DRC Looking Forward to 25th Annual Conference

The DRC’s 25th Annual Conference, _Passion, Purpose & Peacemaking: 25 Years of Service_, will be held on August 10-12, 2017, at the JW Marriott Grande Lakes in Orlando, Florida.

A pre-conference session, Exploring Mediator Ethics, will be held on Thursday, August 10, and features Sharon Press, Director of the Dispute Resolution Institute, Mitchell Hamline School of Law leading participants in interactive activities that explore the Florida Rules for Certified and Court-Appointed Mediators in light of the January 2017 revisions to the rules. Many of you will remember Sharon for her many years of being the Florida Dispute Resolution Center’s Director. Conference participants will also get the chance to hear Sharon as keynote speaker to begin the program on Friday morning.

In addition to a wide variety of workshops, participants can select an Appellate Mediator Certification track (class is at capacity) or the Arbitration Training track. On Friday afternoon, participants will attend a _Safety and Security for Mediators_ plenary session presented by Marshal Silvester Dawson of the Florida Supreme Court. On Saturday, the mediator ethics plenary features a mock hearing panel of the Mediator Qualifications Dispute Resolution Board with audience members participating by deciding what sanctions, if any, should be imposed on the mediator. Wellness activities are also available for conference participants before and after with yoga sessions in the morning and group walks scheduled for the evening.

We are excited to provide this opportunity to enhance your skills and knowledge regarding alternative dispute resolution and look forward to seeing you in Orlando for the first time or once again.
Message from the Director

Some Common Mediator Ethics Violations Which Lead to Sanctions

Although the number of grievances against mediators is small in relation to the total number of Florida Supreme Court Certified mediators, there are some violations of the Florida Rules for Certified and Court-Appointed Mediators (the Rules) which occur more commonly and have led to a finding of probable cause and professional discipline.

A brief examination of several cases in which sanctions were imposed by a hearing panel or by consensual agreement is presented here. The cases are posted on the Florida Dispute Resolution Center’s (DRC) website in the Discipline and Proceedings section.

Self-Determination and Coercion, rules 10.310 and 10.370: Four of the complaints involved mediators violating parties’ rights to self-determination by coercing the parties. In one case, the mediator made threats to a mother that unless she signed the agreement she “might never see her child again.” In another case, instead of advising pro se parties of their right to seek independent legal counsel, the mediator told a landlord to settle and do whatever it took to get rid of the tenant. Another mediator threatened the wife with the possibility the husband would file a motion to keep the children away from her, imprison her for a violation of a temporary restraining order, and cause her immigration status to be revoked.

Demeanor, rule 10.350: Allegations regarding demeanor included mediators raising their voices in an intimidating manner, making a sarcastic comment about what the party might be able to get the judge to believe, making improper references to the physical possessions and attributes of a female party (asking how a party obtained her engagement and wedding rings and whether her watch was a Rolex, stating that the party “really was a beautiful woman and I hope your husband appreciates you.”), and telling a party to quit complaining. In one case, a mediator spoke to the parties without pausing although he knew one party was using a foreign language interpreter, and said in everyone’s presence while making a “repulsive” face, “She does not understand, not even a little bit? She has been here since 1999, works at a Publix, and does not speak English?”
Conflicts of Interest and Failure to Act with Impartiality, rules 10.340 and 10.330: One mediator referred the complainant to a specific attorney, acted as the complainant’s interpreter at the meeting with the attorney, and entered into an intimate relationship with the ex-husband of the complainant. The ex-husband was the other party to the mediation. In yet another case, the mediator had a friendship with one mediation participant (wife) while assuming an adversarial position to the other participant (husband) by giving advice and counsel to the wife prior to and during the institution of legal proceedings. In a case involving marketing rule violations, the mediator created a conflict of interest by stating, “Before the court creates a negative mark on your record permanently, you need to call us. If you use our services, you won’t have to go to court or meet anyone in person. You can even take your family on vacation! We handle your entire case.”

In a probate dispute between siblings, a mediator failed to disclose to the opposing sister and brother and the sister’s attorney that he had once represented the attorney for the brother in the attorney’s divorce. In response to interrogatories by the Mediator Qualifications Dispute Resolution Board prosecutor, the mediator attempted by e-mail to persuade or influence the attorney for the sister to support his untrue account regarding disclosure of the possible conflict of interest.

In a family law case, the mediator failed to disclose that the husband’s attorney had attended the circuit mediation training the mediator provides and, during the mediation, asked the wife’s attorney to attend the training. During the mediation, the mediator also laughed loudly with the husband’s attorney within the hearing of the wife and her attorney leading the complainant to believe the mediator had a special relationship with the husband’s attorney.

Marketing Practices, rule 10.610: A mediator made repeated misrepresentations on his application for mediator certification, in resumes, on web sites, and in other marketing materials implying or stating he was an attorney, member of The Florida Bar, and a retired judge when in fact he was not. Another mediator, who operates a business which provides continuing mediator education (CME), advertised a course for obtaining a concealed weapons permit as an approved CME. In fact, there is no pre-approval process for CME; the course did not enhance a participant’s professional competence as a mediator as required for a course to qualify as CME; and the course did not “constitute an organized program of learning directly related to the practice of mediation” as required by the Florida Supreme Court administrative order regarding mediator certification (AOSC11-1).

An applicant for mediator certification committed, in a direct marketing mailing, numerous false and misleading marketing practice violations by the use of a solicitation letter, sent to at least one defendant in a small claims action. The applicant stated in the letter, “We save you the time of the exhausting drawn out court process while also protecting you from monetary judgment” and “We handle your entire case” (emphasis added).
In conclusion, “[t]he public’s use, understanding, and satisfaction with mediation can only be achieved if mediators embrace the highest ethical principles. Whether the parties involved in a mediation choose to resolve their dispute is secondary in importance to whether the mediator conducts the mediation in accordance with these ethical standards.” See rule 10.200. A wise mediator keeps abreast of the Mediator Ethics Advisory Opinions and the sanction cases posted on the DRC website for guidance.

ADR News and Updates

Florida Supreme Court Invites all Interested Persons to Comment on Amendments to Florida Rule for Certified and Court-Appointed Mediator 10.910

The Court invites all interested persons to comment on the amendments, which can be viewed online at SC17-935. All comments must be filed with the Court on or before August 21, 2017, with a certificate of service verifying that a copy has been served on the Committee Chair, Honorable Rodney Smith, Eleventh Judicial Circuit Court, 73 West Flagler Street, Room 1401, Miami, Florida 33130, rsmith@jud11.flcourts.org and on support staff to the Committee, Juan Collins, Dispute Resolution Center, Florida Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399, collinsj@flcourts.org, as well as a separate request for oral argument if the person filing the comment wishes to participate in oral argument, which may be scheduled in this case.

The Committee Chair has until September 11, 2017, to file a response to any comments filed with the Court. If filed by an attorney in good standing with The Florida Bar, the comment must be electronically filed via the Florida Courts E-Filing Portal (Portal) in accordance with In re Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal, Fla. Admin. Order No. AOSC13-7 (Feb. 18, 2013). If filed by a non-lawyer or a lawyer not licensed to practice in Florida, the comment may be, but is not required to be, filed via the Portal. Comments filed via the Portal must be submitted in Microsoft Word 97 or higher. See In re Electronic Filing in the Florida Supreme Court, Fla. Admin. Order No. AOSC17-27 (May 9, 2017). Any person unable to submit a comment electronically must mail or hand-deliver the originally signed comment to the Florida Supreme Court, Office of the Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927; no additional copies are required or will be accepted.
UPDATE: Appointment and Selection of Florida Supreme Court Certified Mediators in State Trial and Appellate Court-Filed Cases

The Supreme Court of Florida Committee on Alternative Dispute Resolution Rules and Policy (Committee) is exploring options to clarify the professional standards for mediators, including seeking revisions to the rules of mediation procedure regarding the appointment and selection of mediators in state trial and appellate court-filed cases. These modifications would require that only mediators who hold Florida Supreme Court mediator certification can mediate cases which are filed in the state trial and appellate court system. After e-mailing over 5,700 mediators, posting the proposal on the Court’s website, and allowing a comment period from May 31 to July 7, the Committee received 75 comments from professionals involved in conflict resolution – lawyers, mediators, professors and various rules committees of The Florida Bar. Of note, parties would continue to be able to choose a mediator who is not Florida Supreme Court certified in any case not filed with the court system (pre-suit, administrative, etc.).

The proposed revisions may be obtained by sending an email request to: DRCmail@flcourts.org. Watch for further updates, and the Committee expresses its appreciation to all who took the time to submit comments.

DRC Welcomes Juan Collins as new Staff Attorney

The DRC is pleased to welcome our new staff attorney, Juan Collins. Juan’s previous experience includes serving as Deputy General Counsel at the Agency for Persons with Disabilities and Assistant General Counsel at the Florida Department of Children and Families (DCF). While working at DCF, Juan stressed mediation in their cases and his unit was awarded the Davis Productivity Award for saving the state over $44 million dollars in litigation costs. Juan is also a retired JAG Officer having served over 29 years in the United States Army Reserve.

Juan has a very deep passion for mediation, having served in all capacities of the process for the last eleven years and looks forward to contributing to the on-going success of the DRC.

Juan Collins pictured with his daughter Rikisha at the Tallahassee Area Chapter of 100 Black Men Awards in June.
On a personal note, Juan is the father of six children and has eight grandchildren and two
god-sons. Juan serves on the Board of Directors for the Neighborhood Medical Center and the
Sickle Cell Foundation and serves as Vice-President of the Tallahassee Area Chapter of 100 Black
Men.

Juan was selected “Man of the Year” by the Tallahassee Chapter of 100 Black Men at the
Chapter’s 2017 Black Tie Scholarship Gala on June 16, 2017. The 100 Black Men is a national
organization that provides mentorship to youth and scholarship opportunities. Juan is the Vice-
President of Development for the chapter which awarded $25,000.00 in scholarships to local
high school seniors this year.

In Memoriam: Justice Parker Lee McDonald

Retired Florida Supreme Court Justice Parker Lee McDonald, who was 93, passed away in
late June in his Tallahassee home. Justice McDonald was well known for his opinions which
restricted the ability of prosecutors to remove jurors from a case based solely on their race.
After this retirement from the Court, Justice McDonald was a certified circuit mediator from
1995 – 1999 and was a supporter of the local Neighborhood Justice Center during its years of
operation.

Judgments and Decrees Interest Rate Set

Small claims mediators take note. The quarterly rate of interest payable on judgments and
decrees increased to 5.17 percent beginning July 1, 2017. For more information contact the
Bureau of Accounting at 850-413-5511 or visit Florida’s Chief Financial Officer’s website.

Florida State Courts Annual Report Released

The latest Florida State Courts Annual Report was released in May 2017 and is available
electronically in a web page, mobile friendly HTML version or PDF version. A large part of the
report covers information on the Court’s Long-Range Issues. Alternative Dispute Resolution falls
under Long-Range Issue #2: Enhance Access to Justice and Court Services and begins on page 30
of the report (pdf version).
Let’s say you’re the court-appointed mediator of a negligence claim. After substantial negotiation between the parties, it appears an impasse is looming. You believe the reason for this possible impasse is the parties disagreement regarding what plaintiff must prove and whether she can prove it. During the mediation, plaintiff has identified evidence which she believes proves all four elements of her negligence claim; the defendant asserts the evidence does not show causation, i.e., that the damages were caused by the breach of duty. In caucus, the plaintiff asks you for your opinion. What can you do?

While there are several mediator ethics rules that might be involved, Fla. R. Med. 10.370 takes center stage here. As you know, Rule 10.370(c) indicates you may not offer a personal or professional opinion “intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue.” While the rule allows you “to point out possible outcomes of the case and discuss the merits of a claim or defense,” so long as you respect impartiality and party self-determination, the rule specifically prohibits a mediator from offering an opinion “as to how the court in which the case has been filed will resolve the dispute.” If, as a mediator, you believe the plaintiff is going to lose because of the causation issue, the plaintiff’s question puts you in something of a quandary.

Clearly, you are prohibited from telling the plaintiff you believe she would lose in court, because that would be offering your opinion about how the court would resolve the dispute. But, what if you specifically disclaimed this as a prediction, saying, for example, you’re not predicting what the court would do but, if you were to decide the case, you would rule against plaintiff? I understand some mediators use that construction as a means to try to get around rule 10.370(c)’s prediction prohibition. I respectfully disagree with those mediators. The mediator’s opinion is only useful to the parties if it does predict what might happen in court; if it is not intended to predict what might happen in court, then who cares what your opinion is about who might win? Thus, even though such an opinion is not specifically offered as a prediction, it necessarily must have been intended, at a minimum, “. . . to decide the dispute or direct a resolution of [the] issue.”

So, how may you address this thorny question consistent with the mediator ethics rules?

One way, of course, is to decline to answer the question: “I’m sorry, but as you may know, mediators are not ethically allowed to answer that question.” That approach is often dissatisfying to both the party and the mediator, as it is unlikely to help the parties avoid an
impasse. But, as noted in rule 10.200, “...Whether the parties involved in a mediation choose to resolve their dispute is secondary in importance to whether the mediator conducts the mediation in accordance with these ethical standards.” In other words, sometimes mediations don’t result in a deal, so we mustn’t cross the ethical line just to “help” the parties reach a deal. Not to worry: we have some other options available.

For example, another way to respond is by indicating you think she “may have some difficulty” in persuading the court on the issue of causation, because... (explaining why you believe so). While many mediators use this technique, one must be very careful in doing so. This is where not only what we say but also how we say it matters significantly. The more what we say (or how we say it) leads the plaintiff to believe you think she’s going to lose, the more likely your communication crosses the line into unethical conduct under rule 10.370(c). Instead, you might use the following construction: “Based on what you’ve told me, some people might think you have proven causation, some people might think you haven’t. The problem is that, as you sit here today, you don’t know which of those people will be sitting on your jury.”

Alternatively, you might ask direct risk-of-loss questions, such as, “Would you agree there is a chance the court might rule against you on the issue of causation?” or “What do you think the chances are that the jury will rule in your favor on that issue?” You might, preface the question by pointing out that, in your experience (if you have this experience), sometimes the plaintiff wins and sometimes the plaintiff loses on causation. This can be an especially useful approach if the plaintiff is represented by counsel, who will usually concur that plaintiffs sometimes win and sometimes lose. You can then use that acknowledged risk of loss as a predicate for continued negotiation. For example, you might ask the plaintiff to assign a percentage likelihood the jury would find in her favor on the causation issue, and discount the amount of damages she is asserting by that percentage. So, if she were asserting $30,000 in damages (I often use the plaintiff’s most recent demand as the damages amount for this purpose) and she stated there was a 25% chance she might lose on the issue of causation, I would ask her if she were willing to make an offer of $22,500 (75% of $30,000). If she resisted, that might be an ideal opportunity to suggest bracketing, to spur the parties to move beyond their current positions, i.e., asking the plaintiff if she would come down to $22,500 if the defendant came up to, say, $12,500.

Another way to respond to the question is by eliciting the plaintiff’s assistance in persuading the defendant to change his position. For example, you might tell plaintiff that you believe the defendant, just like the plaintiff herself, came into mediation knowing certain information about the case, and likely made preliminary decisions about what to settle the case for based on that information. Then, pointing out that the defendant does not appear to have learned anything new that would lead him to change his position (assuming you believe that), you might ask the plaintiff, “What do you think might persuade the defendant he has a greater risk of loss than he seems to be indicating?” If the response is that there is no new information,
you might ask her, whether she is willing to reduce her demand as a basis simply to move the negotiation forward. At that point, I would often propose bracketing (if not already in use) or a specific reduced demand. I suggest plaintiff’s incentive to do so is that offering these changes in position would at least give her more information about where the defendant was willing to go in the negotiation. That way, she could make an informed decision about whether to have me declare an impasse or whether to continue negotiating with the defendant.

There are, of course, other possible techniques, but using almost any of the techniques we’ve discussed here can help the parties move beyond potential impasse and reach further towards a deal.

**News from the Field**

Free CME Resources

*American Judges Association Education*

The list below details up to 3.3 CME hours of interpersonal violence education (IPV) in the training modules available at [Adjudicating DV Cases – Training For Judges](#).

**Module 1: 1.0 hour of IPV CME for learning below**

Lesson Unit 1: Dynamics of Domestic Violence: 30 minutes for 3 modules = 0.60 IPV CME

1.1. Discussion: Battering Behavior
1.2. Exercise: Victim Impact Statement with interactive Control Wheel
1.3. Learning Points

Lesson Unit 2: Exploring Victim Behavior: 20 minutes for 2 modules = 0.40 IPV CME

2.3. Learning Points
2.5. Learning Points and Maslow’s Hierarchy of Need

**Module 2: 0.90 hour of IPV CME for learning below**

Lesson Unit 1: Civil Protection Orders: 25 minutes for 2 modules = 0.50 IPV CME

Lesson Unit 1: Issuance of Civil Protection Orders
1.1. Video Scenario – Issuance of Civil Protection Orders
1.3. Mini-Lecture/Learning Points

Lesson Unit 2: Enforcement of Civil Protection Orders: 20 minutes for 2 modules = 0.40 IPV

2.1. Video Scenario – Enforcement of Civil Protection Orders
2.3. Mini Lecture/Learning Points
Module 3: 0.40 hour of IPV CME for learning below

Lesson Unit 3: Dismissal of Civil Protection Orders: 20 minutes for 2 modules = 0.40 IPV CME
3.1. Video Scenario – Dismissal of Civil Protection Orders
3.3. Mini Lecture/Learning Points

Module 4: No CME in this Module

Module 5: Sentencing: 1.0 hour of IPV CME for learning below

Lesson Unit 1: Introduction: 10 minutes for 3 modules = 0.20 IPV CME
1.1. Introduction
1.2. Philosophy on Sentencing
1.3. Introduction to Case Evaluation Form
Lesson Unit 2A: Sentencing of Joe Grippo, Part 1: 10 minutes for 1 module – 0.10 IPV CME
2.1. Video Scenario: Sentencing of Joe Grippo
Lesson Unit 2B: Sentencing of Joe Grippo, Part 2: 20 minutes for 5 modules – 0.40 IPV CME
2.4. Probation Report
2.5 Case Evaluation Fill In
2.6. Video Scenario: Judge Delivers
2.7 Batterers Intervention Programs
2.8 Learning Points
Lesson Unit 3: Sentencing of Jessica Vargas: 10 minutes for 2 modules – 0.20 IPV CME
3.3. Video Scenario – Jessica Vargas Sentencing
3.5. Case Evaluation Review

Florida State University - Family Law CME

Florida State University has an online video training called Successful Co-Parenting After Divorce and is free to all.

Florida Supreme Court Website

There are many videos and webinars on interpersonal violence topics on the Florida Supreme Court’s website under the Court Improvement section including the following topics: Florida Injunctions for Protection, An Overview; Florida Injunctions for Protection, the Hearing; Mythbreakers: Chapter 39 Injunctions; Get Psych’d About Batterer Compliance; The Effects of Exposure to Domestic Violence on Babies and Children; Intimate Partner Sexual Abuse: The Hidden Dimension of Domestic Violence; Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case; Judicial Wellness for Florida Judges and Court Staff: Tools for Self-Care in Domestic Violence and Sexual Assault Cases; Domestic Violence and
the US Military; Seeing Individuals Through a Trauma Lens: Getting from ACEs to Trauma-informed Justice; Strangulation: All Things Medical (March 2015); Strangulation: All Things Legal (April 2015).

Other resources include Virtual Court Training Programs on domestic violence and DV case management may be accessed by requesting a username and password. Training modules on Interpersonal Violence Education are also available. Finally, please see the following for additional links and resources on interpersonal violence.

Just in Time Disaster Training Library

The Disaster Resistant Community Group offers a Just in Time Disaster Training Library of free online videos. Many disaster threats are featured in the Business/Workplace Section of the library that contains topics on security and workplace violence suitable for CME credit under the expanded interpersonal violence education definition.

Active shooter awareness training (in the office and also in general):

Active Shooter – Office
Active Shooter - Awareness
Response to an Active Shooter in General

The National Council of Juvenile and Family Court Judges (NCJFCJ) Webinar Series

The NCJFCJ, in collaboration with a number of other agencies and organizations, has developed a large online library of webinars, devoted to a number of family court and domestic violence court issues. Judges interested in examining the NCJFCJ webinar library can go to this website for more information.

The Stalking Resource Center

Another resource for interpersonal violence CME credit is available at The Intersection of Stalking and Sexual Assault.

Notable Achievements and Milestones

Retired circuit judge David B. Beck has received a special salute by having the Volusia County Veterans Court renamed in his honor. Beck helped found the veterans court in Volusia County in November 2013 and was the first such court in the Seventh Judicial Circuit. Chief Judge Terence R. Perkins presented Beck on Friday, May 26, 2017, with the administrative order dedicating the “Judge David B. Beck Veterans Court.” Judge Beck was formerly a certified mediator and served on the Mediator Qualifications Dispute Resolution Board from 2000 to 2004.
Bruce A. Blitman, Esquire, certified County, Family and Circuit Mediator, was honored at the Justice Teaching Awards by Justice R. Fred Lewis as the Volunteer of the Year. Bruce served as vice-chair of the Mediator Ethics Advisory Committee for eight years.

The Honorable Ronald W. Flury, Mediator Qualifications Dispute Resolution Board Member, was recognized at the Florida State University Law Day Celebration 2017 Awards as the Parks & Crump Thurgood Marshall Judicial Excellence Awardee.

Congratulations to John Paul Jones, Esquire, recognized as a 50-year Member of The Florida Bar – Class of 1967. John Paul is a retired circuit mediation training program provider and served on the Mediator Qualifications Dispute Resolution Board for 12 years and the Mediator Advisory Ethics Committee for eight years.

Kimberly Ann Kosch, DRC Court Operations Consultant, was recognized with a Teamwork Award from the OSCA Awards Recognition Committee as a member of the OSCA Move Team that successfully worked to make the move of several employees from the Supreme Court Building to an annex location as smooth as possible.

The Honorable Christopher N. Patterson, former certified family and dependency mediator, and Mediator Qualifications Dispute Resolution Board member from 2000-2010, was honored at the Justice Teaching Awards by Justice R. Fred Lewis as the Justice Teaching Judge of the Year.

Marion County recently celebrated the grand opening of the Betty White Citizens’ Self-Help Center named in honor of Betty White who served as ADR Director in the Fifth Judicial Circuit for several years. Ms. White was a certified mediator beginning in 2005 until her passing and served on the Mediator Qualifications Dispute Resolution Board.