Dispute Resolution Center’s 26th Annual Conference
Make It Matter: Promoting Mediator Professionalism
by Kimberly Kosch, Dispute Resolution Center

The DRC’s 2018 annual conference began, as it often has, with a welcome from Justice Peggy A. Quince before an audience of 900 conflict resolution practitioners. This year’s welcome was bittersweet as it was Justice Quince’s last official conference as a Florida Supreme Court justice. In January 2019, Justice Quince and her colleagues, Justice Fred Lewis and Justice Barbara Pariente, will retire from the supreme court after two decades of service. Justice Quince promises this will not be the last time we see her at conference and we are delighted that she will continue to support our endeavors.

Phyllis E. Bernard, M.A., J.D., Retired Professor, Oklahoma City University of School of Law, intrigued attendees with her Thursday afternoon pre-conference presentation “Beyond Check the Box: From Domestic Violence Screening to Pre-Mediation Interview for Risk Assessment and Party Preparation” and Friday morning opening plenary keynote, “Reflection, Resilience and Keeping It Real: Self-Care for the Dispute Resolution Professional.” Professor Bernard’s keynote challenged mediators to measure success when our thinking, feeling, saying and doing are in alignment and to rely on our professional ethics to bring us back on track when needed.

Before the afternoon plenary, Chief of Alternative Dispute Resolution Susan Marvin presented two Awards of Appreciation to the Mediator Ethics Advisory Committee (MEAC) former Chair, Susan F. Dubow of Boca Raton, and former Vice-Chair, Charles N. Castagna of Clearwater Beach. Both Sue and Charles concluded two four-year terms on the MEAC in June. Under their leadership, the MEAC released 90 written ethical opinions on topics including, but not limited to, conflicts of interest, mediation procedures, confidentiality, advice and opinions,
marketing and business practices. The depth of their combined acumen provides an expansive educational trail for future generations of mediators to follow.

Nationally renowned Online Dispute Resolution (ODR) guru, Noam Ebner, Professor of Negotiation and Conflict Resolution, Department of Interdisciplinary Studies at Creighton University, offered an insightful guide to the history, constitution and future application of using technology platforms to conduct negotiations and mediations during the Friday afternoon plenary. From smart phones to texting to the internet to Skype, ODR offers opportunities to bring people closer to the expectations they have for conducting all types of business, even conflict resolution, online.

The DRC presented its most prestigious award, the Sharon Press Excellence in ADR Award, prior to the closing ethics plenary. This year’s recipient, Linda Fieldstone, MSW, was recognized for her groundbreaking work with families in the areas of parenting coordination and elder care coordination. In receiving the award named after her dear friend, Linda asked attendees to imagine what life would be like for the children of parents and grandparents who model respect for each other and work cooperatively to resolve their differences. When senior family members receive elder caring coordination, the children have the opportunity to learn a model for the peaceful resolution of disputes from their elders which can be beneficial to the family for generations to come.

The ethics plenary consisted of a panel discussion about unethical mediator behavior as demonstrated by a video reenactment of a caucus in the case of Vitakis-
Valchine v. Valchine, 793 So. 2d 1094 (4th DCA 2001), and a live presentation of the same caucus conducted in an ethical manner. Chris Shulman, Taghrig Gamal Hassan, Jeanne Potthoff, and Charles Castagna, mediators who hold a variety of certification types, served as the panel members who discussed the application of the Standards of Professional Conduct in the Rules for Certified and Court-Appointed Mediators to the real-life scenario. Rules 10.220, Mediator’s Role; 10.310, Self-Determination; 10.330, Impartiality; 10.350, Demeanor; 10.360, Confidentiality; 10.370, Advice, Opinions, or Information; and 10.430, Scheduling Mediation, were highlighted.

Conference plenary sessions were buttressed by five tracks of workshops composed of an approved arbitration training, a certified appellate mediation training, and 25 individual workshops to choose from. The workshops were on topics such as mediation training, mediator ethics, interpersonal violence, international child abduction mediation, implicit bias, diversity, professionalism, child support, and communication. Attendees were also treated to three opportunities to participate in complimentary yoga sessions led by perennial favorite Kristen Mory.

If you were unable to attend this year’s conference, you may order CDs or MP3s from Convention Recordings.

Next year’s conference is already scheduled for August 15-17, 2019, at the J.W. Marriott Grand Lakes, Orlando. Mark your calendars and we will see you there!

Message from the Director

Misconceptions Regarding Lawyers Who Serve as Mediators

Some people believe that The Florida Bar processes complaints filed by mediation participants against lawyers who are either Florida Supreme Court certified mediators or uncertified mediators under the Rules of Professional Conduct of the Rules Regulating The Florida Bar. However, The Bar has no authority to discipline lawyers when they are acting in the role of mediator. According to the Comment to rule 4-2.4, Rules Regulating The Florida Bar, Lawyer Serving as Third-Party Neutral, “A Florida Bar member who is a certified or court-appointed mediator is governed by the applicable law and rules relating to certified or court-appointed mediators.” (Emphasis supplied.) According to the rule:
(a) Definition. A lawyer serves as a third-party neutral when the lawyer assists 2 or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. ... 

The roles of lawyer and mediator are distinct. Serving as a mediator is not a subset of serving as an attorney, a fact that is emphasized in the rule’s requirement that a lawyer/mediator explain the difference between the two roles to unrepresented parties.

(b) Communication With Unrepresented Parties. A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.

According to rule 10.520, Rules for Certified and Court-Appointed Mediators, “A mediator shall comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.” Rule 10.650 provides, “other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediation services, however, these rules prevail over any conflicting ethical standards to which a mediator may otherwise be bound.” Thus, when acting as a mediator under a court order of referral, a lawyer is bound first and foremost by the Rules for Certified and Court-Appointed Mediators, not the Rules Regulating The Florida Bar. The Mediator Qualifications and Discipline Review Board has jurisdiction over “the discipline or suspension of certified mediators or non-certified mediators appointed to mediate a case pursuant to court rules.” (Emphasis supplied.) See rule 10.700.

Anyone wishing to file a complaint against a certified mediator or non-certified mediator appointed to mediate a case pursuant to court rules may do so by following the instructions and using the Mediator Grievance Complaint Form found on the Dispute Resolution Center’s website.
ADR News and Updates

Mediation Day at the Florida Supreme Court

The third Thursday of October is Conflict Resolution Day. Celebrated across the world, Conflict Resolution Day was established to promote awareness of mediation, arbitration, conciliation, and other methods for resolving disputes creatively and amicably. Because mediation is the alternative dispute resolution (ADR) process that Florida’s courts utilize most frequently, this special day is commemorated with a Mediation Day event in the Florida Supreme Court courtroom.

Each year, students studying conflict resolution skills at neighboring schools mark Mediation Day with a trip to the state’s highest court, where they participate in education sessions facilitated by Florida Dispute Resolution Center staff. This year, 32 high school students from Florida State University School and 15 students from Fairview Middle School visited the court to learn about peaceful methods of dispute resolution, participate in a small-group mediation exercise, and take a tour of the supreme court library and rare book room. The highlight of their visit was a presentation by Justice Peggy A. Quince, who talked to them about the values of mediation and then answered questions about ADR and her journey to the supreme court bench.

The immediate goal of peer mediation is to teach students how to resolve disputes peacefully in their schools, but it has a far-reaching goal as well. The essence of democracy is the ability to resolve differences through civil means; in learning ADR skills, these students are learning how to listen respectfully to and to care about what other people say. In short, the ADR skills they are developing are also helping them become better citizens.
DRC Training News

DRC staff Susan Marvin, Juan Collins, Kimberly Kosch, Stephanie McHardy and Ramon Waters participate in a Continuing Mediator Education (CME) program at the Second Judicial Circuit with ADR Director Jennifer Wells and Mediation Services Coordinator Veronica Jackson and Second Circuit mediators. The September 14 CME program covered mediator ethics and interpersonal violence education.

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.
I have learned more about what makes for an effective mediation during a year serving periodically as the neutral than during 25 years as an advocate.

The training to become a certified mediator is extensive, but true insight into the process comes from sitting at the head of the table and observing the positioning, posturing, strategizing and emotion that lawyers and litigants bring to mediation.

There often are opportunities missed because of what some lawyers do and what they fail to do. For the advocate, the art of mediating is different from the art of trying a case.

However, despite the fact that more cases get resolved through mediation than trial, many advocates do not seem to fully appreciate the distinction in approach. A renewed appreciation for the tools of mediation is in order.

I offer here a few observations on those tools from the view at the head of the table.

**Draft a mediation statement worth sharing.**

The mediation statement is helpful for the mediator, but even more important to the opposing party so they can see, likely for the first time outside of formal legal writing, the extent of their exposure.

Resist the temptation to submit a confidential mediation statement for just the mediator to see. If necessary, draft a supplemental submission with information that you want the mediator to keep confidential. But use the confidential mediation statement sparingly; there is little value in convincing the mediator, but great value in empowering the mediator with information to bring about a settlement.

**Don’t waste the opening.**

There is a trend among lawyers toward waiving opening statements. That is an appropriate choice if the alternative is ineffective or counterproductive openings.

Helpful and constructive openings can go a long way to create positive momentum. A constructive opening is one that clearly and concisely informs the opposing party without being contentious or arrogant.

The opening should be prepared for, and delivered to, the opposing party not the mediator and not opposing counsel. Litigants will decide what they will give up to settle the case. Don’t
miss the opportunity to inform them why they should give up more than they planned to give up. But don’t make them so angry that they offer less than that with which they came.

There is a place for empathy and contrition.

Litigants bring emotion, hurt feelings and perceived injustice to mediation, even business disputes. The litigation process often compounds this.

Mediation is the only time a lawyer and client can speak directly to the opposing party outside of the adversarial process. And what is said in mediation stays in mediation. Don’t waste that opportunity. Consider showing empathy and understanding.

And, if appropriate, offer an apology or some show of contrition, at least for the circumstances that have brought you together. I have seen an apology save significant money and time.

Prepare your client.

The most effective lawyers at mediation are those who prepare their clients for how the process works and what to expect. If a client expects a dog fight, then they will either be disappointed by what is actually a conciliatory process, or the lawyer will perform aggressively for the client and lose the opportunity to win over the opposing party.

Well-prepared clients are passionate but composed at mediation, two qualities that often factor meaningfully into the opposing party’s exposure assessment. A well-prepared client also is focused on obtaining the outcome that is best for them and not necessarily on what is worst for their adversary.

Any momentum is good momentum.

Be patient, particularly in the first few rounds of breakout sessions. By design, the mediator should have a better perspective than the attorneys of where the parties are and where they might end up. The first few moves can be grueling, but as the process is moving forward and the mediator has the feel for positions and personalities, big things can happen.

Be creative.

Trials are a zero-sum game. One party wins and the other loses. In mediation, however, the sky is the limit. There are opportunities for a win-win or at least for both parties to get things they could not get through trial.

Letters of recommendation, licensing of intellectual property, rejections, non-solicitation agreements, transfers of property and agreements for future business are arrows in the quiver of negotiating parties.
The bottom line is this: lawyers who approach mediation as an obligatory step in the litigation process will, more often than not, leave money and other positive opportunities on the table and have frustrated clients.

On the other hand, the advocate who approaches mediation with deliberation and sensitivity to the process and to the personalities and the interpersonal dynamics at play will materially increase client returns.

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Michael Freed is a Florida Supreme Court Certified Circuit Civil Mediator and a board-certified business litigator with Gunster, Yoakley Stewart.

If the Stud’s a Dud and Other Horse Tales – Mediation of Equine Law Disputes May Be Your Best Bet
by Jeffrey H. Marcus and Bruce A. Blitman

The economic impact of the equine industry in Florida is estimated to result in $6.5 billion gross domestic product. But horses are expensive animals and things can go wrong. If things go wrong and you end up in a legal dispute, then mediation can be an effective way to resolve your legal dispute. This article will describe some of the kinds of equine legal disputes. We’ll tell you why mediation may be optimal and identify the kinds of disputes for which mediation may be more suitable and those kinds of disputes for which mediation may be less suitable. We will give some practical suggestions on mediation of equine law disputes.

As the title of this article implies, horse breeding is one of the kinds of equine activities that can give rise to legal disputes. Much of horse breeding is conducted pursuant to contracts, the breach of which have legal consequences, including litigation.

Horse sales are subject to legal disputes as well. Horses are considered “goods” under Florida law, so horse sales are subject to Article 2 of Florida’s Uniform Commercial Code. If the legal issues are material, then legal disputes may arise.

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Forty-eight states have enacted equine activity laws. These laws generally provide for owners and operators of equine activities to be immune from liability. But despite such equine activity laws, horse and barn owners and operators may still be sued. The fact patterns may differ, but often include the failure to post the proper notice, the failure to get a proper signed release, or circumstances that fall under one or more express exceptions under the relevant equine activity law.

Mediation can be particularly useful in equine disputes for the following reasons:

1. Mediation offers the parties a greater possibility of preserving their business relationship.
2. Solutions which the parties negotiate themselves may be more flexible or imaginative than the legal remedies available in court. For example, the parties may negotiate for the sale of a replacement horse and the sale of the original horse to a third party.
3. Early resolution through mediation can result in a horse being returned to the seller and resold and the buyer getting back the purchase price.

Mediation may work better than other forms of dispute resolution in the following kinds of disputes:

1. Contracts of sale.
2. For services provided to owners by veterinarians or farriers;
3. The transportation of horses;
4. Horse training agreements;
5. Breeding contracts;
6. Personal injury or property damage related to equine activity; and
7. Construction work of equine facilities.

There are certain types of equine legal disputes for which mediation may not work as well as others, such as the following:

1. When the factual determination is outcome determinative, for example, a dispute over whether a horse received the proper medication or not would depend on a factual finding that might be based on a blood or urine test;
2. Landlord tenant evictions;
3. Stablemen’s liens; and
4. When the insurance carrier may not want mediation.

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3 See Michigan State University College of Law ANIMAL LEGAL & HISTORICAL CENTER Map of Equine Activity Liability Statutes (December 2017) website at URL: https://www.animallaw.info/content/map-equine-activity-liability-statutes. (Only California and Maryland do not have equine activity laws.)
4 A broader discussion of state equine activity liability laws is beyond the scope of this article. For a more in-depth treatment of this important topic, please see Julie I. Fershtman, Equine Activity Liability Acts, Recurring Issues Impacting Insurers and Their Insureds, International Risk Management Institute, Inc. AgriCon Conference Paper (2016); Michigan State University College of Law ANIMAL LEGAL & HISTORICAL CENTER, Detailed Discussion of the Equine Activity Liability Act (2003).
Selection of a mediator for equine law disputes is important to the process. Skilled mediators are accustomed to dealing with specialized industries and related concepts and terminology. In equine disputes, pre-mediation conferences would be a great way for mediators to learn about the things they need to know in order to prepare optimally for the mediation.

The Florida Bar Animal Law Section (ALS) is a good place to start in the selection of a mediator for equine law disputes. The ALS website lists members and their profiles. The recently formed Equine Law Committee of the ALS stands ready to assist attorneys and the public concerning the practice of equine law.

We humans love our animals passionately. Our passion extends to the lengths to which we will go to protect and fight for them. We have offered some keen insights into why and how mediation of equine law disputes is worth considering when passions run high and result in equine law disputes.

The original article was published in the Palm Beach County Bar Association Bulletin, September 2018.

Jeffrey Marcus is in solo practice in Wellington and is a Florida Supreme Court Civil Circuit Certified Mediator.

Bruce Blitman is certified by the Florida Supreme Court as a Circuit, Family and County Court Mediator. Since 1989, Bruce has mediated thousands of disputes throughout Florida and lectured and written extensively about the benefits of ADR.

In Appreciation of John Ives
by Mary-Ellen Cross, 8th Circuit ADR Director

John Ives served as a volunteer mediator for the Eighth Judicial Circuit from January 3, 1997, until his passing on November 29, 2018. Not only did he mediate cases in his home county – Alachua County, he also mediated cases in the other five counties of the circuit. The majority of his volunteer time was spent mediating small claims cases in Alachua, Baker and Levy Counties. Earlier this year, the Baker County Commission honored John for his service as a volunteer mediator. Here is an excerpt from the award presentation:

  Mr. John Ives has been a volunteer county mediator in the Eighth Judicial circuit for more than 21 years, mediating cases in Baker, Levy and Alachua Counties. Before becoming a volunteer mediator, Mr. Ives had an illustrious and long career in hospital administration, which included serving as the CEO of Shands Hospital. He served as a Second

See ALS Membership webpage at URL: https://www.floridabar.org/about/section/section-an-mbrs/.
Lieutenant in the U.S. Army in Korea and has been involved in many civic activities.

From 1999 to 2017, Mr. Ives volunteered thousands of hours mediating county court cases in Baker County. Residing in Alachua County, he traveled to Baker County every month for 18 years to help Baker County citizens resolve disputes in small claims cases. By serving as a volunteer mediator, he helped litigants in small claims court reach a mutual agreement, rather than going to trial. Baker County greatly appreciates his dedication and contribution to the citizens of Baker County, Florida.

In addition to volunteering as a small claims mediator, John also served as an assistant instructor for the UF College of Law Mediation clinic, critiquing the law student’s mock mediations each semester. John served as a mentor for many UF College of Law students obtaining their county mediator certification through the UF mediation clinic, as well as serving as a mentor for current 8th Circuit volunteers.

News From the Field

Achievements and Milestones

The Florida Bar’s Alternative Dispute Resolution Section presented three inaugural awards during The Florida Bar Annual Convention. Three certified mediators received recognition. Aaron J. Horowitz was honored with the Young Lawyer Member of the Year Award, which recognizes a member of the ADR section who has demonstrated leadership and dedication to The Florida Bar. Michael H. Lax of Salmon & Dulberg in Miami received the section’s Lifetime Professionalism Award. The award recognizes the accomplishments of a Florida Bar member who throughout his or her career has demonstrated professionalism, integrity, and dedication to the highest standards of ethics in the legal profession. Ricardo J. Cata of Upchurch Watson White & Max in Miami was honored with the Mediation Publication of the Year Award, which recognizes a book, magazine, article, blog post, or video related to the topic of alternative dispute resolution.

Judge John E. Jordan, Ninth Judicial Circuit, member of the Mediator Qualifications and Discipline Review Board, was presented with The Honorable James B. Glazebrook Professionalism Award. Bestowed by The George C. Young American Inn of Court, this accolade “honors a current or former Inn member whose combination of service to the Inn and professionalism and integrity in practice display a course of excellence.”
Free CME Opportunities

The Florida Department of Law Enforcement offers an Employee Cybersecurity Training. Completion of the online program would be eligible for .50 IPV credit.

In Memoriam

Edward P. Ahrens, Jr. of Tampa recently passed away at the age of 84. After retiring from a distinguished career as Manager of the law department with Florida Power and Light, Ed began a second career as a mediator with Florida Mediation Group in Miami. Ed was also an outstanding writer and he wrote thoughtfully and frequently about mediation and alternative dispute resolution. Ed was a regular at the annual DRC Conferences throughout his mediation career.

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.

Seymour Benson, Orlando
John DiChiara, Deland
Ralph Elver, Labelle
G. Gordon Harrison, Estero