Alternative ADR
Dispute Resolution Section
of The Florida Bar

THE COMMON GROUND

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ANA CRISTINA MALDONADO & NATALIE PASKIEWICZ, CO-EDITORS

MESSAGE FROM THE 2021-2022 CHAIR

Patrick Russell, Esq.

The entire Executive Council of the Alternative Dispute Resolution Section is dedicated and hard at work in building a better Section for you. This means a Section that listens and is responsive to your concerns and needs.

To that end, we recently conducted a comprehensive membership survey that asks you precisely what it is that you want out of the Section. We carefully crafted the survey so we can address your needs and develop a long-range and strategic plan that represents the interests of all members.

Thank you to everyone who took the time to thoughtfully review and reply to the survey.

This is important work as the results from the membership survey will guide the future direction and initiatives of the Section. View the survey results on the Section's website.

Continued, page 2

IN THIS ISSUE

Message from The Chair

Continued from page 1

Finally, a Section is only as strong as those members who are committed to helping it grow and prosper. Florida is undergoing a major paradigm shift for how our legal system functions and the role of dispute resolution within it. We need all hands on deck to help influence and adapt to these changes. Please volunteer your time to make a difference through ongoing committee work within the Section. The people in this Section are wonderful, the work is important, and the experience is invaluable. We can do this together.

Less conflict. More resolution.

Patrick Russell
2021-2022 ADR Section Chair
pr@meaningful-mediation.com

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Trial Lawyers and ADR Sections Engage in Historic, Statewide Collaboration to Improve Mediation

By Harold Oehler, Oehler Mediation, Tampa

The Florida Bar Trial Lawyers and ADR Sections partnered to co-host the first state-wide "*Litigator Mediator Forum*." This first-of-its-kind meeting of trial lawyers and mediators from around the State was selected for the Florida Bar President's Showcase during The Florida Bar 2022 Annual Convention in Orlando. The unique, statewide collaboration between mediators and trial lawyers was created to collaboratively improve the mediation process in the State of Florida.

The Forum provided trial lawyers and mediators a long-needed platform to discuss how to partner better together to make mediation more effective and efficient. The purpose of the Forum is not only to provide continuing legal education to trial lawyers and mediators on ethical rules and mediation advocacy skills but also to provide a platform to exchange ideas for improving the mediation process.

The Forum, which was held on June 23rd in Orlando, consisted of two sessions. The first was a debate between a panel of prominent trial lawyers and a panel of influential mediators involving eleven controversial mediation-related topics such as "Should Opening Statements be waived," "How much pressure is too much pressure," and "Is virtual mediation preferable to live mediation?" The trial lawyer's panel consisted of Mark McLaughlin, Geddis Anderson and Shirin Vesely while the mediator's panel included Harold Oehler, Fred Lauten, former Chief Judge of the Ninth Judicial Circuit, and Christy Foley, Chair of the Mediator Ethics Advisory Committee.

In addition to the panel of trial lawyers and mediators, Tad David, Chief of Alternative Dispute Resolution for the Office of the State Courts Administrator, participated in the program to review ethical rules which impacted the 11 debate topics.

The second session utilized an interactive "World Café" format where live and online audience members shared their ideas for improving mediation.

All suggestions were transcribed and sent to the editors of the Second Edition of the *Florida Mediation Best Practices Handbook*, the first mediation best practices handbook in Florida history, which will be released in the Fall of 2022.

The *Florida Mediation Best Practices Handbook* was created in 2021 by a collaboration between the Mediation and Trial Sections of the Hillsborough County Bar Association (HCBA). ADR Section member Harold Oehler chaired the Mediation Section of the HCBA at that time and conceived the Handbook as a "living document" to provide trial lawyers and mediators an ongoing platform to share their views for improving mediation. The Handbook consists of best practices proposed by over 300 trial lawyers and mediators from across the State of Florida who were surveyed by the HCBA. A copy of the Florida Mediation Best Practices Handbook is available on the ADR Section website.

Continued, next page

ADR Section Engages in Historic, Statewide Collaboration to Improve Mediation

Continued from page 3

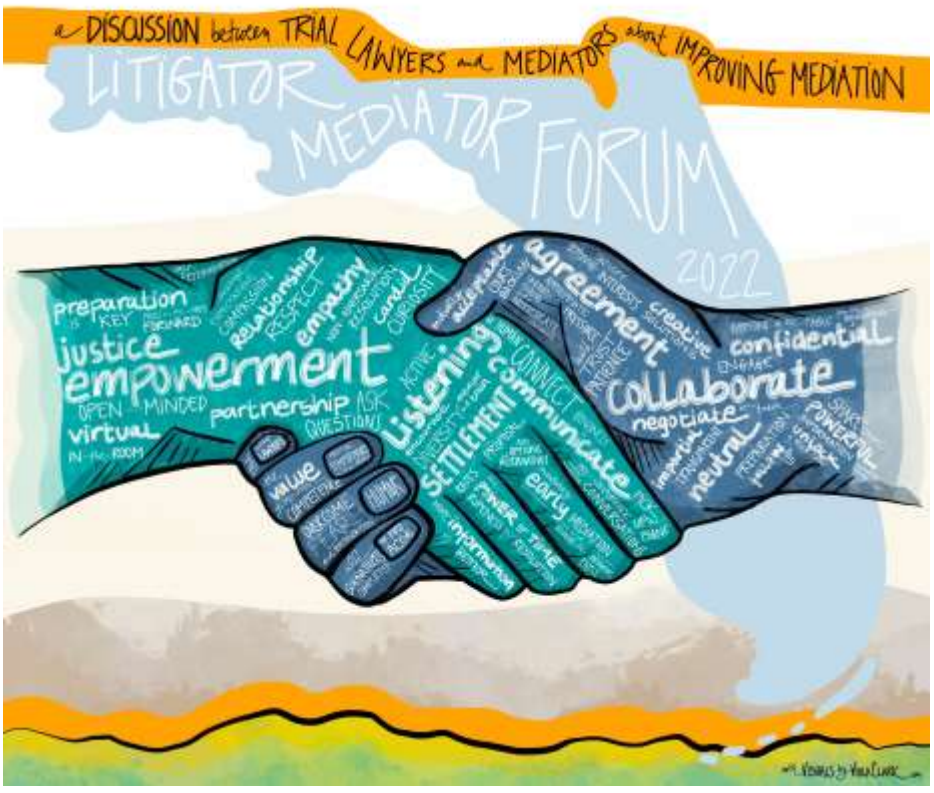
This partnership between the Trial Lawyers and ADR Sections comes at a most critical time, as Florida judges are facing a 1.5 million case backlog caused by the COVID Pandemic, which threatens the administration of justice.

By using the Florida Mediation Best Practices Handbook to connect all mediation stakeholders across the state, the Trial Lawyers and ADR Sections are bringing all mediation thought leaders together to improve mediation for all Florida litigants.

Harold Oehler is a full-time, Federal and Florida Supreme Court certified circuit civil mediator with over 30 years of experience representing clients in employment, personal injury, product liability, insurance and commercial litigation claims.

He is the Chair of the Mediation & Arbitration Section of the Hillsborough County Bar Association and serves on the Executive Council of The Florida Bar's Alternative Dispute Resolution Section.

Harold is co-author of the Florida Mediation Best Practices Handbook, Florida's first mediation best practices manual. Harold is a former trial lawyer and general counsel of a national, public company where he oversaw all litigation, attended all mediations and negotiated the company's contracts, nation-wide. He has spoken across the country on topics including mediation and litigation strategy for over 20 years. For more information, visit OehlerMediation.com.



Graphic facilitator and artist Viola Clark took key words that represented input from forum participants and turned it into a memorable, collaborative image.

Images From the Litigator-Mediator Forum and Networking Reception

In Memoriam: Alan B. Bookman

Alan B. Bookman

Please join us in celebrating the life of Alan B. Bookman, a former president of The Florida Bar and the inaugural chair of the ADR Section. Alan passed away on December 24.

"If I can impart anything, it's to do it the right way." - Alan B. Bookman

Alan was a senior partner with Emmanuel Sheppard & Condon in Pensacola, specializing in commercial and business litigation and commercial real estate development matters. He was a mediator for nearly 30 years.

Given his deep roots in Bar service and his experience with mediation, Alan was the logical choice to be the ADR Section's first chair. Click here to learn more about Alan's life and career.

ADR Section—Making a Difference

A Summary of Accomplishments 2021–2022

The Alternative Dispute Resolution Section of The Florida Bar has been hard at work for you. The 2021-2022 Bar year was a whirlwind of activity.

First, the Section studied and filed two comprehensive and thoughtful comments to separate proposed rule changes that will affect dispute resolution in Florida for years to come.

The first comment was to the proposed rule change from the Florida Supreme Court in Case SC21-990 concerning the continued use of communication technology after the pandemic. Your responses to our membership survey on this topic formed the backbone for the comment and were attached as an exhibit for the Florida Supreme Court. Meah Tell, a former Chair of the ADR Section and current Executive Council Member, appeared on behalf of the Section to provide oral argument before the Florida Supreme Court for this case.

Meah Rothman Tell

The second comment was on proposed rule changes from the Florida Supreme Court's ADR Rules and Policy Committee. These proposed changes covered a litany of topics ranging from the certification for county court mediators to conflict of interest issues, and even social media concerns. A seasoned group of members from the Executive Council, including Bob Cole, Jeff Fleming, Kathy McLeroy, Meah Tell, Lori Adelson, and Cristina Maldonado, prepared a written comment on these changes to advise where we concurred with the changes as well as to address concerns for unintended consequences and to suggest other possible changes to further enhance the rules.

Additionally, as a determined effort to strengthen relationships across the board, the leadership of the Section traveled to Tallahassee to meet with Tad David, the Chief of the Dispute Resolution Center to identify common goals. The Section also sponsored and attended the 2022 Legislative Reception that kicked off the new legislative session.

As the Section seeks to enhance collaboration with other sections of The Florida Bar, we are proud that the inaugural "Litigator-Mediator Forum," a joint CLE program with the Trial Lawyers Section, was chosen for the prestigious Presidential Showcase at the Annual Florida Bar Convention in Orlando. Executive Council member Harold Oehler spearheaded this effort, and it was an exciting and well-attended event.

To ensure the Section's continued growth and to facilitate the unwavering goal to be a Section representative for all of its members, a Strategic Planning Committee led by Executive Council member John Salmon has been established, and it is hard at work building a vision for our future. A comprehensive membership survey was sent to all members to ask you what you want and expect from the Section. Thank you to everyone who responded; your ideas and input are invaluable. If you are able, please volunteer your time. Leadership positions are available, and *you really can make a difference*.

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Alternative ADR
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Bad Branding for a Great Idea: Making More Effective Use of Special Magistrates (Masters) In Florida

By Merril Hirsh, FCIArb
Law Office of Merril Hirsh PLLC, Washington, D.C.

"With a name like Smuckers, it has to be good!" An old Saturday Night Live routine made fun of this slogan by coming up with ever more inappropriate brand names (it starts with "Nose Hair" and then gets worse) and insisting that no one could possibly have chosen a name like that unless the jam were really terrific.[1] The name "special masters" and even its better Florida version "special magistrates,"[2] suffer from some branding problems too. Not only is it hard to find anyone (OK, besides a St. Bernard) who really likes having a "master," the word at its most positive still suggests that someone is being appointed to take over. And while "magistrate" is certainly more positive, it too suggests someone who is appointed to adjudicate.

Unfortunately, bad branding is not just the stuff of comedy skits. Wrong words create misimpressions.

The best way to describe a special magistrate/master is not someone appointed to usurp "adjudication." It is "a Swiss army knife."

Special magistrate/masters can provide adjunct services to free up time for judges and court administrators. What services? Almost anything. In civil litigation, special masters have been used (among other ways) to oversee discovery (including specifically e-discovery); to assist with settlement of either particular issues or the whole case; to coordinate among proceedings; to conduct hearings or trials; to conduct investigations; to advise the court or the parties as experts; to monitor conduct (whether of the parties generally, or the litigation specifically); to analyze, facilitate and deal with issues arising out of class actions; to administer claims; to conduct audits or provide accountings; to serve as receivers; to act as intermediaries between the parties, or other ADR professionals and the court; and to resolve specialized disputes (for example, internecine disputes among plaintiffs or defendants or their counsel). In criminal proceedings, special masters have been used (again, among other ways), as case masters, conference judges, search warrant monitors, investigators for the court, and monitors of the adequacy of the Government's *Brady* disclosures. Have a project that swamps the handling of a docket? Have a special master review the 5,000 documents for ostensible privilege, or investigate the alleged spoliation and report back, or provide scientific advice on the Daubert or Frye motion, or the forensic accounting that gets to the bottom of the dispute.

These examples illustrate three things:

1. **Unlike what the term "special magistrate" suggests, many of the things a special master does are not even *quasi*-adjudicative.** For example, someone used to help the parties work out problems is being facilitative. Someone used to provide expertise to the Court is being advisory. Someone used to inquire into and report on facts is being investigative. Someone used to review to which the court should not (in fairness) be exposed and to convey messages is insulating. These "special magistrates" do not make even preliminary rulings.
2. **Unlike what the term "special master" suggests, even when the role is quasi-adjudicative, the job is to supplement not supplant the Court.** To be sure, it is valuable to have someone sift through thousands of documents, or assess the approach used to exchange terabytes of data and draft proposed rulings. But the best and highest use of a special master or special magistrate does not come from taking a first crack at deciding motions. It comes from working with the parties to avoid the motions in the first place.

Continued, next page

[1] *See* this video.
[2] *See* Florida Rule of Civil Procedure 1.490; *see also* Howard R. Marsee, "Utilizing Special Masters in Florida: Unanswered Questions, Practical Considerations, and the Order of Appointment," THE FLORIDA BAR JOURNAL, v. 81, No. 9 (October 2007) ("*Marsee*") at 12, available at this link and 2009 update available here (noting that while the rule uses "Special Magistrate," Florida court decisions go back and forth between that term and "Special Master," sometimes in the same decision).

Continued from page 9

Rewind the tape on a case with massive, expensive discovery disputes, and envision how much time could have been saved by having a neutral review the discovery when it was exchanged. Simply having the review incentivizes the parties to be more reasonable (because no one wants to look unreasonable in front of a neutral). Now imagine if a request appears unclear or unreasonable, and the neutral schedules a joint call, with a simple message – like "this request No. 6, the one that asks for every document that relates to every other document that relates to every other document, is it just me, or are you asking for every document in the universe? You can't want that. What do you need?" This can save the parties and the court enormous time when compared to the alternative of objections, threatening letters, even more threatening response, and reply recriminations, followed by motions, briefs, responses, replies, argument and court ruling. That is not usurping a court's role. That is a court using a resource that helps the parties work out what the courts expect them to work out on their own if they could.

3. **The potential uses for this resource are limited only by our creativity.** The demands of the pandemic, for example, open the possibility of using masters in ways no court has needed to in the past. Is a docket backed up? What about having someone triage the docket to identify cases that could benefit from different handling (such as mediation), or particular motions that it would help to resolve? Can't schedule a civil jury trial in the near future? Have a special magistrate work with the parties to ensure that the case gets prepared for trial or that the parties exchange the information that will help them settle.

The bad branding for this great idea leads to more than just confusion. Florida is one of the few jurisdictions in the country (federal or state) with rules that on their face totally prevent the use of special masters or magistrates – no matter what the special master is being asked to do, or how useful this resource could be for the court, or how much its use could save the parties in time and expense – unless all parties consent. Florida Rule of Civil Procedure 1.490(c), Family Law Rule of Procedure 12.492(b) and Probate Rule of Procedure 5.095(c) specify that "No reference shall be to a magistrate, either general or special, without the consent of the parties." And Florida courts have "held lack of consent fatal to the appointment of a special master."[3]

This consent requirement throws the baby out with the bathwater. Likely no one would want to bar judges from using law clerks for ***any*** purpose without the parties' consent. There are things a judge cannot delegate to a law clerk, either at all, or at least absent party consent. Parties, for example, cannot be made to try their case before a law clerk. But that is no reason to empower parties to veto a judge's choice to have a law clerk do a first draft of a decision or research an important legal issue. Empowering either party to prevent the court from using this resource ***would*** usurp judicial authority.

So too with special masters/magistrates. Yes, parties should (at least) be able to consent if the court were to try to assign a special master/magistrate to handle a trial and special masters should not be empowered to issue warrants. But it usurps judicial power to afford parties a veto power over ***any*** use of a special master/magistrate that the court finds to be warranted. Indeed, as a practical matter, parties are most likely to exercise a veto power when the special master or magistrate is most useful. If parties perceive it to be in their interest not to cooperate with each other, they have no reason to cooperate in having a special master or magistrate appointed. That is a situation

[3] *See Marsee*, *supra*, at n.14 and related text. Unlike Fla. Prob. R. 5.095(c), Fla. Prob. R. 5.697, contains ***no*** consent requirement for the appointment of special magistrates to review guardianship, inventories, accountings and plans. It is difficult to know what to read into this difference. But having special magistrates, for example, investigate where money went is a good illustration of how this resource assists the court without substituting for it.

Continued, next page

Continued from page 10

when it most needs to be the court's judgment, not that of the parties, that determines the resources necessary to bring the case to a just, speedy and inexpensive resolution.

There is, of course, an important distinction between a law clerk and a special master. Law clerks are usually paid by taxpayers. Special masters are usually paid by parties. But this too is not a reason for having a party veto. It is a reason for the court to listen to the parties' concerns and exercise care to ensure that the benefits of the special magistrate outweigh the costs. The veto rule prevents courts from appointing special magistrates over objection even when the court determines that it would *save* the parties substantial money, or the special magistrate agrees to serve *pro bono*. Yet, parties are not generally authorized to veto other court requirements that impose costs (including filing fees, briefing obligations, requirements for case and witness preparation and rules that make some cases turn on expert testimony).

There is a better way. The Florida absolute consent requirement prevents its judges from making the most effective use of resources at a time when a 100-year pandemic has created the greatest need for them. This sweeping impediment is contrary to the rule in almost every other jurisdiction.[4]

Moreover, the idea of restricting the use of court resources across the board in this way runs contrary to developments in the field. In January 2019, the American Bar Association House of Delegates approved – *over no apparent opposition* – consensus Guidelines on the Appointment and Use of Special Masters in Federal and State Civil Litigation drafted by a Working Group with representatives of ten of the ABA's Divisions, Sections and Forums.[5] The basic thrust of these Guidelines is that courts could make more effective use of special masters if they considered using them as a regular part of judicial administration in all complex cases and other cases that might warrant their use. And since then, the ABA Judicial Division Lawyers Conference Special Masters Committee has been working to draft a model rule for states; principles of ethics; and support documents including criteria for creating a roster and a survey instrument for evaluating special masters' work. It has also designed programs to discuss and brainstorm options and directly assisted courts in evaluating their needs and possible ways of meeting them. You can see much of the Committee's work on the ABA website.[6]

[4] Federal Rule of Civil Procedure 53(a)(1)(C), for example, allows appointment of a master without consent to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." The vast majority of states either follow this language or generally permit special masters without party consent under at least some circumstances. *See* Academy of Court-Appointed Masters, Benchbook, available here, Section 5. This is not surprising – appointments of special masters when they served court purposes date back to the time of Henry VIII; a special master was appointed in the first case filed in the United States Supreme Court. *See Marsee*, *supra*, at n.5 and related text; Irving R. Kaufman, *Masters in Federal Courts*: Rule 53, 58 Col. L. Rev. 452, 452 (1958); *Vanstophorst v. Maryland*, 2 U.S. 401 (1791). Indeed, even in jurisdictions where use of special masters might seem to be prohibited by rule, such as Federal Bankruptcy Court, *see* Fed. Bankr. R. 9031, or constitutional interpretation (as in Michigan), judges have avoided those limitations through various means, including using a different title for the person they appoint.

[5] A copy is available on the ABA's Special Masters Committee *website*.
[6] *Id.*

Continued, page 14


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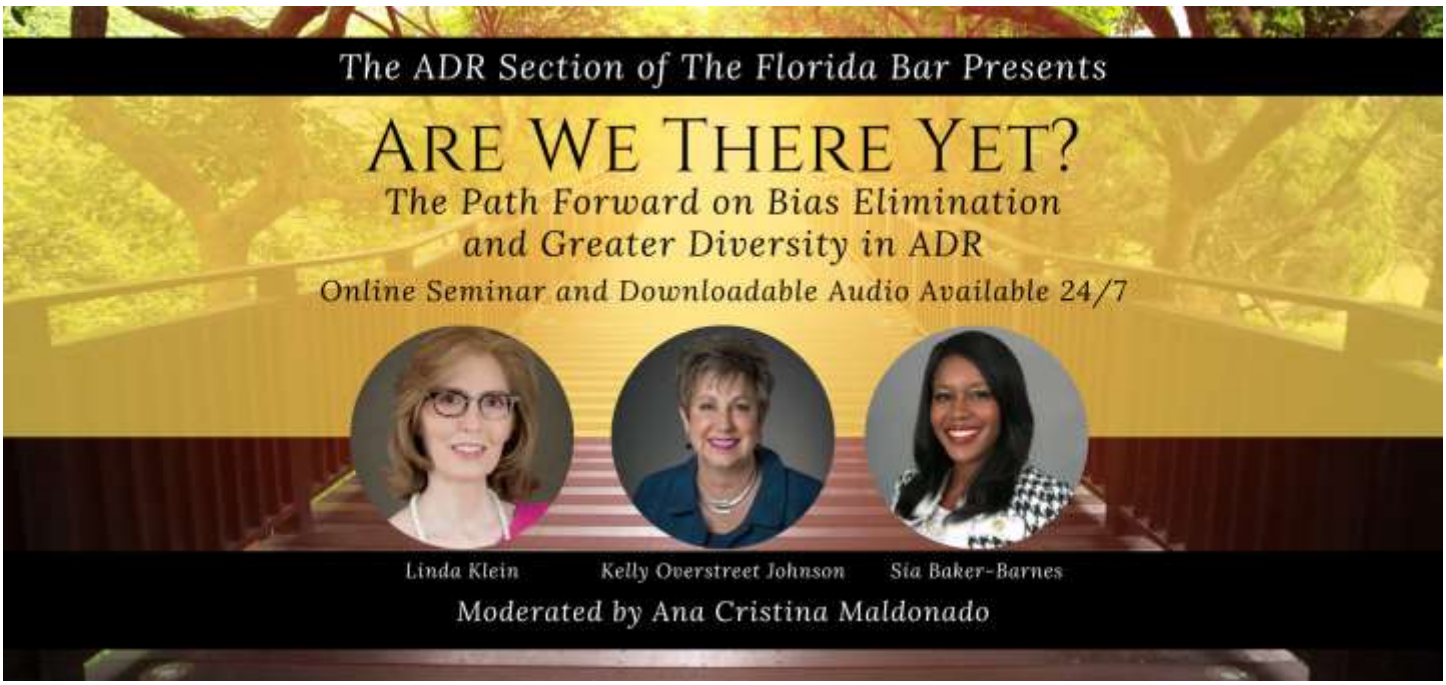
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Mindfulness to the Rescue!

By Piero Falci, Calcagnini Center for Mindfulness
at Jupiter Medical Center, Jupiter

We are not only tired; we are exhausted, all of us. Isn't that so? But although we know that we need to take care of ourselves, we don't make that a priority. It seems that work always comes first. And because we don't do those things that we all know are good for us, we find ourselves always more and more depleted of energy. We seldom pause to rest, eat healthy meals, exercise, meditate, go out in nature, and sleep as much as we need. Unfortunately, many of us end up coping with the compounded fatigue and loss of drive in unhealthy ways. We choose the fast way out: overworking, overeating, and ingesting damaging amounts of caffeine, tobacco, alcohol, drugs… And we all know what the results of such choices are, right?

Well, I encourage you to make an important decision: decide to put yourself first and take better care of yourself. And if you do so, I invite you to take a deep look into the practice of mindfulness meditation. From my experience, I can affirm without hesitation that this is a practice that will improve your physical, mental, and emotional health. So, why not give it a try?

When people ask me, "What should I do to incorporate mindfulness in my life?" My answer is: "The most effective way of making mindfulness part of your life is by participating in a Mindfulness-Based Stress Reduction (MBSR) program." The MBSR is an 8-week program where participants learn several mindfulness practices that help them improve their health and overall well-being. Students develop the ability to more accurately observe their thoughts, emotions, and physical sensations, and respond more wisely to the stressors in their lives. This educational program, developed by Jon Kabat-Zinn, Ph. D., at the University of Massachusetts Medical Center in 1979, is being taught all over the world because it is supported by four decades of published scientific research. Studies show that participation in the MBSR program can lead to a wide range of benefits including:

- increased focus, mental clarity, and improved memory
- increased relaxation, energy, and enthusiasm for life
- enhanced communication and interpersonal relationships
- reduced emotional reactivity
- reduced anxiety and depression

In Palm Beach, this program is offered at the Calcagnini Center for Mindfulness at the Jupiter Medical Center. Email Sheila Griffin at sheila.griffin@jupitermed.com for more information. And to obtain information about upcoming MBSR programs in Miami-Dade, contact Gus Castellanos at gus@18mind.com. And if you are interested in learning more about mindfulness, I unashamedly recommend my book, "Mindfulness Meditation and Mindful Living; The Practice and the Game."

If you suspect that your mental health is declining, do not hesitate: Seek help! That's the first and most important step. Remember: there's no shame and you are not alone.

Piero Falci is a Certified Mindfulness-Based Stress Reduction Program Teacher who received his certification from Brown University School of Public Health. He teaches a variety of mindfulness workshops and has written several books. His latest is "A Better Life in a Better World: Can Mindfulness Save Us From Ourselves?" For more information visit pierofalci.com or contact him at pierofalci@gmail.com.

Diversity, Equity and Inclusion in ADR and Law: A Capital "J" for Justice Issue

By (L–R) Ana Cristina Maldonado, Upchurch Watson White & Max, West Palm Beach, and Megan Moschell, Miami Mediation Group, Miami, on behalf of the ADR Diversity, Equity and Inclusion Committee

Law as a profession is less diverse in comparison to other professions. "As of 2012, African Americans and Hispanics comprised 16.5% of accountants and auditors, 19.9% of financial managers, 12.3% of physicians and surgeons, but only 8.4% of attorneys. Women, members of racial and ethnic groups, members of LGBTQ groups, and attorneys with disabilities continue to be underrepresented in the legal profession."[1] In particular, the field of ADR is "arguably the least diverse corner of the profession"[2] and a "stubborn enclave of homogeneity" despite "significant efforts by organizations and individuals within the Dispute Resolution community to address the lack of diversity."[4]

Consider the nomination of a female and African American attorney for Justice of the United States Supreme Court through the lens of history and current data. Since the United States Supreme Court was founded in 1789, there has never been a female African American Justice. Today, 37% of lawyers are female, and 4.7% of lawyers are black.[5] The estimated breakout is that approximately 2% of lawyers are black and female. That is far less than the 12% of the general U.S. population that is black, which has enormous implications for our judicial system.[6] The push for equity is still required. We are better but not yet at the promised land. Want more current demographic information about lawyers in the United States? Check out the ABA's Profile of the Profession 2021.[7]

The purpose of this article is to raise awareness about diversity in ADR. Specifically, this article focuses on ABA Resolution 105 on Diversity in ADR, the recent creation of a Diversity, Equity, and Inclusion (ADR-DEI) committee for the ADR Section of The Florida Bar and their plan to address this issue.

ABA Resolution 105 on Diversity in ADR. In 2018, the American Bar Association (ABA) passed Resolution 105, which reads as follows:

> RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities ("diverse neutrals") and to encourage the selection of diverse neutrals; and
>
> FURTHER RESOLVED, That the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals.

A report accompanying the resolution breaks down the problem into two components: 1) the pipeline issue of growing and sustaining a more diverse supply of neutrals, and 2) the selection issue, addressing how neutrals are chosen through networks which lack transparency, and in processes that are affected by the implicit biases of attorneys and clients.

Regarding the pipeline issue, data was analyzed from rosters of FINRA, JAMS, AAA, NAM, and CPR and the report concludes that "gender and racial/ethnic diversity of institutional providers of dispute resolution is less than one half that of law firms."[8] Further, the Report finds that diverse and qualified neutrals who are on the rosters "are less likely to be selected."[9] The report highlights challenging patterns. Even among panels of neutrals with diverse members, "there is a small pool of 'repeat players' who are predominantly white and male who ultimately win the work from attorneys and clients."[10] Another

Continued, next page

[1] (ABA Resolution 105 Report, at 1-2).
[2] (Ben Hancock, *ADR Business Wakes Up to Glaring Deficit in Diversity*, Law 360 (2016) at 4, quoted in ABA Resolution 105 Report).
[3] Id. at 3.
[4] Id.
[5] ABA 2021 Profile of the Profession.
[6] Race and Ethnicity in the United States: 2010 Census and 2020 Census
[7] ABA 2021 Profile of the Profession.
[8] ABA Resolution 105 Report at 4.
[9] Id. at 5.
[10] Id.

Continued from page 16

pattern is that "the more high-stakes the case, the lower the odds that a woman would be involved."[11] Corporate and commercial law are highlighted as areas where these issues are of particular concern.[12] These patterns have "two major ripple effects."[13] First, potential diverse neutrals choose not to invest in the skills and experience needed to become neutrals if the odds of having a lucrative practice are low.[14] Second, there is a broader societal impact of lack of diversity in a legal system where over 90% of cases settle before trial so that "the jury trial is an exceptional rather than a commonplace outcome."[15]

In 2018-2019, Florida's County and Circuit courts saw 3,580,173 new filings.[16] This is the case load that is faced by the State's 605 Circuit Court judges and 330 County Court judges.[17] Just looking at these (pre-pandemic) numbers reminds us that despite the courts' best efforts during the pandemic, private justice ADR processes are an integral part of our legal system. ADR is essentially our private justice system, a branch of legal services with tremendous powers of disposition.

The reality is that:

> "Neutrals in both arbitration and mediation serve a role that is often a substitute (and sometimes annexed to) the judicial process. Therefore, it becomes an issue of fairness that the decision-makers or facilitators should be representative of the individuals, institutions and communities that come before them." the decision-makers or facilitators should be representative of the individuals, institutions and communities that come before them."[18]

Lack of diversity in our private judicial system of ADR thus becomes a capital "J" for Justice issue.

Having outlined a better understanding of this challenge, the Report on ABA Resolution 105 further concludes that "A network-based culture, reinforced by implicit bias and cloaked in confidentiality, reduces [the] selection of diverse neutrals."[19] Observers note that:

> "(1) many neutrals are chosen or at least vetted through the networks of equity law firm partners, and (2) established neutrals are often asked to make referrals to other neutrals. In both cases, the networks are largely white and male, and the recommendations and referrals are subject to implicit bias. Second, the confidentiality and privacy that are integral elements of most dispute resolution processes reduce public awareness of the scope of the problem, most notably awareness on the part of the stakeholders in the best position to bring about change - clients."[20]

Reliance on "informal," "word of mouth" networks "where colleagues consult each other for recommendations" leads to resistance to trying someone new and "loss of opportunity to broaden the company's roster of preferred neutrals."[21]

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[11] Id., citing July 2017 Report of the Commercial & Federal Litigation Section of the New York State Bar Association in *If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR*, July 2017, at 10.
[12] ABA Resolution 105 Report at 6.
[13] Id. at 6.
[14] Id. at 6.
[15] Shari Seidman Diamond and Jessica M. Salerno, Report to the American Bar Association Commission on the American Jury: *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, Louisiana Law Review, Louisiana State University.
[16] Office of the State Courts Administrator *Annual Report*, 2019-2020 at 90
[17] Id. At 75.
[18] ABA Resolution 105 Report at 6, quoting Hancock at 7.
[19] ABA Resolution 105 Report at 7.
[20] Id.
[21] ABA Resolution 105 Report at 8, quoting Theodore K. Cheng, *The Case for Bringing Diversity to the Selection of ADR Neutrals*, NYSBA New York Dispute Resolution Lawyer (Summer 2016) at 19.

Continued from page 17

The Report highlights that "[i]t is natural and indeed common for people to recommend those with whom they are most familiar."[22] However, the dynamic results in a sense that the neutrals who are "most palatable to clients" are the "largely older and white male cohort" of attorneys, top tier litigators and retired judges.[23] This implicit bias, present in our culture as a whole, operates invisibly and unconsciously, and "results in even well-meaning individuals [...] pass[ing] over those who are 'different.'"[24] Social science experiments have shown that minority job seeking candidates can experience as much as 50% fewer call backs in an experiment where the same resume is submitted to employers to employers and where the only difference is the person's name.[25] In another experiment, law firm recruitment partners were shown the same legal memo, ostensibly by a man named Thomas Meyer, which included intentional errors. Half of the reviewers were told that the attorney who wrote the memo was white and half were told he was black. White Thomas Meyer's average rating was 4.1 out of 5, and his memo generally praised. Black Thomas Meyer's average rating was 3.2 out of 5, and his memo critiqued as average at best and needing a lot of work.[26] These examples are illustrative. Similar patterns are at work in the hiring of mediators and arbitrators.

Continued, next page

[22] ABA Resolution Report at 8.
[23] ABA Resolution 105 Report at 8, citing *Implicit Bias and the Legal Profession's 'Diversity Crisis': A Call for Self Reflection*, Nicole Negowetti, Nevada Law Journal, 432.
[24] ABA Resolution 105 Report at 6, quoting Hancock at 10.
[25] *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (National Bureau of Economic Research Working Paper No. 9873).
[26] Debra Cassens Weiss, *Partners in study gave legal memo a lower rating when told the author wasn't white*, ABA Journal (April 21, 2014).

Continued from page 18

ABA Resolution 105 paints a clear picture of the issue, the challenge, and the obligation to chart a path forward to greater equity and inclusion. That path consists of both supply and demand interventions. On the supply side, we need strategies for building and supporting a pipeline of diverse mediators: reaching outside the usual networks and getting more qualified diverse lawyers to consider adding ADR skills to their skill set so that eventually, they might make the jump to full neutral practice. On the demand side, we need to bring greater transparency to the dynamics of neutral selection. Perfectly capable and trained diverse neutrals will languish from lack of work and leak out of the pipeline if there is no market to sustain them. Individual choice solutions, like identity-based niche marketing (e.g., women hiring women, etc.) and affinity-driven selection (e.g., a client is of a particular background, so the neutral selected is chosen to mirror that characteristic) are important. However, greater awareness and systematic efforts are required to support and expand the available choices, or the lack of diversity in ADR will persist, perniciously, as it has, despite existing efforts.

Creation of the ADR Section of The Florida Bar's Committee on Diversity, Equity, and Inclusion. In December 2021, the ADR Section's newly created Diversity, Equity and Inclusion committee met for the first time. This group begins its journey with the hope to help move the needle in Florida for our field and our institutions towards diversity, equity and inclusion, improving our judicial system as we do. We welcome participation, input and feedback from our members as we do this. Learn more here.

Did you know? The creation of the committee was inspired by a podcast in which Linda Klein, the former President of the American Bar Association, and a mediator and arbitrator, spoke about the ABA's Resolution 105 on Diversity in Dispute Resolution.[27] Linda graciously accepted the Section's invitation to present on this issue during a CLE panel on April 7, 2022. Purchase the CLE here.

[27] ABA Resolution 105 podcast.

The Current State of Diversity, Equity and Inclusion in Florida Mediation, Arbitration and Law. One of the first things the ADR Section DEI committee did was to gather information to develop a numerical baseline by collecting and reviewing existing data on mediators, arbitrators, Florida Bar attorneys, and members of the ADR Section.

Currently, there are just under 6,000 certified mediators in the state of Florida. Demographic data on gender and race/ethnicity for mediators is available via the Dispute Resolution Center (DRC) website under the "Mediator Search." Of the five different certifications, County and Family are more diverse, in the sense that they are close to representative of the state population's racial and ethnic composition.[28] The Circuit Civil, Dependency, and Appellate mediator certifications are substantially less diverse in the area of racial and ethnic composition. On the whole, the non-attorney population of mediators is more diverse than the attorney mediators. Looking only at certified lawyer neutrals, over 80% of County, Circuit Civil, Dependency and Appellate mediators are Caucasian. With respect to gender (with options of Male or Female), there are more female attorneys mediating Family (58.2%) and Dependency (78.9%), and more male attorneys mediating Circuit (67.8%) and Appellate (61.2%).

As of April 1,2022, there are 91,734 members in good standing of The Florida Bar, of whom 78,199 practice in Florida. Of eligible members, 60% are men, 40% are women, and under 1% report their gender as Unknown.[29]

Continued, next page

[28] Florida Courts DRC.
[29] Florida Bar Membership FAQ.

Continued from page 19

There is not a page on The Florida Bar website where you can click and see additional demographic information about the Bar. The Committee made a public information request to The Florida Bar for member data, and in reviewing this raw data for the gender and racial/ethnic breakdown of members, we encountered a barrier. The database has "No Data Available" for the self-reported demographic information on the racial and ethnic background of nearly 42% of the Bar's members. However, after examining the raw data on members in good standing, we feel comfortable hypothesizing that Florida lawyers echo the national patterns of fewer women than men in practice, and that even though we are one of the country's largest Bars in a very diverse state, we suffer from a serious under-representation of historically excluded racial and ethnic groups. The incompleteness of the racial and ethnic group data, and the near total lack of data on LGBTQ or disabled attorneys and neutrals makes it harder to even create a baseline to measure change on these important issues.

The lack of data obscures the nature of the problem, which is one that as a Bar, we *have* committed to addressing. Diversity and Inclusion are key parts of The Florida Bar's mission:

> "To increase diversity and inclusion in The Florida Bar so that the Bar will reflect the demographics of the state, to develop opportunities for community involvement, and to make leadership roles within the profession and The Florida Bar accessible to all attorneys, including those who are racially, ethnically and culturally diverse, women, members of the LGBTQ community and persons with disabilities."[30]

If we, as lawyers, aren't keeping track of whether we are moving forward or backwards on our stated mission, then how do we know if we are doing well or badly? It's hard to even set effective goals.

The ADR Section DEI committee is currently considering a number of initiatives. Learn more here.

This Takes All of Us. In the spirit of Alan Bookman, our first Section President, we, the members of the ADR Section DEI Committee want to do this "the right way."

That is a vision that includes everyone. We understand that this topic can feel alienating, even threatening to some members of our community. Having the conversation is fine and dandy until a flock of new people come in and compete in what is already a very competitive market. If you are a member of the majority, we ask for your help in making sure that our field and institutions are taking steps to reflect our community. Women could not give themselves the vote, men had to do it, just 100 years ago. Black Americans could not pass the 13th Amendment to abolish slavery, white men had to do it, just 156 years ago. True change requires the support and buy in of the majority in power. This issue concerns and affects all of us, whether we feel it directly or not.

What can I do? We encourage you to start with the "Each One Reach One" recruitment approach:

- Reach out to diverse attorneys who you think could make good neutrals to encourage them to get trained and join the field.
- If you are in the position of hiring neutrals, take actions to diversify your neutral short list. Think about the issue on the front end, and not on the back end.
- Be intentional about inclusion. People fret about "tokenism," where one person is brought in as diversity window-dressing. Tokenism a start, and better than no action at all, but it needs to be followed up with true, systematic inclusion of voices and experiences across the board, and a wider field of opportunity. Without consistent support, diverse neutrals recruited will leak out of the pipeline.

Continued, next page

[30] The Florida Bar Diversity and Inclusion *webpage*.

Diversity, Equity and Inclusion in ADR and Law: A Capital "J" for Justice Issue

Continued from page 20

- Apply the conflict resolution concept of "Reflective Practice," this idea that we are learning from our mistakes and missteps as we work together to improve our process.

Lack of diversity in our private judicial system of ADR is a capital "J" for Justice issue. We call on all attorneys and neutrals to take actions that will make legal and neutral practice more Just, Equitable, Diverse, and Inclusive.

Ana Cristina Maldonado, Esq. is a mediator and arbitrator with Upchurch Watson White & Max and a member of the National Academy of Distinguished Neutrals (NADN).

A member of The Florida Bar and a Florida Supreme Court Certified Mediator in Circuit Civil, County, Dependency and Family since 2010, she has mediated over 2,000 cases. She is fluent in Spanish and Portuguese.

Megan Moschell, Esq. practices as a neutral with her firm, Miami Mediation Group, and as an attorney in the area of Estate Planning and Probate Administration at Moschell & Moschell.

A third-generation attorney, Megan attended the University of South Florida and law school at Nova Southeastern University, where she participated in the Alternative Dispute Resolution Clinic. Megan is a Florida Supreme Court Certified Mediator in Circuit Civil and Family. Ultimately, Megan hopes to help the Florida ADR community grow and flourish for years to come!

- The section hosts live audio webcasts, generally monthly, so that you can consistently get quality CLE credit on ADR-related topics, technology and ethics—and section members receive discounted registration.
- Most of our CLEs are also approved as CMEs, so you can earn dual credit.
- We encourage section members to submit ideas for CLE/CME seminars and to serve as presenters.
- Section membership enables you to stay informed of changes in the rules and procedures for ADR, with an opportunity to respond to requests for comments.
- We offer the opportunity to submit articles for publication in our biannual publication, The Common Ground.
- The section hosts a variety of networking events—virtual and/or in-person—throughout the year, such as networking socials online at conferences like The Florida Bar Annual Convention, The Florida Bar Winter Meeting, and the annual Dispute Resolution Conference.
- We host a Mentoring Academy for certified mediators, where attendees can learn and practice new techniques and receive live, immediate feedback to improve their skills.
- We host an Arbitration Advocacy Institute at which participants hone their arbitration advocacy skills and learn tips and techniques to better represent clients at arbitration.

The Florida Bar ADR Section Committee Preference Form

2022 – 2023 Florida Bar Year

Appointments are for the Bar term July 1, 2022, to June 30, 2023. Committee service is voluntary and travel expenses are not reimbursed. The Executive Council leadership decides annually whether and to what extent to reimburse expenses associated with service on the Executive Council. Preference forms may be submitted at any time throughout the Bar year.

Name: _____ Bar/Member Number: _____

Address: _____

City: _____ State: _____ Zip: _____

Email: _____ Cell Phone Number: _____

Years practicing law: _____ Practice area(s): _____

Circuits in which you practice: _____

Please check the Alternative Dispute Resolution Section committee(s) you would like to join.

- □ Arbitration
- □ Arbitration Advocacy Institute
- □ Bylaws/Surveys
- □ CLE
- □ Communications/Publications/ Social Media)
- □ Diversity
- □ Ethics
- □ Legislation and Rules
- □ Long Range Planning
- □ Mediation
- □ Mentoring Academy for Certified Mediators
- □ Membership/Social
- □ Nominating
- □ Outreach

Let us know your other interests for involvement:

- □ Executive Council
- □ CLE presenter (live or audio webcast)
- □ Article contributor for The Common Ground
- □ Sponsorship/partnership
- □ Social media
- □ Other _____

Please let us know your certifications:

- □ Appellate
- □ County
- □ Circuit
- □ Dependency
- □ Family

Please attach this application and a separate sheet highlighting your prior service to The Florida Bar, the Alternative Dispute Resolution Section and other legal organizations or Bar activities.

SEND THIS COMPLETED FORM AND ATTACHMENTS TO:
Sheridan Hughes, Alternative Dispute Resolution Section Administrator
Email: SHughes@floridabar.org

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Editors Ana Cristina Maldonado and Natalie Paskiewicz are soliciting articles for the Fall 2022 edition of The Common Ground. Please contact them at acmaldonado@uww-adr.com and natalie@pazmediation.com. Interested in advertising? Click here for information.

Alternative Dispute Resolution
Section of The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399

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