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 2022-2023 CHAIR

Kathleen S. McLeroy, Esq.

The Section provides a forum for the discussion and exchange of ideas regarding alternative dispute resolution. It was created to serve not only lawyers who work as ADR professionals but also lawyers who participate in ADR through their law practices. In September, we began hosting a monthly online Arbitrator's Forum, for the statewide exchange of ideas. During Mediation Week this year (October 17–23, 2022), the Section held Mediation Mixers around the state, letting neutrals take a welcome break from all the Zooming and connect live with fellow neutrals and clients.

After a COVID-related hiatus and Hurricane Ian-related reschedule, the Mediation Mentoring Academy will take place in Tampa on February 24–25. Get details and register at this link.

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Message from The Chair

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Through our CLE and publications, we strive to keep you updated on the latest in our field. Many of our nearly 1,000 members have spoken up about their priorities in our recent member survey, and we are working hard to make sure the Section serves their needs.

It is my honor to serve as the ADR Section's Chair this year. The Executive Council and I welcome your participation. Join a committee. Write for this newsletter. Attend our CLEs and events. Plan to come, in person or virtually, to one our public Section meetings at the Summer and Winter meeting of the Bar, and let your voice be heard. There are many opportunities to network and learn.

Kathleen S. McLeroy
2022-2023 ADR Section Chair
kmcleroy@carltonfields.com

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What's New and Different? A Summary of Recent Revisions to Procedural Rules Regarding ADR

By Meah Tell, Esq.,[1] Meah Rothman Tell, P.A., Tamarac

Several Court Rules – including Federal and State – have been revised recently. This article summarizes and discusses Rule revisions that impact the practice of ADR.

I. RULE OF PROCEDURE 16.2 COURT ANNEXED MEDIATION, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, Administrative Order 2022-88, effective December 1, 2022.

On October 26, 2022, the Rule 16.2 regarding Court Annexed Mediation in the United States District Court, Southern District of Florida was revised to allow participation in mediation by video-conference or by in-person appearance.

Significantly, new Rule 16.2 (a)(2) Format provides:

"Unless the Court orders otherwise, the parties shall decide whether their mediation conference will be conducted in person or by video-conference and, if **the parties cannot agree, the mediation conference shall be held by video-conference**." (emphasis supplied)

Video-conference requires connecting to and participating via video and audio. The Mediator's Report must state whether the mediation was conducted in person or by video-conference and whether any party failed to participate in the mediation. For in-person participation, unless otherwise excused in writing by the Court, a natural person cannot appear through an agent. However, there is no such prohibition for party participation via video-conference.

The ADR Section, represented by Karen Evans-Putney, Esq., as well as others at oral argument on the proposed rule changes, advocated for this default to video-conference mediation.

The ADR Section's written comment to the Court noted that the September 2021 survey of ADR Section members highlighted a favorable view of the use of technology to facilitate mediation conferences.

- 79% of the survey respondents believed that virtual mediations they participated in were very effective;
- 66% of the survey respondents believed that the virtual settlement rate was higher than a live mediation;
- 63% of the survey respondents did not believe that settlement rates would have been different if the mediation was live versus being remote;
- 70% of the survey respondents received positive feedback from lawyers and pro-se parties about virtual mediation; and
- 85% of the survey respondents were in favor of courts continuing/ordering virtual mediations in the future.

The Comment noted that based on the survey, "allowing the parties to determine how to engage in the mediation process furthers two significant goals of mediation: providing fair and equal access to the dispute resolution process, and fostering party self-determination in designing the process and outcome."

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II. AMENDMENTS TO FLORIDA RULES OF CIVIL PROCEDURE, FLORIDA RULES OF GENERAL PRACTICE AND JUDICIAL ADMINISTRATION, FLORIDA PROBATE RULES, FLORIDA RULES OF TRAFFIC COURT, FLORIDA SMALL CLAIMS RULES, AND FLORIDA RULES OF APPELLATE PROCEDURE. SC21-990, effective October 1, 2022.

A. Florida Rules of Civil Procedure, Rule 1.700: Rules Common to Mediation and Arbitration

Rule 1.700 (a) provides that the parties to any contested civil matter may file a written stipulation to mediate or arbitrate any issue between them at any time. The written stipulation no longer has to be contained in an order of referral but must be filed in the court docket. The order of referral or written stipulation may provide for these processes to be conducted in person, through the use of communication technology,[2] or by a combination thereof.

Most importantly, "Absent direction in the order of referral, mediation or arbitration **must be conducted in person**, unless the parties stipulate or the court, on its own motion or on motion by a party, otherwise orders that the proceeding be conducted by communication technology or by a combination of communication technology and in-person participation."

Language in 1.700 (a) (2) now requires the court or its designee (who can be the mediator or arbitrator) to notify the parties in writing of the date, time and as applicable the place of the conference or hearing, **and the instructions for access to communication technology that will be used for the conference or hearing, unless the order of referral, or other order of court or written stipulation specifies this information**. This can be problematic since

filing information in the court file which identifies Identification Numbers or Passwords to participate in proceedings using electronic communication lessons the security, privacy and confidentiality of the proceeding and makes the proceeding more vulnerable to security breaches.

A possible solution to protect security, confidentiality and privacy of the proceeding is to include language in a Notice of Mediation or Arbitration that states that information regarding access to the communication technology to be utilized in the hearing or conference will be provided to the parties by separate email or communication. Nothing in Rule 1.700 (a)(2) requires a notice of the mediation conference or arbitration hearing date to be filed in the court file, although orders of court or written stipulations with this identifying information will appear in the court file.

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B. Florida Rules of Civil Procedure, Rule 1.720: Mediation Procedures

This Rule addresses appearance at mediation. The list of participants who may attend mediation without physical presence[3] remains unchanged. They can appear via communication technology if so authorized under Rule 1.700(a).

C. Florida Rule of Civil Procedure, Rule 1.730: Completion of Mediation

Rule 1.730 (b) Agreement provides that a partial or final agreement reached at mediation and reduced to writing and signed by the parties and their counsel, if any, can be signed with original signatures, electronic or facsimile signatures, and may be in counterparts.

Rule 1.730 (c) Imposition of Sanctions provides that the parties may "not object to the enforceability of an agreement on the ground that communication technology was used for participation in the mediation conference if such use was authorized under rule 1.700 (a)."

D. Florida Rule of Civil Procedure, Rule 1.750: County Court Actions

Rule 1.750 (e) Appearance at Mediation was amended to provide that in county court actions, party appearance is satisfied by physical presence or if authorized under Rule 1.700 (a), participation through the use of communication technology. This does not apply to small claims mediations, where a nonlawyer representative may appear on behalf of the party if they have the party's signed written authority to appear and full authority to settle without further consultation.

Rule 1.750 (f) Agreement was amended to provide that any agreements reached in small claims mediations mut be written in the form of a stipulation, and signatures may be original, electronic, or facsimile and may be in counterparts.

E. Florida Small Claims Rules, Rule 7.090: Appearance; Defensive Pleadings; Trial Date

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E. Florida Small Claims Rules, Rule 7.090: Appearance; Defensive Pleadings; Trial Date (continued)

Rule 7.090 (f) Appearance at Mediation, Sanctions is amended to provide for appearance at mediation in person, or if authorized by the court, or by written stipulation of the parties, through the use of communication technology as that term is defined in Florida Rule of General Practice and Judicial Administration 2.530. This subsection also states that any agreements reached at mediation must be written in the form of stipulations, and the signatures on the stipulation may be original, electronic, or facsimile and may be in counterparts.

F. Florida Appellate Rules, Rule 9.700: Mediation Rules

Rule 9.700 (b) Referral provides that the court on its own motion, or upon motion of a party can refer a case to mediation, and "may direct that the mediation be conducted in person, through the use of communication technology as that term is defined in Florida Rule of General Practice and Judicial Administration 2.530, or by a combination thereof." A party motion for mediation must indicate that the movant has consulted with opposing counsel or unrepresented party and may represent if the party is opposed to using communication technology. "Absent direction in the court's order of referral, mediation must be conducted in person, unless the parties stipulate or the court, on its own motion or on motion by a party, otherwise orders that the proceedings be conducted by communication technology or by a combination of communication technology and in-person participation."

The rule goes on to state that the term "presence" means physical presence at the mediation conference or participation using communication technology if authorized under rule 9.700 (b).

G. Florida Appellate Rules, Rule 9.740: Completion of Mediation

Rule 9.740 (b) Agreement provides that a partial or final agreement reached at mediation must be signed by the parties and their counsel, if any. "Signatures may be original, electronic, or facsimile and may be in counterparts."

Rule 9.740 (c) contains new enforceability language: "The parties may not object to the enforceability of an agreement on the ground that communication technology was used for participation in the mediation conference if such use was authorized under rule 9.700 (b)."

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H. Florida Rules of Civil Procedure, Rule 1.820: Hearing Procedures for Non-Binding Arbitration

It should be noted that Rule 1.820 which relates to Hearing Procedures for Non-Binding Arbitration [mandatory non-binding arbitration] does *not* provide for appearance using communication technology. However, Rule 1.700, which covers mandatory non-binding arbitration permits in person, electronic communication or a combination thereof if agreed to by the parties, or as ordered by the court in the order of referral, or as otherwise ordered in the absence of agreement, with the default being in-person appearance.

The chief arbitrator has the authority under Rule 1.820 (3) for good cause shown to excuse the attendance at the arbitration hearing of individual parties or authorized representatives of corporate parties. This was not amended, so the arbitrator appears to be able to continue to have this authority. However, there are some trial judges who are issuing orders of referral to mandatory non-binding arbitration that provide that the trial judge (and not the chief arbitrator) must excuse attendance at the arbitration hearing.

I. Florida Rules of Civil Procedure, Rule 1.830: Voluntary Binding Arbitration

Rule 1.830 (a) is amended to include the use of communication technology.

J. Other rule changes

Other related rule changes provide "permanent and broader authorization for the remote conduct of certain court proceedings," including hearings, depositions, pre-trial conferences, and trials.

III. AMENDMENTS TO FLORIDA RULES OF JUVENILE PROCEDURE, FLORIDA FAMILY LAW RULES OF PROCEDURE, AND FLORIDA SUPREME COURT APPROVED FAMILY LAW FORMS. SC22-1, effective October 1, 2022.

A. Florida Family Law Rules of Procedure, Rule 12.740: Family Mediation.

This Rule governs mediation of family matters and related issues, and provides for participation at mediation or arbitration by use of communication technology and permits a combination of in person participation and participation using communication technology under certain circumstances.

Rule 12.740 (b) Referral requires in person participation at mediation or arbitration unless (i) the parties stipulate or (ii) the court in the order of referral, or on its own motion or on motion by a party, otherwise orders that the proceeding may be conducted by communication technology or by a combination of communication technology and in-person participation. The order of referral or written stipulation of the parties may provide for mediation or **arbitration**[4] in person, remotely via audio or audio video-communications technology or by a combination thereof.

Rule 12.740 (d) Appearances provides that a party is deemed to appear if the named party is physically present at the mediation conference, or, if permitted by court order or written stipulation of the parties, present via communication technology.

Rule 12.740 (f) Report on Mediation states that an agreement reached at mediation as to any matter or issue, including legal or factual issues to be determined by the court, must be reduced to writing and *signed by the parties*, and and submitted to the court unless the parties agree otherwise. *This deletes the requirement that counsel if present at the mediation must also sign the mediation agreement*.

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Rule 12.740 (f) also adds that signatures to the mediation agreement "may be original, electronic or facsimile, and may be in counterparts."

B. Florida Rules of Juvenile Procedure, Rule 8.290: Dependency Mediation

Rule 8.290 (d) Referral was amended to provide that orders of referral to mediation in dependency cases "may provide that mediation be conducted in person, by communication technology or by a combination thereof." Absent direction in the referral mediation must be conducted in person, unless the parties stipulate or the court, on its own motion or on motion by a party, otherwise orders that the proceeding be conducted by communication technology or by a combination of communication technology an in-person participation.

Rule 8.290 (l)(1) Appearances, Order Naming or Prohibiting Attendance of Parties states that the Order of Referral must name the parties and participants who must appear at mediation and "the order may provide for mediation to be conducted in person, by communication technology, or a combination thereof." Subsection (l)(2) states that unless otherwise agreed to by the parties or ordered by the court any party or participation ordered to mediation must be present at the mediation conference either in person, or, if permitted by court order or written stipulation of the parties via communication technology.

Rule 8.290 (o) Report on Mediation provides that signature on mediation agreements may be "original, electronic, or facsimile, and may be in counterparts."

C. Other rule changes

Other rule changes relate to "permanent and broader authorization for the remote conduct of certain court proceedings in the areas of delinquency, dependency and family law," including hearings.

IV. IN RE: AMENDMENT TO FLORIDA FAMILY LAW RULE OF PROCEDURE 12.200. SC 22-574, effective September 15, 2022.

This amendment strikes the requirement that Orders setting prehearing conferences must be uniform throughout the territorial jurisdiction of the court. Paragraphs (J) and (K) which address what courts should do during case management conferences in family cases were not amended and continue to provide that during these conferences the court should:

> "(J) refer the parties to mediation if no significant history of domestic or repeat violence that would compromise the mediation process is involved in the case and consider allocation of expenses related to the referral; or refer the parties to counseling if no significant history of domestic or repeat violence that would compromise the process is involved in the case and consider allocation of expenses related to the referral;"
>
> "(K) coordinate voluntary binding arbitration consistent with Florida law if no significant history of domestic or repeat violence that would compromise the process is involved in the case." (emphasis supplied)

V. AMENDMENTS TO FLORIDA RULE OF CIVIL PROCEDURE 1.530 and FLORIDA FAMILY LAW RULE OF PROCEDURE 12.530. SC22-756 effective August 25, 2022.[5]

The new amendments require that in order to preserve for appeal a challenge to the *sufficiency of a trial court's findings in the final judgment*, a party must raise that issue in a motion for rehearing under Florida Rule of Civil Procedure 1.530 (a) and Florida Family Law Rule of Procedure12.530 (a).

In the family law arena this resolves the split in circuits. Some circuits have *required a motion for rehearing to be filed to address the failure of the trial court* to make necessary factual findings.

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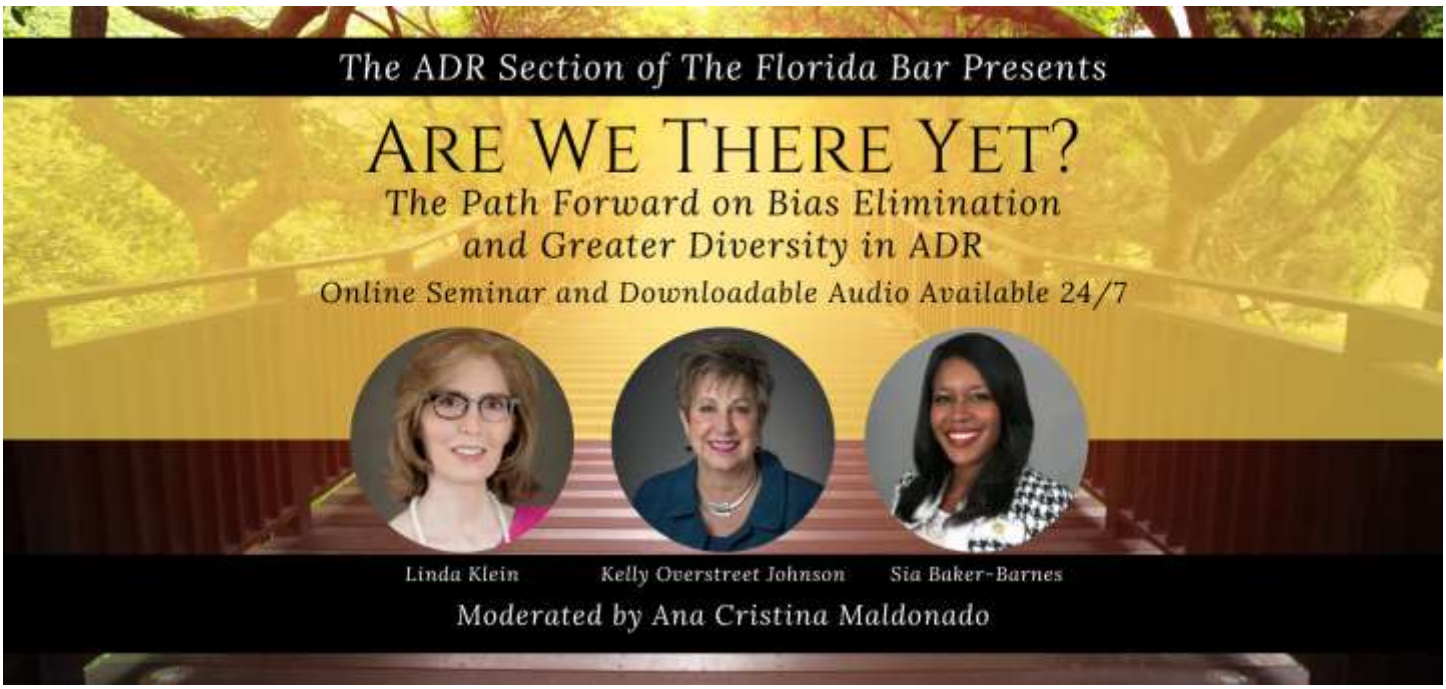
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The Fourth District Court of Appeal has stated that when required factual findings are not made in the Final Judgment no motion for rehearing has to be filed in order to preserve the issue on appeal. *Fox v. Fox*, 262 So.3d 789, 793 (Fla. 4th DCA 2018) (A motion for rehearing is not required to "preserve the issue of a trial court's failure to make statutorily-required findings in alimony, equitable distribution, and child support" proceedings.) *Cf. Eaton v. Eaton*, 311 So.3d 34 (1st DCA 2020). For more information regarding the issue of preservation of issues for appeal, see Jonathan M. Streisfeld, *We're Back: The Appellate Court Said You Didn't Find Anything*, Fla. Bar Jn'l, Vol. 82, No. 4, Page 32 (April 2008).

The importance of these rule changes for appellate mediators is that if no motions for rehearing are filed in civil and family cases based upon the lack of findings by the trial judge in the final judgment, the appellant may be *precluded* from raising the argument as to lack of necessary factual findings on appeal.

VI. CONCLUSION

With these Rule revisions, the United States District Court for the Southern District of Florida and the Florida Supreme Court have made permanent the use of remote technology in the mediation process, which proved popular and effective during the Covid-19 crisis. The United States District Court for the Southern District of Florida Rule allows for the parties to elect participation in mediation either in person or through video-conference (audio video) with the default being video-conference participation if the parties cannot agree or the court does not order otherwise. The Florida Supreme Court rules have made permanent the use of communication technology (audio or audio-video) in court-connected mediation and arbitration processes, with the default being in-person participation in the absence of agreement by the parties or court order. The Florida Supreme Court Rules permit the flexibility of parties choosing communication technology (audio and audio-video conferencing) or a combination thereof. ADR practitioners and participants welcome these revisions which give the parties the opportunity to choose the format for their ADR process.

Endnotes

[1] The comments herein are solely those of Meah Tell, and not the ADR Section of The Florida Bar.

[2] **How do the Florida Courts define "Communication Technology"?** Communication technology is defined in Rule 2.530 of the Florida Rule of General Practice and Administration as "audio communication technology or audio-video communication technology." This Rule provides that audio communication technology "means electronic devices, systems, applications, or platforms that permit all participants to **hear and speak to all other participants in real time."** Audio-video communication technology additionally requires when using these electronic devices, systems, applications, or platforms, that all participants **hear, see, and speak to all other participants in real time."** Rule 2.530 contains the general authorization for use of "communication technology" before a court officer. The rule does not include mediator or arbitrator as court officers. Unless otherwise noted, the Rule amendments discussed in this article which specifically refer to "communication technology" follow the definition in Rule 2.530.

[3] "**(1)** The party or a party representative having full authority to settle without further consultation; and
(2) The party's counsel of record, if any; and
(3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation, or
(4) If the party to a mediation is a public entity required to operate in compliance with Chapter 286, Fla. Stat., a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the public entity."

[4] The addition of the language "arbitration" is ambiguous and does not state what type of "arbitration" proceedings it means. Several colleagues have opined that Rule 12.740 (b) encompasses court-connected mandatory non-binding arbitration, court-connected voluntary binding arbitration and even binding arbitration under Chapter 682, Fla. Stat. However, 44.104 (14) and Chapter 682.25 make it clear that disputes (cases) involving issues of child custody, visitation or child support cannot be adjudicated at all in a binding arbitration. (*Martinez v. Kurt*, 45 So.3d 961 (Fla. 3rd DCA 2010) relying upon *Toiberman v. Tisera*, 998 So.2d 4 (Fla. 3d DCA 2008).

More importantly, the Rules of Civil Procedure that relate to Mandatory Non-Binding Arbitration and Voluntary Binding Arbitration under Chapter 44.103 and 44.104, discussed above, do not apply to family cases, which have their own Family Law Rules of Procedure. There are no Family Law Rules of Procedure for court-connected arbitration.

Perhaps what is meant in the Rule 12.740 (b) amendment is voluntary binding arbitration pursuant to F.S. 44.104 and Chapter 682, Fla. Stat., subject to the limitations for disputes (cases) involving issues of child custody, visitation or child support. We can refer to recent amendment to Florida Family Law Rule 12.200 in SC 22-574, effective September 15, 2022, which draws attention to what the court should do during pretrial conferences in family cases. See Section IV in this article.

[5] The amendments were effective immediately upon issuance of the opinion on August 25, 2022, but because they were not published for comments previously, interested persons had 75 days (or on or before November 8, 2022) to file a comment. The Comment of the Civil Procedure Rules Committee opines among other things, that the term "factual findings" should be used. The Comment of the Statewide Guardian Ad Litem Office highlights the split among circuits in dependency cases (which are not governed by Rule 12.530). The matter was submitted to the Court without oral argument.

Meah Tell is a member of the Executive Council and a Former Chair of the ADR Section of the Florida Bar.

Meah formerly served on the Florida Supreme Court ADR Rules & Policy Committee, the Florida Supreme Court Mediator Ethics Advisory Committee, and the Florida Supreme Court Mediation Training Review Board.

Embracing ENE in Florida:
Early Neutral Evaluation Presents Another Alternative

By Lawrence H. Kolin, Esq.
Upchurch Watson White & Max Mediation Group, Orlando

Elsewhere in the United States, Early Neutral Evaluation (ENE) is fully evolved as an effective form of ADR, given the continued high cost of litigation. This process, which matured in California's federal courts, is a corollary of mediation that puts the neutral in the role enhancing direct communication between the parties about their claims and supporting evidence. ENE can provide an assessment on the merits of the case by a neutral expert in an early reality check for clients and lawyers alike. This helps to identify and clarify the central issues in dispute, assist with discovery (including electronically stored information) and can streamline case management.

Early Neutral Evaluation can:

- Enhance direct communication between the parties about their claims and supporting evidence
- Provide an assessment of the merits of the case by an experienced legal neutral, amounting to a reality check for clients and lawyers
- Identify core issues in dispute while assisting with discovery planning (including electronically stored information)
- Facilitate settlement discussions when requested by the parties before the evaluation

A court-appointed neutral with expertise in the subject matter typically hosts an informal meeting of clients and counsel, once the parties request ENE. Following presentations consisting of a confidential exchange of factual information, the evaluator identifies areas of agreement, clarifies the issues and encourages the parties to enter into any stipulation or agreement that is feasible, including settlement. The neutral case evaluator has no power to impose settlement and may not force a party to accept any proposed terms. The parties' formal discovery, disclosure and motion practice rights are fully preserved. The confidential evaluation is non-binding and is not shared with the trial court. If no settlement is reached, the case remains in litigation, but likely with the litigants better informed as to the risks, amount of work still necessary and the monetary estimate of continuing toward trial.

A publication from the American Bar Association[1] on ENE thoroughly outlines the process based on the trendsetting federal local rules of California's Northern District (and more recently its Southern District). [2] ENE aims to position cases for early resolution, serving as a cost-effective substitute for formal discovery and pretrial motions.[3] The process[4] is described as compact presentations and supporting arguments (without rules of evidence and without

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Direct or cross-examination of witnesses). The evaluator may cause parties to enter procedural and substantive stipulations, though there are limitations on authority.[5] The evaluator then prepares a private evaluation that includes a realistic cost estimate, the likelihood of liability with a dollar range of damages, and an assessment of the relative strengths and weaknesses of each side. There are special provisions for intellectual property cases.[6]

However, before the evaluator presents the evaluation to the parties, an option of mediation exists. Parties can ask either to hear the evaluation (which must be presented if any party requests it), or postpone the evaluation to engage in settlement discussions facilitated by the evaluator, as mediator. If settlement discussions do not ultimately resolve the case, the evaluator may help the parties devise a plan for sharing additional information and/or conducting focused discovery that may result in later meaningful settlement discussions or position the case for resolution by motion or trial.

ENE is a proactive process that provides incentive for litigants by saving money and time. For the many cases in which shared information at the outset is not sufficient to support productive settlement discussions, ENE enables parties to identify the most important disputed issues in their case, both factual and legal. Additionally, it prompts parties to understand better the support for their respective positions on those issues, to narrow discovery and motion practice, and to explore prospects for settlement before spending significant sums getting to a more traditional pretrial mediation. ENE can promote efficiency that will likely reduce court dockets, if Florida judges would consider including ENE among their offerings in managing civil cases. ENE is, of course, nonbinding and confidential and should be utilized before significant motion activity and discovery have been undertaken. An ENE session is not recorded and parties decide for themselves what to include in their presentations. Use of remote attendance such as Zoom is contemplated at least by one magistrate judge.[7] Opposing parties are given an opportunity to respond and the evaluator may recap in order to correct misunderstandings or allow additional material for consideration. The evaluator remains unconstrained in being evaluative unlike a facilitative mediator, but still identifies common ground and encourages parties not to waste resources on tangential matters.

As mentioned, though the evaluator has no power to force the parties to proceed, they may agree to convert the ENE session into mediation. Through mediation, the evaluator can explore whether the parties are able to reach a settlement, or at least can help position them to reach an agreement. The evaluator offers to help overcome the obstacles to settlement that the process has revealed. ENE, much like pre-suit mediation, provides an incentive for lawyers, parties, and claims adjusters to evaluate earlier than they otherwise might.

Endnotes

[1] 1 Brazil, Wayne D., Early Neutral Evaluation, ABA Press, Chicago (2012)
[2] ADR Local Rule 5, Early Neutral Evaluation, U.S. District Court, Northern District of California (2018); Local Rules, United States District Court of Southern California (2022)
[3] N.D. Cal. ADR Local Rule 5-1, 5-8
[4] See Id. at ADR L.R. 5-1, 5-11
[5] See Id. at ADR L.R. 5-13
[6] See N.D. Cal ADR Local Rule 5-9 and S.D. Cal Patent Local Rule 2.1
7 See, e.g., *McCormack v. Sterling Jewelers Inc*., (S.D. Cal. June 14, 2022)

Lawrence Kolin brings parties and their counsel together to settle difficult cases by mediating lawsuits in state, federal and appellate courts. He has successfully mediated thousands of matters, including multi-party and complex civil cases of all types since becoming certified in 2001.

Lawrence formerly served as a General Magistrate in the Ninth Judicial Circuit Court of Florida, presiding over hearings and bench trials. He is also experienced in conducting arbitrations as a qualified arbitrator since 2005. Lawrence is an AV Rated Preeminent™ Super Lawyer® and has been recognized by Florida Trend Legal Elite for Mediation & Arbitration. He is a Graduate Faculty Scholar at UCF and authors OrlandoMediator.blogspot.com.

January 19 Executive Meeting—All Are Welcome

Please join us for the ADR Section's next Executive Council and Member Meeting, in-person and on Zoom during The Florida Bar Winter Meeting at Rosen Shingle Creek in Orlando. The room location will be announced soon. The Florida Bar has reserved a block of rooms at the special group rate of $209 single/double occupancy. The rate is available until December 27, 2022, or until the block is sold out, whichever comes first. Limited self parking is available for $10 plus tax per day per car; valet parking is $40 plus tax per car, per day. One night's guestroom and tax must be secured with payment at the time of booking. Reserve your room online or call 1-866-996-6338 and mention The Florida Bar Winter Meeting.

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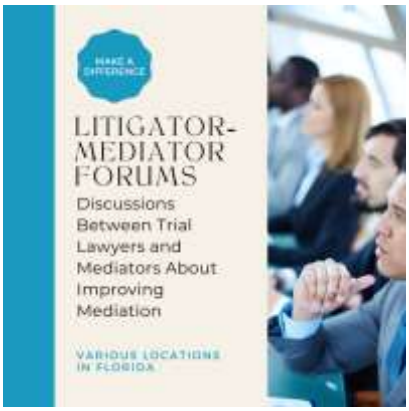
Excellent CLE and Networking Opportunities

Jan. 24, 12–1:30 PM, live GoToWebinar. "Why Aren't They Listening? How to Create Change in a Disputant's Mindset" by Dr. Debra Dupree, PsyD—The MINDSET Doc: Dispute Resolution Specialist, Educator, Keynote Speaker and Trainer. With the advance of neuroscience coupled with the pain of what's transpired during the COVID years, our clients demand a different kind of service (and attention) from the advocate/mediator professional. We know that feelings influence outcomes. We know that emotions convey information that can be used strategically if we know what to look for. And we know there are readily available techniques to reduce emotional intensity (without being a psychologist). This program presents to the advocate/mediator professional behavioral science strategies to bring this together. Course number 6800 is approved for 1.5 General CLE credit. Section members register for only $50.

Feb. 15, 2:30–3:20 PM live GoToWebinar. "Arbitration Myth Busting: Eliminating Misconceptions and Bias Towards Arbitration" by Patricia H. Thompson, FCIArb, JAMS. A business that frequently encounters or often needs to pursue complex claims would prefer to resolve those claims as efficiently, cost effectively, and quickly as possible without sacrificing fairness and due process. The question arises, though which process, litigation or arbitration better serves these goals? Course number 5820 is approved for 1 General CLE credit. ADR Section members register for only $50.

Feb. 22, 12:50 – 1:50 PM live GoToWebinar. "Mediation Opening Statements: Shoulds, Should-Nots, and Should We Even Do Them?" by Natalie Paskiewicz. 1.0 General CLE credit; 1.0 Family Law certification credit pending approval. 1.0 CME credits. Registration opens soon.

SAVE THE DATES for these upcoming CLE programs that will be jointly hosted by the ADR and Family Law Sections of The Florida Bar. Live webinars, 12–1 PM. Details and registration coming soon: **Feb. 9**—Hot Topics in Mediation: Virtual Conferencing, Opening Statements, and Third-Party Participation, **March 30**—Working With Pro Se Parties, and **May 11**—Active Listening and Emotional Intelligence.



Upcoming Litigator-Mediator Forums

January 10, 12 PM—Jacksonville (Jacksonville Bar Association offices)

January 11,11:30 AM–1 PM Hillsborough Association for Women Lawyers (University Club in Tampa)

January 27, 12 PM—Polk County (Location TBD)

February 18, 9–10 AM—ABA In House Counsel-Mediator Forum (Ritz Carlton Orlando Grande Lakes Resort)

March 22, 3–5 PM—Sarasota and Manatee County Bar Associations with happy hour following (Charles Ringling Mansion on Sarasota Bay at New College)

April 5, 12–1:30 PM Hillsborough County Bar Association's 3rd Annual Litigator-Mediator-In House Counsel Forum (Hillsborough County Bar Association offices) Live and Zoom event

ADR Section's Arbitration Committee Launches Monthly Arbitrator's Forum

Calling all members of The Florida Bar who handle arbitration—or anyone who's interested in learning more about arbitration in Florida—our next "Arbitrator's Forum" is Tuesday, Jan. 10, 8–9 AM on Zoom. It's free and it's open to all.

In this session, we will discuss How Arbitrators Can Make the Best of Less-Than-Ideal Arbitration Agreement Terms—Battlefield Stories and Strategies." The Zoom credentials are the same for each Forum. Details are online at bit.ly/ADR_ArbForum5.

- Join the Zoom Meeting here
- Meeting ID: 817 1009 4208
- Passcode: 567343

The ADR Section's Arbitration Committee introduced the forum to create a community of better arbitration neutrals in our state. Join your fellow Florida neutrals on Zoom to discuss what works, what puzzles you, and what might improve your practice.

Keep your calendars marked for the monthly forum sessions!
What: TFB ADR Section's Arbitrator's Forum
When: Second Tuesday of each month
Time: 8–9 AM

Questions? Contact ADR Section Arbitration Committee Chair Patricia H. Thompson, FCIArb, at 305-794-4345 cell, 305-371-5267 office or pthompson@jamsadr.com for more information.

ADR Section Celebrates 2022 Mediation Week With "Mediation Mixers"








The American Bar Association recognizes the third week in October as Mediation Week to educate the public about mediation. During Mediation Week, the ABA encourages all to recognize the importance of the work of neutrals, advocates, and policymakers and celebrate the strides we have made in institutionalizing mediation as a dispute-resolution process.

In keeping with that spirit, members of the ADR Section hosted mixers during October to highlight Mediation Week, provide information about Section membership, and encourage networking and camaraderie among fellow mediators. Thank you to each of the hosts and to the local mediators and advocates who joined them. Read The Florida Supreme Court Mediation Week Proclamation here.

Morgan v. Sundance, Inc.: Arbitration Agreements Cannot be Treated More Favorably than Contracts Generally

By Steven B. Chaneles, Esq., Miami Beach

On May 23, 2022, the U.S. Supreme Court published its opinion in *Morgan v. Sundance, Inc.*, 596 U. S. ___ (2022), wading into arbitration jurisprudence for the second time this term following its March 31, 2022 opinion in *Badgerow v. Walters*, 596 U.S. ___ (2022).

Morgan involved an action brought by a Taco Bell employee against Sundance, a Taco Bell franchisee, in federal court for violations of the Fair Labor Standards Act, notwithstanding that the employment application Morgan signed included an agreement to arbitrate any employment-related disputes.[1] Sundance initially defended itself against Morgan's suit as if no arbitration agreement existed.[2] But eight months after Morgan filed the action, Sundance moved to stay the litigation and compel arbitration under Sections 3 and 4 of the Federal Arbitration Act.[3] Morgan opposed the motion, arguing that Sundance waived its right to arbitrate by waiting so long to seek arbitration.[4]

The district court denied Sundance's motion to compel arbitration, finding that Morgan was prejudiced by Sundance's delay under the prevailing Eighth Circuit precedent specific to waiver of contractual rights to arbitrate. "Under [the Eighth] Circuit's test, a party waives its contractual right to arbitration if it knew of the right; 'acted inconsistently with that right'; and—*critical here—'prejudiced the other party by its inconsistent actions*.'"[6]

The Eight Circuit reversed, concluding that the prejudice requirement had not been met, and sent the case to arbitration.[7]

Nine circuits (including the Eighth) applied an arbitration-specific waiver rule demanding a showing of prejudice, while two circuits rejected that rule.[8] Resolving the split, the Court reversed the Eight Circuit, and held that arbitration agreements cannot be treated more favorably than contracts generally, notwithstanding the FAA's policy favoring the validity and enforcement of arbitration agreements.

The Eight Circuit had adopted the requirement to apply to arbitration agreements specifically because of the "federal policy favoring arbitration."[9] However, the prejudice requirement is not a feature of federal waiver law generally.[10] Rather, tracing the history of the development of the prejudice requirement from a 1968 Second Circuit opinion, the Court observed that the FAA's "'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules. . . .The policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.'"[11]

The opinion is notable for two reasons beyond merely its holding. First, the Court assumed, without deciding, it was appropriate for the lower courts to analyze the waiver issue as a matter of federal waiver law, leaving open the question of whether federal or state waiver law (or some other standard) should apply. "On remand, the Court of Appeals may resolve that question, or . . . determine that a different procedural framework (such as forfeiture) is appropriate. [cite omitted]. Our sole holding today is that it may not make up a new procedural rule based on the FAA's 'policy favoring arbitration.'"[12]

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Second, the Court's prior arbitration jurisprudence regarding neutral treatment of arbitration agreements (that is, interpreting the FAA to mandate that arbitration agreements be treated in the same manner as contracts generally) typically addressed legislation or court rulings treating arbitration agreements less favorably than contracts generally.[13] In Morgan, the Court placed the other bookend – arbitration agreements cannot be treated *more favorably* than contracts generally either, noting that the focus of FAA policy is the enforcement of the arbitration agreement, rather than a preference for arbitration as an alternative dispute mechanism.[14]

Endnotes

[1] Morgan, 596 U.S. at ___ (slip op. at 2).
[2] Id.
[3] Id. (slip op. at 3).
[4] Id.
[5] Id.
[6] Id. (citing Erdman Co. v. Phoenix Land & Acquisition, LLC, 650 F. 3d 1115, 1117 (8th Cir. 2011)) (emphasis added).
[7] Id.
[8] See Id. at ___ (slip op. at 4). *Compare* Joca-Roca Real Estate, LLC v. Brennan, 772 F. 3d 945, 948 (1st Cir. 2014); O. J. Distributing, Inc. v. Hornell Brewing Co., 340 F. 3d 345, 355–356 (6th Cir. 2003); PaineWebber Inc. v. Faragalli, 61 F. 3d 1063, 1068– 1069 (3rd Cir. 1995); S & H Contractors, Inc. v. A. J. Taft Coal Co., 906 F. 2d 1507, 1514 (11th Cir. 1990); Miller Brewing Co. v. Fort Worth Distributing Co., 781 F. 2d 494, 497 (5th Cir. 1986); ATSA of Cal., Inc. v. Continental Ins. Co., 702 F. 2d 172, 175 (9th Cir. 1983); Carolina Throwing Co. v. S & E Novelty Corp., 442 F. 2d 329, 331 (4th Cir. 1971) (per curiam); Carcich v. Rederi A/B Nordie, 389 F. 2d 692, 696 (2nd Cir. 1968) *with* St. Mary's Medical Center of Evansville, Inc., v. Disco Aluminum Prods. Co., 969 F. 2d 585, 590 (7th Cir. 1992); National Foundation for Cancer Research v. A. G. Edwards & Sons, Inc., 821 F. 2d 772, 774, 777 (D.C. Cir. 1987)
[9] Morgan, 596 U.S. at ___ (slip op. at 3).
[10] Id.
[11] Id. at ___ (slip op. at 5-6) (citation omitted).
[12] Id. at ___ (slip op. at 7).
[13] See, e.g., Kindred Nursing Centers L.P. v. Clark, 581 U.S. (2017) (involving a state law prohibiting a someone acting under a power of attorney to enter into an arbitration agreement without an express grant of that authority).
[14] See Morgan, 596 U.S. at ___ (slip op. at 6).

Steven B. Chaneles is an attorney, arbitrator and mediator in private practice in Miami Beach, Florida, specializing in complex commercial transactions and disputes. He is admitted in Florida, Colorado and Virginia and serves on the National Roster of Arbitrators of the American Arbitration Association and is a Florida Supreme Court Certified Circuit and County Court and Appellate mediator.

Why Next-Gen Lawyers Need Mediation Advocacy Training

By Bruce A. Edwards
Edwards Mediation Academy, Tiburon, CA

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Mediation has become a prominent forum for resolving conflicts of all complexities, yet few lawyers are equipped with the skills needed to represent clients effectively in a mediation. Bruce Edwards, a lawyer and leading mediator, shares his list of essential skills for being an effective mediation advocate. He explains why young lawyers should seek training in mediation advocacy to add value to clients and expand their legal practice.

The Decline of the Jury Trial in Civil Litigation. Across the U.S., litigants, in-house counsel, courts, and judges are demonstrating a strong preference for mediation and other forms of alternative dispute resolution for resolving conflicts. By some estimates, less than 1% of civil disputes in the U.S. end in a jury trial. "While litigation isn't going away," says Edwards, "young lawyers will have fewer opportunities to participate in traditional trial litigation. The next generation of lawyers should add mediation advocacy to their skill sets to develop the broadest range of competencies for serving their clients' needs."

The Mediation Mindset is not the Litigation Mindset. As a practicing mediator, Edwards regularly interacts with lawyers appearing in mediations and observes first-hand that many lack the mindset and the client-focused skills needed to be the best advocate for their clients. "When you approach mediation with the skills of a litigation advocate, where your goal is to crush your opponent, you are guaranteed to fail. Winning at mediation requires a different mindset entirely."

9 Essential Skills for the Effective Mediation Advocate. There are distinctly different skills that serve the mediation advocate, and Edwards lists these as essential to success:

Emotional Intelligence. The best mediation advocates will address their client's emotional needs and those of others in the dispute.

Exceptional Listening Skills. An effective mediation advocate must be able to listen with empathy, compassion, and an open mind for new information.

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Strategic Questioning. Unlike litigation, the mediation advocate must learn the art of using all kinds of questions, including broad, exploratory, and open-ended questions.

Empathy. The best mediation advocates appreciate that nothing helps deepen their connection with the other side and soften the tone of the conflict than a genuine display of empathy.

Trustworthiness. The effective mediation advocate must know how to establish trust and credibility with the mediator and others in the mediation.

Preparation. The best mediation advocates know their case inside and out and are well-prepared for any potential derailing moments in the mediation.

Flexibility. The best mediation advocates come to a mediation prepared to pursue their side as vigorously as possible but anticipate that in the end, there will still likely be a difference of opinion and positions between parties.

Creativity. The best mediation advocates appreciate that mediation is really about the art of exploring the possible ways to match the client's interests with creative solutions.

Patience. The most effective mediation advocates prepare themselves and their clients for the patience required to work through complex issues and negotiate an agreement.

To help lawyers gain the skills and knowledge they need to represent their clients effectively in a mediation, Edwards has developed a comprehensive training course, The Effective Mediation Advocate, available through Edwards Mediation Academy.

Bruce A. Edwards is an ADR industry pioneer and former chairman of the board of directors of JAMS, largest private provider of ADR services in the U.S. Along with his wife, Susan Franson Edwards, Mr. Edwards cofounded Edwards Mediation Academy, an online education platform dedicated to improving the skills of mediators around the world.

EDWARDS
MEDIATION ACADEMY

Clerk Of Court Online "Case Search" Function and "Registered User" Status Helps Neutrals Review Pleadings in Florida State Court Cases

By Ana Cristina Maldonado
Upchurch Watson White and Max, West Palm Beach

Some neutrals like being parachuted right into their case with no advance information. Others prefer the "reach out and touch someone" option, picking up the phone and contacting counsel or parties in advance. Some mediators and arbitrators include requests in their engagement letters and pre-session emails asking lawyers or paralegals to provide any relevant pleadings for review in advance. If you are the type of mediator who prefers to prepare, you have some additional options that you may not be familiar with.

With minor advance paperwork, it is possible for a mediator or an arbitrator to gain full access to the pleadings on a case docket in most Florida Circuit and County court cases through the local Clerk of the Court.

There are 67 counties in Florida, and each one has an elected Clerk of the Court, who—among other functions—serves as the file keeper for the pleadings on County and Circuit court cases. Many clerk services have gone digital. Gone are the days of waiting at a window for a Deputy Clerk to locate and hand you a physical copy of the file.

If you want to use the Clerk websites to research an upcoming case, you have two options.

Case Search. Each county clerk office now has a "Case Search" that is public record. This search covers nearly all types of cases, with the exception of juvenile dependency and mental health-related matters. If you have some information on a case, you are able to input it and get the correct style of the case, verify a case number, see the lawyers and judges on a case, and view the list of docket items and the dates on which they were filed. If you have a paralegal or assistant, they probably use this function all the time to verify that case information they are using is correct. As a neutral, having the ability to look up the docket allows you see if there are pending motions, upcoming hearing dates, existing orders on the file, etc. You can benefit greatly from having such advance notice of the procedural stance of a case without having to ask the lawyers or parties.

"Registered User" status. As mediators and arbitrators, we qualify under the "Registered User" category created by AOSC2020-108, In Re: Access to Electronic Court Records. Mediators and arbitrators can contact Clerk of the County offices to obtain Registered User status. This generally involves a simple form, which has to be notarized and physically submitted to the Clerk's Office. Once approved, you receive a username and password via email from the Clerk. With your new log in credentials, you can use the same "Case Search" function, except that as a Registered User you are able to view a PDF of the actual documents that are filed with the Court, instead of just the line item on the docket. In addition to reviewing the procedural stance of a case, you can see the substantive matters that are being pled. Some neutrals bill for this advance preparation. Your parties and counsel will appreciate that you are knowledgeable and prepared.

There is no statewide "Registered User" category.

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Clerk Of Court Online "Case Search" Function and "Registered User" Status Helps Neutrals Review Pleadings in Florida State Court Cases

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You have to repeat the procedure in each county where you wish to obtain log in access. While you don't need to register in all 67 counties, it is beneficial for you to sign up for "Registered User" status in your home county, and to consider registering in any nearby counties where you work regularly.

My local Clerk's "Registered User" log in page is saved as a Bookmark on my browser tab, and I run a case search on every case that comes to me.

So, visit your local Clerk of the Court's website, try a "Case Search," and consider applying for "Registered User" status. If you learned Zoom two years ago, you can definitely do this. It is simple and worth it!

Ana Cristina Maldonado is a mediator and arbitrator with Upchurch Watson White and Max as well as a mediation trainer. She is Treasurer of the ADR Section and Co-Editor of The Common Ground.

- 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

The Common Ground is a publication of The Alternative Dispute Resolution Section of The Florida Bar. Statements of opinions or comments appearing herein are those of the contributing authors, not The Florida Bar or the ADR Section.

Editors Ana Cristina Maldonado and Natalie Paskiewicz are soliciting articles for the Spring 2023 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

FLABARADR.COM

@FlaBarADR

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