2018 DRC Conference

Make it Matter: Promoting Mediator Professionalism

The DRC’s 26th Annual Conference is just around the corner and we are excited to once again bring you an outstanding educational program featuring a wide variety of training and workshop opportunities with a focus on promoting mediator professionalism.

The conference opens with a pre-conference workshop on domestic violence screening presented by Phyllis Bernard. Professor Bernard describes the evolution of domestic violence screening from a “check the box” questionnaire to increasingly nuanced and sensitive tools. Professor Emerita Phyllis Bernard recently retired from nearly thirty years of bringing the real world into the classroom at Oklahoma City University School of Law where she was the Robert S. Kerr, Jr. Distinguished Professor of Law and founding Director of the Center on Alternative Dispute Resolution. For nearly a decade she was Director of the Early Settlement Central Mediation Program for the Oklahoma Supreme Court’s Alternative Dispute Resolution System. Her work in ADR brings a nearly 360-degree, national and international view drawn from her roles as corporate director, adjudicator, litigator, business lawyer, administrator, negotiator, mediator, ADR trainer and supervisor, ADR system designer and evaluator. Professor Bernard will also deliver the opening keynote on Friday morning.

The topic of the Friday afternoon plenary is Online Dispute Resolution (ODR) and Its Impact on ADR. This session will introduce a dozen categories of ODR, providing past and current examples of each and noting the successes and the professional and ethical challenges it faces. The session will be presented by Noam Ebner who is a professor of negotiation and conflict resolution in the Department of Interdisciplinary Studies, at Creighton University’s Graduate School. Originally from New York, Noam lived in Israel for many years, dividing his time between his home in Jerusalem, and his teaching, training and consulting activities in the U.S and abroad. Professor Ebner has been involved in online dispute resolution for over a decade, in practice, teaching, and research. He has also developed simulations for teaching and practicing online negotiation and mediation skills and has presented on ODR at many national and international conferences, including both of the main annual conferences on ODR.
Message from the Director

Public Confidence in Mediation: Mediator Ethics and Professionalism

- “You will lose at trial and the doctors really don’t care about what they did (to your husband who is now deceased) anyway.”

- “If that had happened to me, I would also be suing for the full amount of the damages (statement addressed to the plaintiff during joint session with both parties present).”

- “You are a beautiful woman and I hope your husband appreciates you. You are visually distracting. Where did your husband purchase your wedding and engagement rings? Is your watch a Rolex? Don’t you think you are punishing the defendants by pursuing this case? I think you should walk away from the case since your financial resources are greater than the defendants.”

- “I will tell the judge you are being uncooperative if you leave the mediation now.”

The statements described above were all allegedly made by mediators during mediation sessions and are contained in complaints filed with the Mediator Qualifications Discipline and Review Board (MQDRB). The MQDRB is tasked with determining if the allegations are true by applying a clear and convincing evidence standard.

The allegations illustrate the importance of parties’ perceptions during mediation. Whether a mediator conducts private mediations or mediates for a court-connected ADR program, each mediator may be the mediator upon which parties base their perceptions of mediation and by extension, the court system as a whole. The parties one mediates for may not be frequent litigants who will experience the skills and professionalism of several mediators and form their opinions of mediation based on numerous mediation experiences. Thus, it is important that each mediator perform these services with professionalism and instill public confidence in the mediation process by conducting themselves in an ethical manner. It is possible that the entire mediation community is affected when the reputation of mediation and even a party’s understanding of what constitutes a mediation is tarnished by the unethical behavior of a mediator as parties talk to their relatives, co-workers, and friends about their mediation experiences.
Sometimes, when striving to attract the favor of attorneys who select mediators, or attempting to maintain a high settlement rate to attract business, a mediator may lose sight of the principle adopted by the Florida Supreme Court in rule 10.200, Rules for Certified and Court-Appointed Mediators, "the 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."

When reading the above statements, one can see how the parties hearing these statements could feel that they were not in the presence of a third party neutral who was facilitating a voluntary agreement, “honoring their right of self-determination; acting with impartiality; and avoiding coercion” which are the responsibilities a mediator has to the parties under rule 10.300, Florida Rules for Certified and Court-Appointed Mediators. As provided in the Committee Note to rule 10.310, Self-Determination, “it is critical that the parties’ right to self-determination (a free and informed choice to agree or not to agree) is preserved during all phases of mediation. A mediator must not substitute the judgment of the mediator for the judgment of the parties, coerce or compel a party to make a decision, knowingly allow a participant to make a decision based on misrepresented facts or circumstances, or in any other way impair or interfere with the parties’ right of self-determination.”

The first three statements above raise the question of whether the mediators who made them were impartial, one of the foundational principles of mediator behavior. As defined in rule 10.330(a), “impartiality means freedom from favoritism or bias in word, action or appearance, and includes a commitment to assist all parties, as opposed to any one individual.” It seems likely that a respondent hearing a mediator say to the plaintiff in joint session “If that had happened to me, I would also be suing for the full amount of the damages” might believe the mediator favored the plaintiff. Likewise a plaintiff hearing a mediator say, “Don’t you think you are punishing the defendants by pursuing this case? I think you should walk away from the case since your financial resources are greater than the defendants’” would have cause to question the mediator’s ability to be impartial.

As to whether a mediator may express an opinion during mediation, rule 10.370(c) provides, “A mediator shall 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. ... A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.” The statement “You will lose at trial and the doctors really don’t care about what they did (to your husband who is now deceased) anyway” appears to violate rule 10.370(c), as does the statement “I think you should walk away from the case since your financial resources are greater than the defendants.” In the first of these two statements, the mediator is offering an opinion regarding how the court will rule. Both
statements express opinions in a manner that may have been intended to coerce and influence the parties in their decision making in order to resolve an issue.

The statement by the mediator that the mediator will tell the judge about the party’s behavior at mediation violates another basic tenant of mediation – confidentiality. If a party chooses to leave a mediation at any time after the mediator has delivered their mandatory orientation under rule 10.420(a), they may exercise their self-determination by doing so. The act of leaving the mediation is “nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation” under section 44.403(1), Florida Statutes, and as such is confidential under section 44.405(1).

Sandra Day O’Connor said, “I don’t know that there are any short cuts to doing a good job.” It is worth taking the time to learn how to conduct an effective mediation ethically, taking the short cut of behaving unethically only damages the public’s confidence and use of mediation in the long run.

ADR News and Updates

Continuing Mediator Education – Method 2: Interactive Definition Clarified

There are two methods of earning continuing mediator education (CME) hours that involve using audio or video recordings. On the CME Reporting Form these are education methods 2 and 3. The difference in these methods is that method 2 is considered a live, interactive activity and method 3 is a non-live activity. Method 3 is simply listening to or viewing a CME presentation on your own. On the other hand, method 2 involves listening to or viewing a CME presentation in a group with at least one other person present and requires real time interaction either in person, telephonically, or through electronic means.
On June 21, the Dispute Resolution Center (DRC) conducted a full day continuing mediator education program for 23 certified family and county mediators from Polk County. In addition to the education provided by DRC staff, the training included a working lunch where the circuit’s plan to move from paper to electronic files for mediation agreements and reporting was unveiled.

Pictured are the mediators with DRC staff Susan Marvin and Kimberly Kosch and Tenth Judicial Circuit ADR Director Forrest Young.

The DRC’s commitment to offering free local mediator professionalism training for court mediators across Florida supports a professional, ethical and skilled judiciary and workforce, one of the issues highlighted in the Supreme Court’s 2016-2021 Long-Range Strategic Plan.
The DRC also recently conducted a certified county mediation training in Key West, training 11 new volunteer mediators. Pictured with the class are Mediation Services Coordinator Carey Goodman and trainers, Susan Marvin, Jeanne Potthoff, Peter Spanos and JoDell Coning.

Mediator Ethics Advisory Committee (MEAC)

The Mediator Ethics Advisory Committee provides ethical guidance to certified or court-appointed mediators by interpreting and applying the Florida Rules for Certified and Court Appointed Mediators and the State Court Procedural rules applicable to mediators. If you have an ethical question for the Committee, you may address your question to the Committee c/o Dispute Resolution Center, 500 S. Duval Street, Tallahassee, FL 32399.

Several new opinions have been issued in recent months and have been posted on the MEAC Opinion Page.
When should or may a mediator express an opinion regarding the settlement of a dispute? It is clear that a mediator “…shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.”\(^1\) However, it is equally clear that a mediator “…may point out possible outcomes of the case and discuss the merits of a claim or defense.”\(^2\) But, what about forming and expressing an opinion as to the settlement value of a case? Mediators who utilize the evaluative approach to mediation are far more likely to find themselves in a position of being asked to give an opinion on how the parties should settle the dispute. Is forming and giving such an opinion a proper approach to the mediation process?

The Florida Supreme Court has described an “evaluative approach” to mediation as one in which a mediator “…often at the request of the parties, makes and offers an independent judgment on the merits of issues under consideration and explains the likely outcome of litigation.”\(^3\)

The use of an evaluative approach to mediation was recognized by the Florida Supreme Court during the last major rules revision in 2000.\(^4\) In explaining its decision to approve the current language of Rule 10.370, the Florida Supreme Court stated:

“…In considering proposed rule 10.370, we have reviewed the differences of opinion surrounding the evaluative mediation technique, but believe that the Committee [on ADR Rules and Policy], with its broad expertise in both mediation and arbitration, is best equipped to address the dispute. Accordingly, we decline to second guess the Committee’s decision that this mediation technique should be recognized in the rules.”\(^5\) \textit{[Emphasis added.]}
Of course, the permission in Rule 10.370(a) to “... provide information that the mediator is qualified by training or experience to provide” comes with the caveat of Rule 10.370(c) that “... a mediator shall 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.”

The difference between evaluating the merits of issues raised in the dispute and explaining likely outcomes if the dispute moves forward versus expressing an opinion on how the case should ultimately be resolved is a critical one. A mediator who falls into the trap of actually formulating an opinion on the best outcome for the mediation has already jeopardized that mediator’s ability to “… reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute.”6 One of the reasons for this jeopardy is the implication of a concept known as confirmation bias.

Confirmation bias has generally been described as a “...tendency to process information by looking for, or interpreting, information that is consistent with one’s existing beliefs.”7 This tendency is not a conscious thought process, but is unintentional and operates outside the awareness of the party. Experienced mediators already anticipate and expect that the parties will come to a mediation chock full of confirmation bias. In fact, much of a mediator’s reality testing is designed to break through these subconscious barriers to objective analyses.

However, once a mediator has formed a firm opinion concerning the best settlement outcome for a mediation, it may be impossible for that mediator to continue to impartially consider information or possible outcomes inconsistent with the mediator’s own subconscious bias. The mediator runs the risk of becoming vested in the mediator’s own opinion.

Taking the process one step further to the actual verbalization of the mediator’s opinion, even if only offered at the request of the parties, expressing that opinion only serves to strengthen confirmation bias, as the mediator now has an expressed belief to support. Once the mediator has formed an opinion and expressed it, that mediator will be more likely to subconsciously embrace information that confirms the opinion, while ignoring or rejecting information that casts doubt upon it.

Expressing the mediator’s opinion also runs the risk of alienating one of the parties to the dispute, as the opinion, unless a truly “middle of the road” opinion, will tend to favor one party to the disadvantage of the other. Even if the alienated party does not express its displeasure with the mediator’s opinion, there is a risk that that party, if there is an actual settlement, will leave the mediation process believing that the decision was “rigged”.8 Rather than resolving

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6 Rule 10.220, Mediator’s Role, Florida Rules for Certified & Court-Appointed Mediators.
the parties’ dispute, such a settlement may only serve to intensify ill will between the parties and jeopardize the ultimate enforceability of the settlement, based upon later claims of coercion or improper influence by the mediator.9

Another factor to consider before a mediator formulates, let alone expresses, an opinion as to the best outcome for the mediation, is the possible influence of “repeat players” on the mediator’s judgment.10 If one party to a mediation is a repeat player (i.e., an insurance company or a condominium or homeowners’ association), how likely is it that the mediator will express an opinion diametrically opposed to the opinion of the repeat player? Could taking such a course adversely affect the repeat player’s decisions regarding selection of that mediator in future mediations? Will the mediator, in formulating an opinion on the best outcome for the mediation subconsciously be swayed by the repeat player’s involvement?

Thus, it is possible that the mere formulation of an opinion may implicate confirmation bias in a mediator’s approach to the mediation process and continuing a mediation after forming such an opinion may impair the mediator’s impartiality. Actually expressing an opinion may result in a party’s perception of a rigged decision in any final settlement, while suggesting outside factors, such as avoidance of alienation of a mediator’s repeat players. Mediators employing an evaluative technique in mediations should be cautious in threading the needle between permissible conduct under Rule 10.370, and offering a personal or professional opinion as to how the case ultimately should be resolved.

W. Jay Hunston, Jr. is a Certified Family, Circuit and Appellate Mediator and member of the ADR Rules and Policy Committee.

Eldercaring Update
by Linda Fieldstone

Good news as the new ADR process eldercaring coordination has now reached out to help more than fifty families in Florida alone. In Ohio, the humiliation of labeling the elder “incapacitated” was avoided in 11 out of 14 cases referred because eldercaring coordination enabled the families to work together to support the needs, care and safety of their elder loved ones! A Florida family remarked that eldercaring coordination was responsible for making this the happiest Father’s Day they have had in a long time because all family members were able to visit their elderly father without the interference of disharmony. A pilot site judge commented that eldercaring coordination was integral to saving the life of an elder in one of her cases!

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9 Rule 10.310, Self-Determination, Florida Rules for Certified & Court-Appointed Mediators.
The word on eldercaring coordination is getting out. The Association for Conflict Resolution/Florida Chapter of the Association for Family and Conciliation Courts Elder Justice Initiative on Eldercaring Coordination (“Eldercaring Coordination Initiative”) was in the spotlight at the International Symposium on Innovations in Working with Families in the 21st Century, hosted by Children Now/Canada in Montreal at the end of May. It was the only presentation involving the intergenerational aspects of family conflict. The goal of this session was to widen the scope of participants’ thinking about the word “family,” rather than restricting the concept to parents and minor age children.

Eldercaring coordination was also highlighted by the International Federation on Aging where Judge Michelle Morley and I will be presenting a symposium and workshop at the Federation’s Global Conference in Toronto in August. The presentation will include panelists Karen Campbell and Karim Yamout from Florida, Sue Bronson from Wisconsin and Jane Martin from Toronto.

Along with Judge Morley and Sue Bronson, I spoke at the United Nations on eldercaring coordination as a model of Awareness to Action in honor of World Elder Abuse Awareness Day on June 14. Also in June, there was a workshop on eldercaring coordination at the South District Conference for the National Association of Social Workers and the Association for Family and Conciliation Courts presented by Fran Tetunic and Cathy Bowers.

This October, the ABA National Aging and Law Conference in Virginia will include a plenary session focusing on eldercaring coordination and one other innovative program from Canada; eldercaring coordinator Fran Tetunic will be presenting with researchers Pamela Teaster, Ph.D. and Megan McNab, Ph.D. from Virginia Tech. The ABA Commission on Law and Aging has published a new legislative fact sheet, Guardianship and the Right to Visitation, Communication and Interaction, and includes eldercaring coordination as a conflict resolution option for high conflict cases regarding the care, needs and safety of elders.

Additionally, the Eldercaring Coordination Initiative has been awarded a grant from the American Arbitration Association Foundation to train new eldercaring coordinators (ECs) and other stakeholders. The Ohio Supreme Court will be hosting that training in November.

StayWell/WellCare, the largest Medicare/Medicaid provider in Florida, gave the Association for Conflict Resolution (ACR) for Elder Justice Initiative on Eldercaring Coordination (Initiative) an $8000 contribution, with $1000 earmarked for each of the eight Florida pilot sites for partial scholarships for eldercaring coordination. The ACR is the fiscal agent of the Initiative and communications related to the scholarships are currently with the ACR. StayWell/WellCare has recognized that high conflict is a health issue for elders and received approval to cover eldercaring coordination through their long-term care for elders. There is a committee working to find a way to bridge cases identified through the elder’s medical insurance with a court order needed to initiate eldercaring coordination.
Finally, the next newsletter published by the Florida Chapter of the Association of Family and Conciliation Courts will be focused on eldercaring coordination. For more information, check out the EldercaringCoordinationFL.com website created by eldercaring coordinator Maria Schlafke.

It is noteworthy that the accomplishments of the Eldercaring Coordination Initiative have been driven by the dedication and commitment of the eight Florida circuits participating as pilot sites, the judges, magistrates, pilot site administrators, eldercaring coordinators, court administration, organizations committed to the welfare of our aging population, and other devoted stakeholders who recognize the benefits of eldercaring coordination in helping families reduce conflict, minimizing risks and abuse, and respecting and preserving the dignity and quality of life of aging persons.

*Linda Fieldstone is a Certified Family Mediator and member of the ADR Rules and Policy Committee.*

**News From the Field**

**Save the Date**

The Florida Chapter of the Association of Family and Conciliation Courts will hold its 14th Annual Conference *Open Minds: Diverse Services for Diverse Families* on September 26-28, 2018, in Orlando, Florida.

**Mediator Retirements**

The DRC would like to acknowledge and send best wishes to the following mediators who have announced their retirement since our last issue.

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<td>Lori Frazier, Jacksonville</td>
<td>Stephen Mitchell, Tallahassee</td>
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<td>James Calvin Goodlett, Tallahassee</td>
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