counsel to explain the argument or ask counsel probing questions about the argument. This often helps counsel and the party discover weaknesses in their position.
- When a party appears nervous, ask if the party is uncomfortable and address their concern or issue. Assure them that no decisions will be made without their approval.

- Stress the *collaborative* nature of mediation as opposed to the confrontational nature of litigation.
- **Counter-Productive Offers**: If a party wants to make an offer or send a message that would be counterproductive, help them think through the consequences of delivering that offer or message before it is communicated.
    - Ask, "How would you respond to that offer if you were the other side?" or "Is that going to keep them negotiating with you? Remind the party that they cannot have a successful mediation without the cooperation of the other side.
    - Ask the party making the offer to provide a basis for the offer to allow you to explain it to the other side.
    - Advise the party that making the counterproductive offer will add considerable time to the mediation and will negatively affect the counter-proposal they will receive.
    - If the person is adamant about sending the offer, ask, "In case they don't accept, would you give me a number I can suggest as the mediator to try to get you some movement? (Since the number is suggested by the mediator, it doesn't affect the party's bargaining position.)
    - If the offer or message upsets the other side, let the offending party know the consequences of their behavior to prevent further unproductive conduct, i.e. "They took that personally. I'm having a hard time getting them over that."
- Encourage each party to guide the discussion regarding solutions rather than urging the parties to accept the solution the mediator feels is best. If the parties require assistance with formulating creative solutions, the mediator should endeavor to offer creative solutions, which satisfy the needs of the parties, while always preserving the parties' right of self-determination.
- When the mediator disagrees with counsel on valuation or another issue in the case, the mediator should 1. discuss this privately and not in front of the client or 2. ask questions to help counsel and the client appreciate the risks of taking that position.
- Mediators should not merely be "number carriers" but should be creative and affirmatively seek out alternative solutions from the parties that satisfy their interests. The mediator should also not merely engage in "meet in the middle" negotiations.
- Mediators should strive to offer creative solutions to meet the parties' needs which the parties and their counsel may not have thought of. When

suggesting any potential solution, or making a Mediator's Proposal, the mediator must present the proposal in a manner that preserves the parties' right of self-determination. For instance, the mediator should state "Have you considered…" rather than "You should consider…" (MEAC Opinion 2010-006). Never suggest that there is only one option. (Rule 10.370(c)).

- Motivate movement by discussing each party's BATNA, WATNA and PATNA. (See above). The mediator may discuss possible *outcomes* but must never predict how the case will be decided. (Comments to Rule 10.370).
- Build trust by being empathetic, honest and a good listener. (Rule 10.350).
- Do not offer legal advice but encourage the parties to seek guidance of counsel. (Rule 10.370(b)).
- Keep the caucus discussions succinct and focused on the parties and their needs. Mediators should not waste time talking about themselves or sharing war stories.
- Build rapport with each attorney and individual attending the mediation by speaking to each person in a manner that makes them feel comfortable, heard and respected. Praise the attorney's good work in front of the client. Be sensitive to different levels of sophistication and experience. (Rule 10.350 and 10.670). Speak to each individual in a manner that makes them feel comfortable based on their level of experience with the process and the law.
- Identify the motivations and emotions behind each position and demonstrate that you understand by repeating, reframing and/or clarifying the party's position. Address not only the legal and factual issues but use empathy to address the parties' feelings as well.
- No information obtained during a caucus may be revealed by the mediator without the consent of the disclosing party. (Rule 10.360(b)).

- Inquire if it appears that a non-party's interest will be impacted by any settlement. (Rule 10.300).
- Determine through questioning, whether a party, party representative, counsel or non-party is impeding settlement and explore the party's reservations.
- Create momentum by obtaining agreement on small issues first.
- **Road Rage**: When the litigation has been contentious, parties will often allow anger towards the other party or their attorney to affect them during mediation. When the mediator senses this, it is important to encourage

the party or counsel to not allow the conduct of the other side to control their behavior or judgment and lose their opportunity to resolve the case.

- Provide perspective on possible outcomes for contested issues without giving an opinion about how the case will be decided. (Rule 10.370 (c)).
- **Chest Pounding:** When an attorney threatens to forgo mediation to take the case to trial, file a counter-claim, etc., ask the attorney how much that will cost the client in time and money.
- During long caucuses, check in with the other side periodically to keep them informed and engaged.
- Preparation, patience and persistence are essential. The best mediators do not give up easily. Work with each party at their individual pace. Never demonstrate impatience by word or action.
- **Impasse Prevention Strategies**:

    o Brackets. If a party states it doesn't like Brackets, suggest a "Contingent Offer," i.e. "if I can get them to X, would you go to Y?" Setting up a low or high bracket may allow one side to "win the bracket" by settling near the top or bottom of the bracket and beating the midpoint.

    o Ask the parties if they would be willing to combine a couple of rounds of offers to accelerate movement from the other side,

    o Conduct an attorney-only conference especially if an attorney is impeding settlement,

    o Conduct a client-only conference,

    o Ask each counsel to describe next steps in the litigation and the cost of going forward through trial and an appeal with their client (but warn them before the mediation you may do this),

    o Ask the attorney and the client to describe their BATNA (Best Alternative to a Negotiated Agreement) and the cost of pursuing their BATNA,

    o Ask Plaintiff's counsel to tell their client how much more they will need to recover at trial to equal the "net" of the current offer, or

    o Ask the parties if they would consider a Mediator's Proposal

- **Moving Backwards:** When a party indicates they want to move backwards from a prior position or offer, either by changing a dollar amount or a settlement term that was previously agreed upon, ask the party to explain their intention in making the offer and caution the party that the offer may create the impression that the party making the offer is attempting to end the mediation. Advise them that the offer may result in the other side reversing their own position which then may take hours to undo. Suggest

an alternative way to deal with their concern, or at a minimum, ask for an explanation which may be provided to the other side to provide context.

- **"We are out of here!"** When a party threatens to leave, one or more of the following approaches may be used to try to keep the mediation going:
    - "I can see that you are frustrated. What can I do to make this more productive?"
    - "We have come three-quarters of the way up the mountain. (Give a specific example of the progress that has been made.). Can we hang in there a little longer?"
    - Suggest that the party wanting to leave make a "bottom line" proposal.
    - Offer to make a Mediator's Proposal.
- **"This is my final offer"** There are multiple strategies to keep the mediation going after a party takes this position.
    - **Option One:** "I will communicate that to the other side. Please wait here in case I get a message from them. We've waited all day to get information about the other side's bottom line and we're about to get that information." The mediator then tells the other party: "The other side said this is their final offer. What are you going to give me to keep them negotiating?"
    - **Option Two:** "I'm going to ask you for permission to do something different. If I say "final offer" you likely won't get a response back. So let me give them this offer and let's see what they come back with and then you can decide how to respond."
- Be persistent but if a party is unwilling to participate in the process, bring the mediation to a close. (Rule 10.420).
- Be familiar with each of the circumstances requiring termination of a mediation. (Rule 10.420).
- At the end of each caucus, reiterate 1) the offer and any message to be delivered and 2) the information which may and may not be disclosed.
- Consider using a red pen or other distinctive means to distinguish information in your notes which may not to be disclosed to the other side.

E. CROSS CAUCUSES

- A cross caucus is a private meeting exclusively between the mediator and the attorneys or between the mediator and the parties. The possibility of a cross caucus should be introduced during the mediator's opening and utilized only with the parties' permission.
- Attorney only conferences can be productive when either the attorney or the client is impeding the process. Ask questions such as "What am I missing?" to uncover the cause of the attorney's concern or, if the client is causing the impasse, pledge to help the attorney discuss the concern with the client.
- Do not allow any attorney or party to bully another participant in a cross caucus.
- Be aware of any imbalance of power before conducting a cross caucus. Do not conduct a client-only conference if the opportunity for bullying or coercion exists.
- Do not overuse cross caucuses as this may alienate the excluded individuals. Cross caucuses are typically used toward the end of a mediation to address a small number of issues or to negotiate the settlement agreement.

F. AFTER A SETTLEMENT OR IMPASSE IS REACHED

1. After a Settlement in Principle is Reached

- Consider maintaining templates of settlement agreements for common cases.[6]
- Encourage counsel and the parties to execute the final settlement agreement before leaving the mediation. As transactional lawyers know: "Time kills all deals."
- In Florida state courts, a settlement arising out of a mediation may not be reported to the court, or enforced, until all parties and counsel have signed an agreement. Fla.R.Civ.P. 1.730(b); Parkland Condo. Ass'n v. Henderson, No. 2D22-1279, 2022 Fla. App. LEXIS 7828 (2d DCA Nov. 16, 2022). The mediator should delay reporting the outcome until a written agreement is signed by the parties and counsel or an impasse is reached. When the final settlement agreement is not signed during mediation, the parties should agree upon a deadline by which the parties will either have a final signed agreement, return to mediation, or have the mediator report an impasse.
- Establish clear conditions for the dismissal of the suit.

[6]See Attachment 5: "Settlement Agreement and Stipulation of Parties (Presuit Mediation)" and Attachment 6: "Settlement Agreement and Stipulation of Parties (Claim in Litigation).

- Identify who is responsible for paying the mediation fee.
- **Virtual Mediations:** Be proficient with screensharing for real-time editing of the settlement agreement and consider having technology available, such as DocuSign or Adobe, to execute the agreement electronically during mediation.

2. After an Impasse

- If an impasse is reached invite the parties to propose a bracket or consider a Mediator's Proposal. (See MEAC Opinion 2010-006 for proper wording of a Mediator's Proposal). Only reveal each side's response to a Mediator's Proposal if the proposal is accepted by all parties.
- Discuss the option of continuing the mediation, rather than declaring an impasse, when that appears to be beneficial.
- Advise the parties that you will follow up periodically to discuss whether settlement dialogue may be rekindled. If settlement talks re-commence, offer to mediate again.

G. POST MEDIATION

- Obtain a fully executed copy of the Settlement Agreement even if it is signed after the day of the mediation.
- Promptly file the applicable mediation report[7] with the court and send the parties a copy along with the Invoice and a signed W-9.
- If there is an impasse, follow up with counsel periodically to attempt to re-initiate settlement discussions. If settlement talks re-commence, offer to mediate the dispute again.

II. MEDIATION BEST PRACTICES FOR THE TRIAL LAWYER

A. PRE-MEDIATION

1. Scheduling

- Confirm the parties' selection of the mediator.[8] Identify who will file the Notice of Mediation.[9]
- Promptly respond to emails and phone calls and communicate with attorneys, legal staff and parties in a courteous and professional manner.

[7]See Attachment 7: "Mediation Results Report" (State) and Attachment 8: Mediation Report (Federal)
[8]See Attachment 9: "Mediation Stipulation and Agreement."
[9]See Attachment 1: "Notice of Mediation – In Person" and Attachment 2: "Notice of Virtual Mediation"

- Promptly advise the mediator where the case is pending, and provide the case number, so the mediator can locate the court file.
- File the Certification of Authority required by Fla.R.Civ.Pro. 1.720(e), identifying the party representative(s) and confirming that they have adequate authority. Serve the Certification on the parties and the mediator.
- Reserve sufficient time for the mediation. If uncertain about the amount of time needed, confer with opposing counsel and the mediator.
- **Virtual Mediation**: Provide the name, position and email addresses of all individuals who will need invitations from the mediator.

2. Preparing for the Mediation

- The most effective trial lawyers should know the critical legal and factual issues during mediation as well as they would at trial.
- Approach the mediation as a transactional lawyer approaches a potential transaction. Be diplomatic and cooperative at all times. Ascertain the needs of the parties, beyond the money, and help the parties find mutually beneficial solutions that fulfill those needs.
- Periodically review the rules and statutes governing the mediation process including the "Rules for Certified and Court-Appointed Mediators" to ensure that counsel's expectations and strategies for mediation are compliant.
- Consider the emotional state of your client and the opposing party and how that might impact their willingness to settle.
- Prepare a case evaluation and cost of litigation analysis. Defense counsel should share those documents with the client and adjuster, where applicable, well in advance of mediation before authority is determined.
- In personal injury cases, research bills and liens prior to mediation. Share this information with the mediator and the other side several weeks in advance.
- Confirm that the real decision maker will be involved in the mediation.
- Prepare a draft settlement agreement prior to the mediation with blanks for key terms and provide this to the mediator. Bring the draft settlement agreement to the mediation and revise it as issues are agreed upon so there is little delay between the verbal agreement and negotiating the written terms.
- "**Single-Text Negotiation**" is a mediation strategy that employs the use of a single document, i.e. a draft settlement agreement, to capture the wide-

ranging interests of stakeholders in a complex conflict. M. Shane Smith, Single-Text Negotiation, beyondintractability.org (July 2015). The parties amend the text of the draft settlement agreement until a consensus is reached on a final document. This process may begin prior to the mediation to create settlement momentum by engaging the parties to begin working together and identify areas of agreement. Blanks are inserted in the sections to be negotiated during the mediation. This process ensures that all issues in a complex case are identified and provides the attorneys and the mediator an outline of all issues to be negotiated. Business people respond favorably to this strategy as the document serves the purpose of a "Closing Checklist" routinely used by transactional attorneys to finalize agreements.

- Meet with the client to prepare him or her for the mediation process and explain the mediator's role, if necessary. Be completely honest with the client about the weaknesses in the client's case and the costs and risk of litigation. Set reasonable expectations for mediation and the litigation and remind the client that compromise will be necessary for a successful mediation. Prepare the client to keep an open mind and conduct themselves to engender trust and cooperation from the other side.
- Encourage your client to suggest creative settlement options.
- During the client meeting, gather information about the client's current willingness to settle, the personalities involved on both sides, impediments to settlement, Best Alternative to a Negotiated Agreement (BATNA), Worst Alternative to a Negotiated Agreement (WATNA) and Probable Alternative to a Negotiated Agreement (PATNA) for *all* parties. Explain the monetary and non-monetary costs required to take the case to trial such as legal expenses, distractions from the client's business, reputational risk, etc.
- Ask your client what a good settlement looks like, what terms are essential (modify the draft settlement agreement as needed), what circumstances may make settlement more desirable and whether there are any "deal breakers" which the other side may demand. Where applicable, ask the client if there is an ongoing relationship with the other side that may impact settlement.
- Review the draft settlement agreement with the client. Discuss the best and worst-case scenarios for trial and settlement, including costs. Consider sending the draft settlement agreement to opposing counsel for suggestions in advance of the mediation.
- Educate the client about the importance of allowing the other side to speak, without interruption, and to avoid argument, which is counterproductive to reaching a settlement. Advise the client that

disagreements will be dealt with diplomatically with the mediator's assistance.

- If the party representative is articulate and sympathetic, consider allowing him or her to speak, particularly where there is a relationship with the other side. If the client will speak during the mediation, practice with the client.
- If you don't have critical information necessary for meaningful settlement discussions, then request the information from opposing counsel before the mediation. The mediator may assist with making this request.
- Prepare a mediation summary that briefly describes the case status, legal and factual issues in dispute, prior offers, impediments to settlement and a description of damages. Attach copies of key evidence, documents or deposition excerpts.
- The mediation summary should outline the most significant points you would like discussed in the other party's caucus room. Condense what you send the mediator to the essential matters in dispute. Avoid providing the mediator an unorganized "document dump" as that will be difficult for the mediator to reference during mediation. Provide the mediator sufficient time to read your materials before the mediation based on the amount of material delivered.
- Consider providing a mediation summary to opposing counsel in advance of mediation to assist them in obtaining adequate authority.
- If a dispute over a legal issue is impeding settlement, attach case law or other authority to the mediation summary with the relevant sections highlighted.
- A less expensive alternative to a mediation summary is to send the mediator relevant pleadings, documents and a summary of prior offers.
- Prior to the mediation, call the mediator to discuss the case, the parties, the issues, prior negotiations (demands, offers, proposals for settlement, etc.) and obstacles to settlement. This is important even when a mediation summary is provided. Advise the mediator if there are emotional obstacles to settlement or hostility between the parties which must be dealt with before the parties may resolve the dispute. Inform the mediator if you need the mediator's assistance to help your client, or the opposing party, understand an issue.
- During the pre-mediation conference call, discuss how, and if, openings should be conducted by the parties. Openings are generally encouraged if they are conducted diplomatically unless the claim is highly emotional, such as a wrongful death case, or hostilities between the parties are so

great that openings would be counter-productive or create the risk of a confrontation.

- Attempt to resolve dispositive motions prior to mediation.
- If the value of the claim is at issue, provide the mediator verdicts from similar cases.
- **Virtual Mediations**: Confirm that each individual attending the mediation has acceptable equipment and knows how to use the technology. Confirm the security settings to be used when speaking to the mediator, such as enabling the waiting room and disabling the recording function. Discuss how the settlement agreement will be executed and who will provide technology such as DocuSign or Adobe to facilitate signing.

B. BEST PRACTICES THAT APPLY TO THE ENTIRE MEDIATION

- **Ethical Canon of Self-Determination**: Mediation is a process to facilitate consensual agreement between parties engaged in a dispute to assist them in voluntarily resolving their dispute. A parties' right to self-determination (a free and informed choice to agree or not agree) must be preserved at all times. (Rule 10.310 and Committee Notes).
- **"**The best general is the one who never fights." -Sun Tzu, *The Art of War.* Mediation is the peace tent providing the parties a temporary cease fire from the hostilities of litigation for the purpose of negotiating a peace treaty to end the dispute. Resist the urge to argue during the mediation and instead build trust and cooperation from the other side by truly listening to their position. Try to discern the other side's needs and create proposals that address those needs. Focus on areas of mutual interest and agreement rather than points of conflict. Consider allowing the mediator to raise contentious issues in private caucus. Every action you make should demonstrate that you and your client are at the mediation to cooperate with the other side to pursue a mutually beneficial resolution.
- Mediation is defined in Florida as an "informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement." (Rule 10.210). Since the goal of mediation is to reach an agreement with the opposing party, it is more like a transactional law event than an adversarial proceeding. Mediation should therefore be approached the same way that transactional lawyers achieve agreement between parties with competing interests: by focusing on areas of mutual benefit, not conflict, and making proposals that satisfy the needs of both parties.

- Use Mediation Advocacy instead of Trial Advocacy during the mediation.[10] Mediation Advocacy is the skill of presenting a client's position, needs and interests in a non-adversarial manner to persuade the other side to enter into an agreement with you by using active listening, empathy and problem solving instead of argument.
- The trial lawyer should avoid the temptation of "beating his chest" for the client. This may jeopardize the mediation by alienating the other side and frustrating the process. At the least, posturing for the client will make the mediation unnecessarily expensive and time consuming.
- Be certain of the accuracy of each statement made during the entire mediation process. (Rule 4-4.1 of the Florida Rules of Professional Conduct and Rule 10.310(c))
- Patience is one of the most important traits for mediation success. Be patient when listening to the other side and responding to offers.
- Treat every person during the mediation with civility and professionalism.

C. JOINT CAUCUSES AND OPENING STATEMENTS OF COUNSEL

- The goal of opening statements by counsel is to earn the trust and respect of the other side and promote cooperation by demonstrating empathy and a sincere interest in resolving the issues while avoiding inflammatory and offensive statements. Remember that "people will forget what you said, but people will never forget how you made them feel." -Maya Angelou
- Opening statements by counsel should not be waived absent the threat of a confrontation because the Opening Statement provides each side a window into the other party's case, allows the trial lawyer to speak directly to the other side and provides the opportunity for each side to start building trust and cooperation.
- Begin the Opening Statement with a story that explains the critical events from your client's viewpoint and introduces a compelling theme. Discuss the other side's weaknesses in a diplomatic, non-accusatory and nonconfrontational manner by discussing the other side's challenges as "obstacles" they will face. The other side is more likely to agree to a settlement if they are treated with respect and diplomacy during the other side's opening statement. Conclude the Opening Statement by committing to work with the other side and the mediator to explore options to resolve the dispute. Describe settlement options you are willing to discuss which the *other side* would be interested in to start building trust and

[10]See Attachment 10: Recommended Reading List.

cooperation. (Be prepared to back up your pledge during Openings to work with the other side by making offers that demonstrate a willingness to compromise.)

- Utilize photographs, videos or key documents in your presentation. Utilize screen share to display these items during virtual mediation.
- Consider allowing the mediator to raise contentious or sensitive topics in private caucus to avoid creating conflict or embarrassing the other side.

D. CAUCUSES

- Engage the party representative in the caucus discussions and encourage them to suggest potential solutions. As the goal of mediation is self-determination by the parties, trust your client to be an active participant in the mediation.
- Avoid sending the mediator out of the room when discussing potential offers. Use the mediator, their knowledge of the other side's interests and objectives and their experience to help you craft effective offers.
- Parties often mirror the movement of the other side. Consider encouraging your client to make offers that demonstrate a sincere desire to resolve the dispute as this will create trust and credibility with the other party and generate greater movement and settlement momentum. Taking extreme positions, making insulting offers and moving in unreasonably small steps will usually generate the same from the other side.
- When appropriate, send an explanation with your offer that provides a rational, objective basis for the settlement proposal.
- To avoid a potential impasse, go over the next steps of the litigation in detail with your client, and the potential cost of the litigation through trial.
- If an impasse is imminent, consider proposing a bracket or asking the mediator to make a Mediator's Proposal. The Mediator's Proposal may also be effective after an impasse is reached.
- If raising a certain type of proposal will compromise a party's negotiating position, consider asking the mediator to raise the proposal.
- When representing a plaintiff, make sure your client is aware of their "net" recovery for each offer.
- At the end of each caucus, have the mediator repeat the offer and any message he will deliver as well as any information that will not be disclosed.

E. CROSS CAUCUSES

- A cross caucus is a private meeting exclusively between the mediator and the attorneys or between the mediator and the client representatives. The possibility of a cross caucus should be introduced during the mediator's opening and utilized only with the parties' permission.
- Use the cross caucus sparingly as excessive use may alienate the individuals excluded from the discussions.
- The cross caucus may be effectively used to resolve a small number of issues by a meeting between counsel or between party representatives. It is also useful to negotiate the terms of the settlement agreement. A joint caucus may alternatively be used where all parties and counsel are present.

F. AFTER A SETTLEMENT AGREEMENT IS REACHED OR AN IMPASSE IS DECLARED.

1. After a Settlement has been reached in principle

- To avoid buyer's remorse, urge the parties to execute the final settlement agreement and release(s) before leaving the mediation. As transactional lawyers know: "Time kills all deals."

- Establish clear conditions for the dismissal of the suit in the agreement and provide that the court will retain jurisdiction to enforce the Settlement Agreement.

- Ensure that the client is aware of the amount of their net recovery.

- In Florida state courts, a settlement arising out of a mediation may not be reported to the court, or enforced, until all parties and counsel have signed an agreement. Fla.R.Civ.P. 1.730(b); Parkland Condo. Ass'n v. Henderson, No. 2D22-1279, 2022 Fla. App. LEXIS 7828 (2d DCA Nov. 16, 2022). When the final settlement agreement is not signed during mediation, the parties should agree upon a deadline by which the parties will either have a final signed agreement, return to mediation, or have the mediator report an impasse.

- **Virtual Mediation**: Have technology, such as DocuSign or Adobe, available to allow the parties to sign the agreement electronically. Confirm with counsel and the parties that they understand how to use this technology.

2. After an Impasse

- Consider continuing the mediation to a specific date, rather than declaring an impasse, if the impasse may be resolved by additional discovery, nonbinding arbitration or a ruling on an issue in dispute.
- Propose that the parties stipulate to non-binding arbitration if this may help clarify an issue or issues causing the impasse.
- Ask the mediator to periodically follow up with the parties to see if a settlement dialogue can be rekindled. If settlement talks re-commence, propose mediating again.

G. POST MEDIATION

- After an impasse:
    - Consider serving a Proposal for Settlement with your last offer.
    - Invite the mediator to make a Mediator's Proposal.
    - Continue negotiations or enlist the mediator's assistance to do so.
    - Set the case for trial.
- Ensure that the mediator is paid on a timely basis. Most mediator's terms of service make the lawyers or law firms hiring the mediator responsible for payment, rather than the lawyer's clients. If the lawyer asks the client to pay the mediation fee, the lawyer should ensure that the client makes payment before it is due or the lawyer should send payment in a timely fashion and seek reimbursement from the client.

ATTACHMENT "1"

NOTICE OF MEDIATION

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA
CIVIL DIVISION

Plaintiff

vs. Case No:

Division:

Defendants,
_____/

NOTICE OF MEDIATION

PLEASE BE ADVISED that this case has been scheduled for mediation to be held before _____, Esquire on:

DATE & TIME: _____, _____, 20__, at ___ a.m./p.m.

LOCATION: **_____**
_____
_____

Respectfully Submitted,

_____
_____
_____
_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed electronically with the Clerk of Court utilizing Florida Court's E-Filing Portal system and in compliance with Florida Rules of Judicial Administration 2.515 and 2.516(3) on ____, 20__, which will automatically transmit an electronic copy to:

_____

_____

_____

_____
Attorney

ATTACHMENT "2"

NOTICE OF VIRTUAL MEDIATION

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA
CIVIL DIVISION

Plaintiff

vs. Case No:

Division:

Defendants,
_____/

NOTICE OF VIRTUAL MEDIATION

PLEASE BE ADVISED that this case has been scheduled for mediation to be held before _____, Esquire on:

DATE & TIME: _____, _____, 20__, at ___ a.m./p.m.

VIRTUAL MEDIATION INFORMATION: Meeting link to be provided.

Respectfully Submitted,

_____

_____

_____

_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed electronically with the Clerk of Court utilizing Florida Court's E-Filing Portal system and in compliance with Florida Rules of Judicial Administration 2.515 and 2.516(3) on _____, 20__, which will automatically transmit an electronic copy to:

_____

_____

_____

_____
Attorney

ATTACHMENT "3"

MEDIATION CONFIRMATION LETTER
CASE NUMBER:

Attached please find the Mediation Engagement, Confirmation and Disclosure Agreement setting forth the terms and conditions of the above-referenced mediation as well as the policies of this office.

Please also refer to our website, _____, for additional information on our mediation practice, office procedures, logistics, and in particular, questions about our location and parking. The website includes an Intro to Mediation which can be shared with clients unfamiliar with the mediation process.

The mediation is scheduled for four (4) hours unless otherwise agreed to and confirmed in writing.

If scheduled at our facility, our address is _____. Our office is located in _____.

Please forward any mediation summary or any other records or reports that may be relevant to the issues of this case and helpful in my preparation for this mediation.

Thank you again for selecting me as your Mediator, and I look forward to working with you to resolve the issues between the parties.

Very truly yours,

ATTACHMENT "4"

MEDIATION ENGAGEMENT, CONFIRMATION AND DISCLOSURE AGREEMENT

CASE NUMBER:

This Agreement will confirm that a mediation conference in the above case has been scheduled for _____.

The conference will be held at _____, _____, _____, Florida _____. The Mediator will be _____, Esquire, Certified Florida Circuit Civil Mediator and Federal Court Mediator. The engagement for mediation services is with the understanding that this Agreement will control and govern the terms and conditions of the Mediation.

SCHEDULE

Mediations are reserved/scheduled in 4 hours slots for morning or afternoon sessions. If you wish to reserve more than 4 hours or all day please let us know, and confirm it in any Notice or other written confirmation of the mediation. Otherwise, we assume only 4 hours is reserved. This will help avoid scheduling conflicts.

FEES

Mediation time will be charged at the rate of $_____ per hour ($____ per hour, per side for two party mediations). For "multiparty" mediations with three (3) sides, the rate is $____ per hour, per side, and mediations with four (4) or more sides will be billed at the rate of $____ per hour, to be divided evenly between the sides. "Sides" refers to parties with opposing positions in the mediation, i.e. co-defendants, represented by the same counsel, whose positions are not adverse constitute one "side." The term "Parties" herein refers to the named parties to the litigation as well as any interested parties voluntarily participating in the mediation process. The mediator is entitled to compensation for all time spent on the case including but not limited to preparation time, telephone conferences, attendance at the mediation conference, follow-up, collection efforts (including but not limited to attorney fees and costs), preparation of the parties' agreement and the Mediation Report to the Court. Travel time is billed at one half (1/2) of the hourly rate.

Parties agree to waive any part of a Court order inconsistent with the afore-mentioned hourly rates. Please note that these fees include reasonable and necessary expenses incurred by the mediator such as clerical, local telephone, local fax charges, postage costs, etc., but we reserve the right to charge for extraordinary expenses.

There is a three (3) hour minimum charge for all mediations, except if a full eight-hour day is reserved which will require a six (6) hour minimum charge, unless the mediator agrees to the contrary in writing. The participating sides shall divide mediation fees equally, unless the parties agree to a different apportionment of costs in writing.

CANCELLATION POLICY

The mediator has been engaged to conduct this mediation. We are accepting this engagement to the exclusion of scheduling other work for the day and the time reserved. Due to the difficulty of scheduling a new case when there is a cancellation, the time and expenses already incurred in scheduling and preparing for the cancelled conference, and the positive effect a scheduled conference can have in settlement negotiations, these policies have been adopted:

If this mediation is cancelled within 48 hours of the scheduled mediation conference, there will be a three (3) hour minimum charge divided by all sides. Unless the parties agree on who should pay the cancellation fee, all parties, through their attorneys, if any, shall be financially responsible for their share. All cancellations should be communicated in writing, by email, with the agreement of all parties and counsel noted.

PAYMENT

Law firms and lawyers – not their clients – will be billed and are responsible for the mediation bill. Payment is due within 10 days of the date of the bill and is not conditioned on settlement, receipt of settlement funds or payment by a client. Past due bills will accrue interest at the highest legal rate and will result in additional charges for time and fees spent on collection.

Pro se parties (those not represented by attorneys) must pre-pay a $500 deposit or bring a check to the mediation.

APPLICABLE LAW, CONFIDENTIALITY & MEDIATOR IMMUNITY

Whether mediation is pre-suit, Court ordered or voluntary, the Mediation Confidentiality and Privilege Act (§§44.401, et seq. Fla. Stat.), Fla. R. Civ. P. 1.700, et seq and/or Federal Rules of Civil Procedure, (and local rules of Court in the District which the case is venued) shall apply. All Mediation Communications are confidential. Mediators are immune from liability, including all forms of negligence, arising from the performance of mediation work. Mediators are immune from providing written, deposition or trial testimony relating in any way to any mediation conducted by them.

ATTENDANCE & SETTLEMENT AUTHORITY

Mediators have no role in or responsibility for compliance with, enforcement of, or sanctions associated with Fla. R. Civ. P. 1.720, pertaining to mediation appearance, attendance or settlement authority of any party, party representative, counsel of record, or insurance carrier representative.

ACCEPTANCE OF TERMS

IF YOU OBJECT TO ANY TERMS OF THIS LETTER, CONTACT ME IN WRITING, BY EMAIL, WITHIN 5 BUSINESS DAYS OF THE EMAIL CONVEYING THE LETTER. OTHERWISE, ALL TERMS SHALL BE DEEMED ACCEPTED BY THE RECIPIENTS OF THIS LETTER, THEIR CLIENTS AND ANYONE ATTENDING MEDIATION WITH THEM. COMMENCEMENT OF MEDIATION AND ENGAGEMENT OF THE MEDIATOR ARE WITH THE EXPRESS UNDERSTANDING AND AGREEMENT OF THESE TERMS.

Thank you again for engaging my mediation services. I look forward to working with you. Please let me know if you have any questions or need assistance.

ATTACHMENT "5"

SETTLEMENT AGREEMENT AND STIPULATION

(PRESUIT MEDIATION)

RESPONDENT/INSURED: _____

CLAIMANT:_____

CLAIM NUMBER: _____

DATE OF LOSS: _____

SETTLEMENT AGREEMENT AND STIPULATION OF PARTIES

Pursuant to the Mediation Conference held on the _____ day of _____, 20__, the parties have agreed to the following:

1. _____ shall pay to _____ the sum of $_____ to be distributed as follows:

2. Said Settlement sums to be paid within ____ days from the date of this stipulation.

3. The Claimant(s)/Releasor(s) shall execute and deliver General Releases, releasing any and all claims that they have or may have in the future against Releasees, arising out of the facts involved in the present dispute of the parties, namely:

_____

_____

_____.

4. Claimant(s) shall execute and deliver to Respondent(s)' undersigned attorney general releases and indemnification agreements which hold Respondent(s) and his/her/its insurance company(ies) harmless from any third-party liens or claims for which Claimant(s) is legally liable. Claimant(s) shall be responsible for satisfying any and all liens which might apply to these settlement proceeds.

5. Each party shall pay their own costs and fees. Mediation fees shall be paid equally by each side and are payable within ten (10) business days of the mediation.

6. The parties hereby stipulate that the mediation shall be governed as if it were court ordered and pursuant to Fla. Stat. §44.102 *et seq,* and F.R.C.P. 1.700 *et seq* as well as any administrative orders in effect from the date the mediator was selected. The parties and counsel also hereby agree that all matters raised in mediation shall remain privileged and confidential unless waived by all parties and the mediator or as otherwise required by law. Also, the parties and counsel further stipulate that the mediator shall be immune from testimony, deposition and liability, including all forms of negligence, whether a Court ordered or voluntary mediation.

THIS STIPULATION BECOMES BINDING UPON ITS EXECUTION BY THE PARTIES AND THEIR COUNSEL.

_____	_____
Counsel for Claimant: _____	Counsel for Respondent: _____
Date: _____	Date: _____
_____	_____
_____, Claimant	_____, Respondent
Date:_____	Date: _____

ATTACHMENT "6"

SETTLEMENT AGREEMENT AND STIPULATION OF PARTIES

(CLAIM IN LITIGATION)

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT IN AND FOR
_____ COUNTY, FLORIDA

CIVIL DIVISION

Plaintiff

vs. Case No:

Division:

Defendants,
_____/

SETTLEMENT AGREEMENT AND STIPULATION OF PARTIES

Pursuant to the Mediation Conference held on the _____ day of _____, _____, the parties have agreed to abide by the following:

1. The Defendant(s) shall pay to the Plaintiff(s) the sum of $_____, in full settlement of the Plaintiff(s) cause(s) of action constituting this litigation.

_____

_____

_____

The Defendant(s) shall pay said sum through the offices of Plaintiff's counsel of record within ____ days from the date of this stipulation.

2. The Plaintiff(s) shall voluntarily dismiss this litigation with prejudice and execute and deliver to the Defendant(s) and his/her/its/their insurance company through the offices of the Defendant's counsel of record, General Release(s) and Indemnification Agreement(s) holding the

Defendant(s) and his/her/its/their insurance company(ies) harmless from any third party liens or claims for which the Plaintiff(s) was/were able to legally collect and for which the Plaintiff(s) is/are legally liable only. Plaintiff(s) shall be responsible for satisfying and all liens which might apply to these settlement proceeds.

3. Each side shall pay their own costs and fees. Mediation costs will be shared equally between the sides and are payable within ten (10) business days of the mediation.

4. This settlement is contingent upon the clearing of funds and receipt by Defendant's counsel of record of the dismissals, releases and indemnifications required herein.

5. The parties hereby stipulate the mediation shall be governed as if it were court ordered and pursuant to Fla. Stat. § 44.102 *et seq,* and F.R.C.P. 1.700 *et seq* as well as any administrative orders in effect from the date the mediator was selected. In Federal Court cases, the Local Rules 9.01 – 9.07 of the United States District Court for the Middle District of Florida shall apply. The parties and counsel also hereby agree that all matters raised in mediation shall remain privileged and confidential unless waived by all parties and the mediator or as otherwise required by law. Also, the parties and counsel further stipulate the mediator shall be immune from testimony, deposition and liability, including all forms of negligence, whether a Court ordered or voluntary mediation. **(Note: Amend citation to federal local rules based on jurisdiction).**

THIS AGREEMENT DATED _____ SHALL BE FILED WHEN REQUIRED BY LAW OR WITH THE PARTIES' CONSENT. THIS STIPULATION BECOMES BINDING UPON ITS EXECUTION BY THE PARTIES AND THEIR COUNSEL. THIS STIPULATION, IF FILED, SHALL BE ENTERED AS A JUDGMENT OF THE COURT, OR THE COURT SHALL RETAIN JURISDICTION TO ENTER FINAL JUDGMENT OR AN ORDER DISMISSING THE CAUSE.

_____	_____
Counsel for Plaintiff: _____	Counsel for Defendant: _____
_____	_____
_____, Plaintiff	_____, Defendant

ATTACHMENT "7"

MEDIATION RESULTS REPORT (STATE)

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA
CIVIL DIVISION

Plaintiff

vs. Case No:

Division:

Defendants,
_____/

MEDIATION RESULTS REPORT

A mediation conference was conducted on the ___ day of ____, 20__.

( ) PLAINTIFF/PETITIONER APPEARED, (_____)
( ) DEFENDANT/RESPONDENT APPEARED (_____)

PLAINTIFF'S ATTORNEY(S) FIRM: DEFENDANT'S ATTORNEY(S) FIRM:

MEDIATOR: **_____, Certified Circuit Civil Mediator**

RESULTS: () FULL SETTLEMENT
() PARTIAL SETTLEMENT
() NO SETTLEMENT
() CONTINUED (DATE) _____

LENGTH OF MEDIATION CONFERENCE: **____ hours**

Respectfully submitted via EFile to the Clerk of the Court, with a copy to counsel for the parties (via email only) this **___ day of _____ 20__.**

_____

_____, MEDIATOR

Florida Mediator Number
Address
Phone Number
Email

ATTACHMENT "8"

MEDIATION REPORT (FEDERAL)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Choose division

Enter name(s),

Plaintiffs,

v. Case No. Enter case number

Enter name(s),

Defendants.

_____

Mediation Report

The parties held a mediation conference on _____, and the results of that conference are indicated below.

1. Attendance

The following participants attended the mediation conference:

☐ lead counsel

☐ the parties or a party's surrogate satisfactory to the mediator

☐ any necessary insurance carrier representative

List any unexcused absence or departure from the mediation conference:

_____

_____

_____

_____

_____

_____

2. Outcome

Under Local Rule 3.09(a), the parties must immediately file a notice after agreeing to resolve all or part of a civil action, even if the resolution is contingent or unwritten.

☐ The parties completely settled the case.

☐ The parties partially settled the case. The following issues remain:

_____

_____

_____

_____

☐ The parties agreed to continue the mediation conference. The mediator will file another mediation report within seven days after the continued conference.

☐ The parties have reached an impasse.

_____

Mediator name/information
Date of signature

ATTACHMENT "9"

MEDIATION STIPULATION AND AGREEMENT

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, STATE OF FLORIDA
CIVIL DIVISION

CASE NO.:
DIVISION:

Plaintiff,

vs.

Defendant.
_____/

MEDIATION STIPULATION AND AGREEMENT

The parties below, by and through its undersigned counsel, if any, hereby stipulate that all parties in this case agree to using the following mediator pursuant to the terms, conditions and policies set forth in the Mediation Engagement, Confirmation and Disclosure Agreement:

Name: _____, Certified Circuit Court & Federal Mediator
Address: _____
Phone: _____
Fax: _____

The parties and counsel also hereby stipulate that all matters raised in mediation shall remain privileged and confidential unless waived by all parties and the mediator or as otherwise provided by law. Also, the parties and counsel further stipulate the mediator shall be immune from testimony, deposition and liability, including all forms of negligence, whether a Court ordered or voluntary mediation.

Dated this _____ day of _____, 202_.

_____ _____
_____, Esquire _____, Esquire
Counsel for Plaintiff Counsel for Defendant

ATTACHMENT "10"

THE MEDIATION PROCESS EXPLAINED

The mediation process has been developed to allow parties in conflict to resolve their differences with a minimum of expense and in a manner that is frequently more efficient and far less expensive than a trial in a court of law. In mediation, a neutral third person, called a "mediator", encourages and facilitates the resolution of the dispute in an informal, non-adversarial manner.

The mediator is not a judge and has no power to command a settlement or decide a winner or loser. The mediator's duty is to allow each party to present their case, if the parties choose to do so, and then, assist the parties in exploring whether they would like to reach a satisfactory settlement. The parties decide, with their counsel's advice whether a settlement is in their best interest. Mediation is an effective means of allowing the parties to control their destinies without relinquishing these decisions to a judge or jury. A mediation settlement provides the parties to a dispute with (1) a guaranteed result, (2) no risk of an adverse decision at a trial, and (3) closure of the matter.

If all parties to the dispute agree to a settlement, this agreement will be reduced to a written agreement, signed by all parties, their counsel and the mediator. This is a binding contract. If the parties cannot or do not agree to the terms of a settlement, they may either agree to a postponement or request the mediator to declare the mediation at impasse, meaning simply that the parties cannot agree to resolving the dispute through mediation.

COMMON QUESTIONS AND ANSWERS ABOUT MEDIATION

WHAT HAPPENS WHEN WE GET THERE? The parties will meet at an agreed upon location at which time the mediator will explain the basics of the procedure to all present. Each counsel for the parties has the right to present an opening statement about his/her client's position. A party also, should he or she wish, address issues at this time. After opening statements, they may continue to meet as a group or, if more effective, they will break into separate groups called "caucuses." The mediator will meet with each group privately and then may withdraw and meet with another caucus group. They may rejoin as a group if beneficial to the mediation process. If the parties agree to a settlement, or if the mediation does not result in a settlement at the end of the mediation, they will meet as a group to sign the settlement agreement or to adjourn because an impasse was reached.

CAN I BE FORCED TO SETTLE MY CLAIM? Absolutely not. This is a voluntary process based upon your conclusion, with your counsel's advice, that settlement at mediation is in your best interest.

WHAT HAPPENS IF WE DO NOT SETTLE? The case continues on through the court system and a decision resolving the dispute may then be made by a judge or jury. You have lost none of your legal rights, but mediation allows you to maintain control of your destiny. You will have limited control of the decision once it is submitted to a judge or jury.

IS EACH PARTY AUTHORIZED TO SETTLE? Before the commencement of the mediation each party, through counsel, represents that each has final decision-making authority to settle.

CAN ANYTHING I SAY BE HELD AGAINST ME IF WE DO NOT SETTLE? No, the basic premise of mediation is that it is a confidential, safe environment where the parties can explore the possibility of settlement. Each party and counsel will agree to abide by these rules of strict confidentiality and there are penalties for violation.

WHAT RULES GOVERN THE MEDIATOR? There are many rules which govern the mediator but the principal rule is that the mediator must remain neutral to all parties. You may tell the mediator confidential information that will never be revealed to the other party or parties unless you specifically authorize such disclosure. At times it is invaluable that information be disclosed to the mediator, and with the concurrence of your counsel, be revealed to the other party in order to convince them that settlement is in their best interests. Nothing said within the context of a mediation is admissible in a subsequent court proceeding. All parties are bound by this rule of confidentiality. Further, the mediator is required to determine if there is a potential conflict of interest before the mediation. Under certain circumstances a mediator is prohibited from doing a mediation because the situation creates the appearance of a lack of impartiality.

IS A MEDIATION ADVERSARIAL? No. For a mediation to succeed, the parties must have a collaborative attitude. They have a problem, and the problem is there is a dispute that is on track to an expensive winner-take-all process. A successful mediation lets the parties use their power to craft a mutually acceptable resolution and take back control of deciding the outcome.

At a mediation, the parties must realize that neither side will convince the opponent that they are right and the opponent is wrong. The attorneys must address the issues, the facts and the problems in a manner that promotes positive negotiation, and be hard on the problem but easy on the people.

WHAT IS THE ROLE OF THE ATTORNEY? The attorney should prepare as if he or she is going to trial. The attorney's goal is to present to the decision-maker on the other side the facts in favor of his or her case such that the opponent recognizes the risk of trying the case and agrees to work toward a settlement.

ATTACHMENT "11"

RECOMMENDED READING LIST

SUGGESTED BOOKS

Fisher, R., Ury, W. and Patton, B., *Getting to Yes*, Penguin Books, 1991

Ury, W., *Getting Past No: Negotiating with Difficult People*, Bantam Books, 1991

Ury, W., *Getting Past No: Negotiating in Difficult Situations*, Bantam Books, 1993

Ury, W., *Getting to Peace: Transforming Conflict at Home, at Work and in the World,* Viking, NY, 1999 (Published as the "Third Side")

Ury, W., *Getting to Yes with Yourself (And Other Worthy Opponents),* Harper Collins, 2015

Voss, C., & Raz, T., *Never Split the Difference*. Random House Business Books, 2017

SUGGESTED LINKS

LINK TO HARVARD'S PROGRAM ON NEGOTIATION - https://www.pon.harvard.edu/

MASTER CLASS HARVARD PROGRAMS FOR 2021 - https://www.pon.harvard.edu/freemium/negotiation-master-class-spring-2021-program-guide/

HARVARD NEGOTIATION PROJECT ARCHIVES - https://www.pon.harvard.edu/category/research_projects/harvard-negotiation-project/

HARVARD NEGOTIATION TEACHING RESOURCE CENTER - tnrc@law.harvard.edu

WILLIAM URY'S WEBSITE - https://www.williamury.com/

WILLIAM URY'S TED TALK "ABRAHAM'S WALK" https://www.ted.com/talks/william_ury_the_walk_from_no_to_yes

WILLIAM URY'S TALK "THREE SIDES TO EVERY ARGUMENT" - https://ideas.ted.com/there-are-three-sides-to-every-argument

ATTACHMENT "12"

E-DISCOVERY MEDIATION

By Kathleen McLeroy, Carlton Fields

When resolving e-discovery disputes, the parties must weigh the relevance, proportionality, cost, and accessibility of information. By mediating e-discovery issues, litigants can limit the time and cost associated with seeking judicial intervention, control the cost of electronic discovery, maintain confidentiality, and avoid potential adverse results, such as sanctions. In the e-discovery arena, mediation can be used either to create a mediated e-discovery plan or to resolve underlying disputes regarding electronically stored information.

Who Should Participate? In addition to the decision makers for the respective parties and litigation counsel, e-discovery mediations should include IT personnel or other technical consultants with knowledge of the parties' electronically stored information systems.

Preparation for e-Discovery Mediation. Electronic information can take many forms, including active data, inactive data, metadata, deleted data, ghost data, legacy data, archived data, and back-up data. Before e-discovery mediation, it is imperative that counsel becomes familiar with the information stored and how it is stored, preserved, retrieved, and produced, as well as the cost of producing it. In addition, counsel should become familiar with the inventory of storage devices used by the client, the location and ownership of those devices, the client's retention policies, and any automatic deletion procedures that may need suspending. Counsel should also become familiar with the client's data mapping and systems mapping.

Mediation Statement. The parties should prepare a confidential mediation statement and deliver it to the mediator well before the mediation. The mediation statement should include:

- the identity of the persons who will attend the mediation, including all IT representatives. If the IT representative is a hired consultant, include the scope and nature of the consultant's engagement;
- a candid discussion of potential issues, including potential spoliation issues, cost concerns, timing issues, and specific privilege concerns;
- a candid assessment of the technological capacity of both the litigant and counsel's law firm with proposed solutions to any deficiencies;
- a disclosure of any e-discovery related depositions of corporate representatives including summary of relevant testimony and copies of relevant portions of the deposition transcripts; and
- if the specific purpose of the e-discovery mediation is to resolve disputes arising from discovery requests already propounded in the litigation, a summary of the specific disputes and copies of all pleadings related to the discovery requests.

Issues to be Addressed Through Mediation. Common e-discovery mediation issues include:

- the scope of reasonably accessible electronic data;
- the search parameters to be used to locate electronic data;
- the method of review to be employed;
- the data format for preservation and production;

- the time and manner of production;
- the procedures for handling inadvertently produced privileged information;
- the potential need for protective orders;
- the methodologies to evaluate compliance with any e-discovery plan or mediated e-discovery agreement; and
- the mechanism and protocol to enforce any mediated e-discovery plan or mediated e-discovery agreement.

The outcome of e-discovery mediation, e.g., an agreed e-discovery plan or an agreement resolving objections to propounded discovery requests, should be reduced to writing and signed by all parties and counsel according to the appropriate rules governing mediation in the jurisdiction of the litigation.

ATTACHMENT "13"

MARITAL AND FAMILY LAW MEDIATION

By Amber Boles, Amber Boles, PA

1. **JOINT MEETINGS AND CAUCUSES:** It is widespread practice for many Marital and Family mediators to not host joint sessions, but rather conduct opening statements in a private session with the Parties and their respective attorneys. Mediators should consider the following circumstances when deciding whether to conduct a joint session or segregate the Parties from the onset:

    a. **Domestic Violence Injunctions:** In some family mediations a temporary or permanent Domestic Violence Injunction ("DVI") may be in place, and the parties are prohibited from being in proximity to one another. Often times the Mediator is not made aware of the DVI prior to the mediation. Accordingly, out of an abundance of caution, the Mediator should inquire about the existence of a DVI and implement procedures, as necessary, to ensure neither Party intentionally nor unintentionally violates the DVI.

    b. **Mental/Physical Abuse:** Even in cases where a DVI is not in place, many family mediation participants have been subjected to abuse by the other party in some way including physically, mentally, financially, etc. Placing the victim in a room (virtual or otherwise) with their abuser often results in an irreparable breakdown of the process from the onset.

    c. **General Acrimony:** Marital and Family mediations are often highly emotional, acrimonious conflicts. Placing the participants together is often emotionally triggering. The Marital and Family Mediator may find it easier to assist the parties in maintaining an emotionally effective mediation mindset by ensuring the parties do not have any contact with one another during the mediation setting.

2. **MAINTAINING CONFIDENTIALITY AT VIRTUAL FAMILY AND MARITAL MEDIATIONS:** Marital and Family mediation participants are often inclined to involve their significant others, and family members in the process, especially during virtual mediations. The Marital and Family Mediator should address the issues of the mediation privilege and confidentiality both in their Mediation Confirmation Letter, and in their opening statement, to ensure the participants maintain the confidentiality of the process.

a. **MEDIATION CONFIRMATION LETTER:** The Mediator should consider adding language to identify the rules governing privacy and confidentiality to their Mediation Confirmation correspondence. Sample language is as follows:

Privacy and Confidentiality. Only the mediation participants may be present during the mediation. Third parties (including, but not limited to, spouses, significant others, and family members) shall be expressly excluded from the mediation unless their attendance is agreed to by all parties in writing in advance of the mediation session. The presence of third parties that have not been mutually agreed upon may result in an immediate termination of the mediation session.

During the online mediation session, each participant will need a secure, private space where their conversation cannot be overheard. Mediation participants will be reminded at the beginning of the mediation that only participants may be in the private space and each participant will be asked to confirm the participants' conversation cannot be overheard by any third party. Please make advance accommodations for children so that they are not in the private space and do not interrupt the mediation.

The provisions of Florida Statute § 44.405 shall apply to online mediation, including but not limited to the following:

(1) Except as provided in this section, all mediation communications shall be privileged and confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. A violation of this section may be remedied as provided by § 44.406 of the Florida Statutes. If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees.

(2) A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.

b. **MEDIATOR'S OPENING STATEMENT:** The Mediator should restate the rules governing the mediation privilege and confidentiality during the Mediator's opening statement, and during a virtual mediation request each participant to confirm they are alone, that no third parties are present, and that no third parties can listen in. If a third party is present, it is the Mediator's obligation to inform the other side, and seek approval. If the other side does not approve of the third party's presence, the Mediator should request the third party vacate the proceeding. If the third party is permitted to stay, he or she should be informed that the rules of mediation, in particular the mediation privilege and confidentiality, must be followed. Explain that if the case does not settle, the judge will not be told about the proposals exchanged during mediation.

c. **ONGOING MONITORING:** The Mediator should monitor the mediation process to ensure confidentiality is maintained throughout the mediation session. If the Mediator has a good faith reason to believe a third party is present, the Mediator should consider requesting the participant to rotate their device so that the Mediator can see the entire room.

3. "CLIENT-ONLY CAUCUS" IMPASSE STRATEGY

Contributed by Lynette Mancuso, Mancuso Mediation

If an impasse is looming, consider asking the parties and their attorneys for their consent to have a caucus with only the clients. Assure them they won't be asked to make any agreements without first consulting with their respective attorneys. If they agree to the client-only caucus, follow these steps: (a) Thank them for their willingness to meet with you; (b) Ask them to think back to when they first started dating, and recall what it was they liked most, admired or respected about the other; (c) Ask them what is the one thing now they are most upset about regarding the other; (d) Ask them if they think they have the power to let go of that upset, forgive the other and move forward; and finally (e) Ask them: When? (Then, remain silent while they let that sink in, and hopefully start the forgiveness process to move toward resolution.)

ATTACHMENT "14"

EMPLOYMENT LAW MEDIATION

Primary Authors: Shane Munoz, Donna Smith

Contributing Authors: Mary Lou Cuellar, Patricia Huie, Harold Oehler, Christopher Shulman

A. PRE-MEDIATION

1. Scheduling

Timing can be the key to settling employment cases at mediation. For example, single-plaintiff wage and hour cases are often easier to settle before both sides have invested extensive time and money. In contrast, it may be difficult or impossible to settle a case based on circumstantial evidence of unlawful motive until discovery has been completed. Carefully consider the timing of mediation. If a first mediation fails, consider reconvening or starting a second mediation if developments warrant doing so. (Alternatively, in the latter type of case, should the parties engage in an early mediation, to avoid unnecessary costs and explore settlement, but that mediation ends in impasse, counsel may consider identifying factual or legal disputes that prevent resolution – and agree to a plan to address those disputes followed by mediation. For example, if the parties do not settle because of disputes over what certain witnesses might say, the parties could agree to take only those depositions and reconvene mediation thereafter.)

2. Preparing for the Mediation

a. Give full attention to pre-mediation risk analysis and communicate that analysis to your client. Include in such an analysis the costs of proceeding beyond mediation. For example, most employment claims have essentially one-way prevailing party attorney's fees provisions. If the mediation is in the context of a binding arbitration process, make sure the client is aware that most administered arbitrations require the employer to pay most if not all of the arbitration forum fees and arbitrator's fees and expenses.

b. Prepare your client for the fundamental differences between litigation/arbitration and mediation.

1) Make sure your client understands that the day is about negotiation, and while they are not required to settle, they are expected to make at least some compromises. Failing to do so may lead the opposing party likewise not to make compromises – preventing your client from learning the other side's "bottom line" or "top dollar." Tell your client that making such compromises is the way to gain information from the other side about what it might actually take to settle, so your client can make an informed decision about whether to settle.

2) Explain to your client that your mediation advocacy – in both tone and content – will and should be different from how you would advocate on their behalf in court or arbitration. Most successful mediation advocates use a "soft sell" approach to persuade the opposing party. So, if that is your approach, prepare your client for it, so they are not left wondering why you do not seem to be vigorously representing their interests.

c. Use the pre-mediation statement as an opportunity to educate the mediator (and your client) as to both strengths and weaknesses of the case. **One of the most compelling reasons mediation works is that it is not a winner-take-all process.** The litigator's credibility with the client is enhanced when he or she informs the client of the litigation risks prior to the mediation. If acceptance of your assessment is an issue, let the mediator know this, so the neutral can develop an appropriate strategy. If your client is first learning about the weaknesses in the case from opposing counsel then the chances of a resolution in mediation may be significantly diminished, if only because the client may reject the "bad news" from opposing counsel simply because of the source. If the mediator is the first one to raise weaknesses in the case, your client may lose faith in you for not having spotted or discussed those weaknesses with the client previously.

d. Anticipate evidence that may be critical to reaching an agreement and have the evidence available at mediation. Examples include evidence establishing that protected status was (or was not) known to the decision maker prior to the decision, other evidence bearing on the motive for an adverse action, evidence of treatment for emotional distress, records of hours worked, and wages paid, and evidence of efforts to mitigate or failure to mitigate the alleged unlawful conduct or action.

e. Recognize that it may serve your client's best interests to disclose information at mediation even if it has not formally been requested in

discovery. Be prepared to do so. Your mediator should be available to assist in defining the scope of information to be exchanged and facilitate confidential exchange of information.

f. Recognize that claims of harassment or discrimination may cause a plaintiff to bring strong emotions to mediation and that accusations of harassment or discrimination may create strong emotions for the accused employee. Whether the plaintiff has been subjected to illegal harassment or discrimination, the plaintiff probably *feels* as if they have been subjected to it. Plan your messaging with a great deal of empathy for both sides.

   1) For the employer, carefully consider the pros and cons of having the accused, or the subject of the complaint, participate in the mediation. Note that, unless the accused employee is and appears genuinely contrite, that employee's attendance is more likely to create emotional obstacles to resolution than to foster meaningful settlement discussions.

   2) Relationships often have much to do with whether employment mediations are successful. On the management side, consider selecting a corporate representative to attend the mediation who has or had a strong relationship with the plaintiff during their employment. On the employee side, consider requesting the presence of a specific individual, either because it is someone the plaintiff believes to be credible or for other reasons, i.e., you might ask that the decision-maker attend if this would assist the process. The employer's response to such a request may, or may not, set the stage for a successful mediation.

g. Before mediation, counsel for parties with insurance coverage should inquire about the relative rights and responsibilities of the insurer and insured regarding approval of settlement.[11] Likewise, opposing counsel should request appropriate insurance information from other parties.

h. Employment disputes often implicate non-monetary interests. Emphasize with your client the opportunity mediation affords (1) to resolve the dispute privately, without a public airing of what are often uncomfortable facts and allegations, and (2) to address a much broader

[11] Counsel should consider whether it may be inappropriate to advise the insurer and/or the insured as to their respective rights. Counsel may determine that their role should be limited to inquiring of insurer and/or insured as to their understanding of their roles, and/or suggesting to the insurer and the insured that they communicate concerning these issues in advance of mediation.

range of interests than may be addressed at trial. A general release, confidentiality, or non-disparagement[12] are not available remedies at trial. Meet with your client in advance to consider non-monetary interests. Think outside of the box. For example:

1) An agreement to revise company policies going forward may resolve concerns expressed by a plaintiff that complaint procedures were not adequate to address workplace complaints.

2) Conversion of an allegedly discriminatory discharge notice to a resignation effective the date of the discharge can provide the settling plaintiff with the ability to state on future applications that their employment ended with their resignation.

3) A wrongful termination case where both plaintiff and defendant value philanthropy may be settled with an agreement to fund a scholarship program for students from the employee's protected class.

i. In class and collective actions, defense counsel should have detailed discussions with their client before mediation about the cost of complex litigation, the benefits of class-wide closure, and the public nature of class and collective settlements. Plaintiffs' counsel should ensure before mediation that the class representative(s) understands their responsibilities toward the class or collective.

B. BEST PRACTICES THAT APPLY TO THE ENTIRE MEDIATION

1. We often find high emotions on both sides in employment cases. Plaintiffs *feel* disrespected and mistreated. Defendants *feel* wrongfully accused of unfair, unethical, or immoral conduct. Emotions may predominate over the facts and the law. The parties want, and sometimes need, for the other side to understand their perspective.

2. Use mediation as a forum for respectful and open-minded communication. The employer should show a genuine interest in understanding the employee's position *and* in fairly considering that perhaps it is not without fault. The employee should be open to taking some responsibility for the situation *and* to the possibility that he unfairly attributed bad intentions to the employer.

[12] Counsel should be mindful that a recent decision of the NLRB, *McLaren Macomb*, 372 NLRB No. 58, found certain confidentiality and non-disparagement provisions unlawful. Whether and to what extent that decision applies beyond the case's facts and context are the subject of much discussion among employment lawyers.

3. While some attorneys prefer to dispense with opening statements at mediation, the better practice in most cases is to have counsel give them. It is often the first time a party hears the "unvarnished truth" of your client's perspective, unfiltered by opposing counsel's take. However, in keeping with the discussions above, counsel's openings should be relatively non-adversarial, simply identifying the areas of agreement and disagreement, dispassionately outlining the obstacles for the other side at trial and pledging to focus on exploring settlement options which both sides may find acceptable. Of course, opening statements should not be conducted in a joint session if there is fear of a physical confrontation or if the mediator believes they cannot be conducted civilly.

C. AFTER A SETTLEMENT AGREEMENT IS REACHED OR AN IMPASSE IS DECLARED

1. After a Settlement has been reached in principle

a. In class and collective actions, in FLSA cases, and in other cases where a settlement agreement needs court approval, the agreement should carefully address the parties' rights and responsibilities if the court rejects the agreement, in whole or in part.

b. Recognize that there are often federal income tax and withholding implications to any settlement of employment actions involving claims of lost wages. Be prepared to discuss how the parties might choose to characterize payment of settlement proceeds. For example, payment of settlement proceeds in three payments: one portion to the plaintiff directly, from which applicable federal withholding is taken and for which an IRS Form W-2 will issue; a second payment to the plaintiff directly, from which no federal withholding is taken and for which an IRS Form 1099 will issue; and a third payment, to plaintiff's counsel directly, from which no federal withholding is taken and for which an IRS Form 1099 will issue to the counsel.

c. In rare instances where it is not possible to remain at the mediation until the final settlement agreement is fully executed, the parties may decide to execute a term sheet or preliminary agreement, embodying the substance of the agreement in principle and contemplating a separate settlement to be drafted and signed after the mediation is complete. **In Florida state courts, a settlement arising out of a mediation may not be reported to the court, or enforced, until all parties and counsel have signed an agreement.** Fla.R.Civ.P. 1.730(b); Parkland Condo. Ass'n v. Henderson, No. 2D22-1279, 2022 Fla. App. LEXIS 7828 (2d DCA Nov. 16, 2022). If the parties and counsel do not sign a settlement agreement at

mediation, the mediator should delay reporting the outcome until a written agreement is signed by the parties and counsel or an impasse is reached. When the final settlement agreement is not signed during mediation, the parties should agree upon a deadline by which the parties will either have a final signed agreement, return to mediation, or have the mediator report an impasse.

d. In addition to describing the agreed-upon consideration, and deadlines for the consideration to be exchanged, the parties' agreement should also include provisions regarding the mutual release of the parties, the method of payment, confidentiality, non-disparagement and the rights of a party damaged by the breach of the settlement agreement. Consider including a prevailing party attorneys' fees provision which applies to the successful enforcement of the settlement agreement.

ATTACHMENT "15"

SECURITIES MEDIATION

Peter B. King
Steven Gard

Mediating securities claims requires a knowledge of the arbitration process by which securities claims are adjudicated. This article highlights some of the unique features of this niche practice area and provides tips for the mediator to help navigate the settlement process.

Most securities arbitrations – those involving claims by investors against their financial advisors, and those by industry members against other industry members -- are conducted under the auspices of the Financial Industry Regulatory Association ("FINRA"), a non-governmental "self-regulatory organization" authorized by rules of the Securities and Exchange Commission to regulate member firms, specifically securities broker-dealers and their "associated persons" (i.e., registered individuals). FINRA administers arbitrations through FINRA Dispute Resolution Services. Disputes involving members of FINRA are compulsory, meaning that a condition of FINRA membership is that members agree to arbitrate disputes with investors and among themselves.

Some financial advisors provide financial advice and services to investors through investment advisory firms registered with the SEC and/or the states. These firms and individuals are not members of FINRA and are not subject to FINRA arbitration but typically incorporate arbitration provisions in their agreements with customers. Such disputes are often arbitrated in AAA, JAMS, or other forums.

While such proceedings are in the nature of court litigation, there are several key differences which a mediator should know to effectively mediate them. While a fulsome discussion of each difference is beyond the scope of this supplement, we undertake to highlight key differences to provide awareness for the mediator and thoughts about the relevance these differences may have in mediation to assist the mediator in bringing the parties to a settlement.

1. Joint caucuses and opening statements.

It has become increasingly common practice in securities mediations for the parties and their counsel to forego opening statements in joint caucus. Be sure to confer with the lawyers in advance to determine if the parties agree whether opening statements would be helpful or a hindrance to the settlement process. Bringing the parties together in a joint caucus to review the guidelines and ground rules for the mediation can be helpful (sometimes laying eyes on the opposing party or their counsel can satisfy a perceived need), even without opening statements from counsel.

2. Information about the arbitrators is often relevant in mediation.

A typical FINRA panel consists of three arbitrators (one arbitrator for small claims). Most cases are decided unanimously by the arbitrators, but unanimous awards are not required by FINRA. Arbitration panels in FINRA have a tendency to split the baby, to "do equity" instead of seeking the correct legal conclusion. In fact, the FINRA Arbitrator's Guide advises that "arbitrators are not strictly bound by legal precedent or statutory law" (although they may not "manifestly disregard the law"). Further, summary judgment motions are not provided for in the rules.

Takeaway: *This is relevant in mediation because it tends to be more difficult in FINRA arbitrations to "anticipate" how a panel will rule on a given issue or case, i.e., it creates more uncertainty and consequently greater risk and arguably more reason to settle. The lack of dispositive motions means that almost every case that does not settle will be tried and the parties' fates will be decided for them by three "strangers" who have enormous latitude in fashioning a remedy (virtually non-appealable, see below) and someone will surely be disappointed with the result. This reality can be useful in moving parties towards a compromise.*

FINRA publishes all arbitration awards on its website, and during the arbitrator selection process FINRA provides biographical information about the arbitrators to the parties. Outside services compile the awards histories of each FINRA arbitrator and parties can and often do acquire this data during the arbitrator selection process (for a fee).

Takeaway: *While not an exact science, this data can reveal tendencies of individual arbitrators that could be relevant to the negotiation in mediation. Though experienced counsel will always find the silver lining even with the least favorable panels, this data can be useful in advising parties during the mediation.*

3. Understanding damages calculations and theories.

Damage calculations in securities mediations are usually based upon the claims or defenses asserted in the dispute. Damages theories of all stripes have been presented to arbitration panels. Three main theories, however, seem to dominate: (1) the "net-out-of-pocket" calculation, (2) the "market-adjusted" or "well-managed portfolio" calculation, and (3) statutory rescission. While a detailed discussion is beyond the scope of this supplement, understanding at least the basics of these three theories will be important to "getting to yes." Generally, resolution of these competing approaches is difficult to reach during mediation, but agreement on the approach is not required to settle the case, just as the lack of agreement on disputed facts or legal theories is not usually an impediment to settlement.

Takeaway: *The uncertainty (i.e., risk) over which theory the arbitrators might apply (and it sometimes turns out to be "none of the above") can be useful in working with the parties towards a compromise.*

Regardless of approach, each party will have (ideally) prepared a damages calculation in advance of mediation and exchanged the calculation with the opposing parties. Often the parties will share their calculations with the mediator in advance of mediation so the mediator can review them without spending valuable time on the day of mediation getting up to speed on the data.

Takeaway: *The mediator may want to caucus separately or together with counsel prior to the mediation to discuss and try to understand these calculations. Doing so usually results in a more efficient day of mediation, giving the parties the best chance of settling on the day of mediation.*

4. The right to an appeal is almost non-existent.

Federal and state laws explicitly provide a strong presumption in favor of arbitration as a dispute resolution method, and a strong emphasis on the "finality" of an arbitration proceeding. They also provide very limited grounds for challenging an arbitration award through an action to vacate the award. Case law bears out that successful challenges to arbitration awards are relatively rare and typically involve egregious fact patterns (such as intentional misconduct by arbitrators, parties, or their counsel).

Takeaway: *The mediator and the parties should understand the potential finality of arbitration and factor it into their negotiations. If collectability of an award is potentially an issue, this too should be a consideration during mediation.*

5. Confidentiality rules are unique to the FINRA forum.

FINRA has specific industry rules regarding confidentiality provisions in settlement agreements. The rules prohibit confidentiality provisions made during a FINRA arbitration that prohibit or restrict a claimant ("or any other person") from communicating with the SEC, FINRA or any federal or state regulatory authority regarding a possible securities law violation. *See* FINRA Regulatory Notice 14-40. Additionally, broker/dealers and their associated persons who are parties to settlements are generally required to publicly disclose on FINRA's BrokerCheck website the fact that a case has settled, the amount paid, and any contribution from the individual associated persons.

Takeaway: *For these reasons, confidentiality issues are relatively less contentious in FINRA settlements than in court, but the mediator should remain mindful of the regulatory constraints on confidentiality provisions.*