Florida Mediation Institute

Volume XI, January 2012

The Funnel of Conflict Resolution: The Stages of Conflict and Opportunities for Resolution

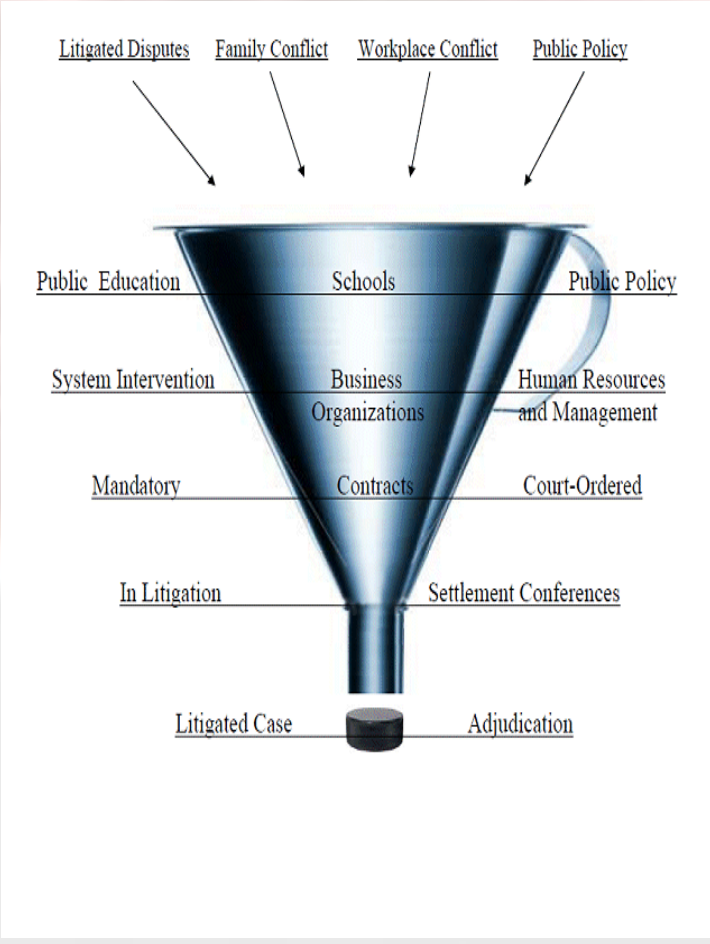
By Lee Jay Berman

The Stages of a Conflict

The world of conflict can act like a funnel, in that disputes can enter from any of a variety of areas of life and can take all forms (arguments, disputes, accidents, cultural trends). As a society, and as a mediation community, we can address these disputes at many different stages.

Early intervention of conflict resolution requires that either those people in dispute are aware of mediation, or that mediators can find them early in their process. The best way to reach people early in the dispute is through generalized public education about mediation, increasing public awareness, and making it generally accessible and available to them. This can best be done in schools, as we try to teach youngsters about conflict resolution. It can also be approached through public policy measures, promoting and funding dispute resolution centers.

Most disputes that continue beyond this early stage, become more serious and formalized, in that they can begin to affect additional people (in businesses or organizations) and can require intervention through systems, including human resources, management and sometimes organizational consultants. Disputes at this stage can often be resolved in face-to-face negotiation, without additional parties.



Continued, Page 2.

Disputes that are not resolved at the system level, generally require more formal intervention, if not even a push or a mandate to seek out dispute resolution. This level often requires mandatory intervention, either through contractual requirements or public policy or a court order to attempt mediation before parties can take the next step in the escalation of the conflict (often arbitration, litigation, or administrative hearings). This is often what mediators call "the last rational moment," meaning that it is the last opportunity for the disputants to engage in conflict resolution or problem solving before they have engaged in the polarizing activities of an adversarial process.

It is never too late to attempt to resolve a conflict. Often in the middle of the litigation process, even just on the eve of trial, parties can still engage in a form of conflict resolution, either through a late voluntary mediation or a settlement conference (either voluntary or mandatory). Seasoned mediators have even seen cases during trial, post-verdict, and upon and during an appeal. By this time, a compromise for the sake of avoiding risk is generally the best case scenario.

Finally, while self-determined resolution can happen at most any phase, some disputes (and some disputants) simply require a third-party determination. In this case, an arbitrator or judge decides the case for them.

How Conflicts Get Resolved at These Stages

When a conflict begins, it is often about the people involved. The conflict at this stage is often driven by, "I don't like the way you treated me" or "You stopped returning my phone calls, so you left me no choice" or "I'll show you… ." Resolutions at this early stage of the conflict can often take the form of correcting misunderstandings, better managing expectations, apologies and forgiveness, and reconciliation of the parties. The primary dispute resolution methods in this early phase often involve mutual dialogue, collaboration, creative problem solving and brainstorming.

As disputes remain unresolved and enter the next stage of the conflict, it can begin to center around the secondary effects of the dispute. This is where people act upon their assumptions about the motives they ascribe to the other person and begin to take retaliatory steps or even what they perceive to be an uneven score between the parties. It sounds like, "Well, he did this to me, so I did that to him because he deserved it." In complex organizations, it can take the form of passive-aggressive behavior such as torpedoing a project headed by that person or of more direct action like asking for a transfer. If it hasn't been exposed by this time, this can be where the underlying conflict surfaces – the conflict that is driving the dispute. It can sound like, "You don't like people like me, I've heard you say it before, so that's why I know it was you who told so-and-so that I did this."

By the more compressed stages of the conflict, it has generally been stated out loud, denied, and remains unresolved. The parties now clearly know what they are fighting about and have refused or been unable to have the kind of dialogue that can resolve the dispute. The parties' stubbornness has been triggered, their competitive juices are flowing and each refuses to "back down," and they both see a settlement as backing down. Each is now showing their bravado by escalating the fight, whether it is in a formal way by increasing the temerity of their discovery demands, or less formal by back-stabbing the other with friends and playing "social politics." In this stage, they often need to be sent into a mandatory dispute resolution process, where the intervention is much more involuntary, and must be done with more strength. Sometimes, conflict resolution can occur at this level, but often times, resolving the instant dispute is the best for which we can hope. Sometimes, kindness and transformative mediation methods can work at this level, but more often, compromise, distributive negotiation and risk assessment are the prevalent dispute resolution techniques at this stage.

Finally, in the late mediations and settlement conferences, the only reasons that people will tell a story is to vent and get it off of their chest, and to attempt to justify their demands. They rarely tell a story at this stage because they are interested in reconciling the events or in restoring a relationship. Here, the dispute resolution method generally more closely resembles getting a settlement done and bringing an end to an otherwise distasteful experience.

Continued, Page 3.

The Florida Mediation Institute Thanks the 2011 Program Sponsors:

"The Funnel of Conflict Resolution," from Page 2.

What Happens to the Dispute (and the Disputants)

One reason for the shape of the funnel is that disputes are being resolved at every stage of the process. By definition, fewer and fewer of them filter down to the next level. At each declining level, the disputants become more hardened and more of the juice gets squeezed out, where the juice is the flavor, the seasoning, the softness of a dispute (and disputant). By the time the dispute gets to the bottom, has been through the litigation process, and is ready to be adjudicated, it has become so much about "just the facts" that the human element is almost removed.

By the end stage, the lawyers and jury consultants have sometimes squeezed all of what matters to the disputant out of the story, and reduced it to the most relevant and compelling facts. "Why" doesn't matter any longer, only "What" does. The stories have been told so many times, that they don't carry any feeling with them any longer, and to the extent that they do, it's more the aggravation of the process they have been through (or perceive the other as having put them through) than their real outrage or hurt over the original event.

The Disputants are no longer in it to heal, and most aren't in it to right a wrong at this stage, they are mostly still in it because they want what they think is fair (in the form of a resource – money or some other thing), or because at this stage, they are simply resigned to winning at all costs.

Simply put, the earlier in a dispute it can be resolved, the better it is for all involved. Outcomes tend to be more creative, collaborative and restorative. People work together to resolve a problem, rather than oppositionally. And the mediator can be creative and can be involved in building something, rather than surgically removing two people.

How We Grow Mediation

Because mediators who work at all of these differing levels of the funnel understand this, and assuming that while it may make logical sense to a person if it is explained to them, the reality is that when involved in a dispute of their own, they will abandon all such understanding and act as anyone does who is involved in a dispute – emotionally.

Continued, Page 4.

"The Funnel of Conflict Resolution," from Page 3.

In many markets in the United States and abroad, mediation of litigated cases has hit a point of saturation. Like ants to a picnic, mediators ran to the courts, first in an effort to demonstrate the value of mediation in a litigated setting. Like when the reporter once asked Willie Sutton, the famous bank robber, why he robbed banks and he answered, "Because that's where the money is;" mediators will answer, "because that's where the disputes are." Truth be told, though, like money, disputes are everywhere. What Sutton meant is that banks were the place where the most money was consolidated together in one place. The same goes for disputes, while the courts certainly hold a consolidated mass of them, they actually only hold a very small percentage of them. Think about every dispute in your life – does it rise to the level of litigation? Only a small percentage of them really do. And if we're following Warren Berger's advice, we're only using the courts as our last resort.

Building on this logic, if mediators everywhere are running to the courts to find disputes to mediate, and given that at least in California, civil filings are down, that means two things. First, it means that we are intervening into disputes at the latest and toughest stages, often allowing mediators to utilize a small portion of their skill set to hammer out compromises (or, worse yet, causing mediators to only develop those skills that they need for that purpose). Second, it means that there is a limited number of matters available to be mediated, as there is a fixed number of litigated cases filed each year, and in some mature mediation markets, if you divide those cases by the number of mediators, there is not much of a career there.

The latest studies say that of all of the cases filed these days, only 1.5% of them actually go through trial. That means that 98.5% of all cases are disposed of at some time between filing and trial. I believe that the same proportion applies to disputes – that of all of the disputes that happen in the world, only about 1.5% of them end up being filed as lawsuits. The rest, like the lawsuits, are resolved somehow, or people just walk away from them. When two basketball players get into a fight on the court, or a teenaged boyfriend and girlfriend have an argument, or a parent gets upset with a child, the public rarely hears about it. So, if only 1.5% (or some number like that) of all disputes make it to the court house, that would imply that the overwhelming majority of disputes live outside of the courthouse, or upstream in our funnel.

In order for mediation to grow as a profession, it has to push back up the funnel closer and closer to the top. If what comes out the bottom of the funnel, after it had been through litigation as well as all of the processes along the way, is a juice-less, hardened, dried out, densely compressed disk like a hockey puck, then for every one of those there are dozens or hundreds or thousands coming into the top of the funnel. They enter the funnel fluffy and pliable like cotton candy, and that is when mediators should want to get to them.

For mediators, this means connecting with (from the bottom up) insurance adjusters for claims that haven't yet reached litigation, to human resource professionals, to leaders of religious congregations, non-profit boards and organizations and through mass media, volunteers in schools, public officials and non-profit dispute resolution providers to help spread awareness of the availability of mediation and mediators.

In the end, while a small number of disputes will always be headed on a bee-line right for the bottom as they enter the funnel, the majority can be resolved much earlier, if mediators can intervene earlier and educate the public more broadly, both by empowering them with conflict resolution skills and by making them aware of the availability of mediation early in the dispute.

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Debunking Mediation Myths

by Steven H. Kruis, Esq.

Myth No. 1: All Mediations are the same -- One Size Fits All.

There are at least three types of mediation models: the facilitative, the evaluative, and the hybrid. Under the facilitative model, the purist mediator works toward finding creative solutions that meet the interests and needs of both sides, ascribing relatively little importance to the legal rights of the parties. The best cases for the facilitative model are those more about hurt feelings and anger than money. The mediator is a facilitator, not an evaluator. The purist mediator would say most of his/her disputes are not about money, and (s)he expresses no opinion about either party's position in the case. Under the evaluative model - on the other end of the spectrum - the mediator analyzes the case and tells the parties what (s)he thinks it is worth. The mediator attempts to convince both counsel and their clients that his/her evaluation is right. The process is solely about money; the emotional aspect of the case is largely irrelevant. The mediator may not even talk to the parties. This model closely resembles a judicial settlement conference, and the neutral is sometimes referred to as a "muscle mediator".

Under the hybrid model, in the middle of the spectrum, the mediator, a skilled facilitator with a legal background, shares neutral impressions with the parties to help them evaluate their case. Instead of assigning a value to the case and prevailing upon the two sides to agree with the mediator, the hybrid model mediator attempts to get the two parties to agree with each other regarding the settlement of the case. The hybrid model is usually most conducive to settling the types of disputes civil litigators handle. There is emotion in virtually all litigation, whether it involves personal injury, real property, employment, or business matters. Emotions must be addressed before the parties can get down to the important business of negotiating a settlement. If ignored, the emotional baggage hinders settlement. However, civil litigation is often ultimately about the dollars, which will change hands following a settlement.

Not all mediators follow the same model, so not all mediations are the same. Mediators are stylistically different and at different points along the spectrum. In selecting the appropriate model (and mediator), the litigator should consider the model that is best for the lawyer and client in light of the personalities involved and subject matter of the dispute. The mediator will ordinarily provide references to lawyers who have used the mediator and can tell you about his/her style.

Myth No. 2: Certain Types of Cases Cannot Be Mediated.

All types of cases can be mediated. The subject matter and amount in controversy are generally irrelevant. The real question is one of timing - is the case ripe for mediation? Do you have enough information to negotiate intelligently? For example, in a personal injury case, the parties need to know enough to address liability, causation, and damages. In a real estate non-disclosure case, the parties should know about proposed methods and costs of repair, i.e., damages, in addition to facts establishing and refuting liability.

Myth No. 3: Ex Parte Communication before the Mediation Is Improper.

The ex parte rules that apply in judicial proceedings and arbitration do not apply in mediation, because the mediator cannot impose a decision on the parties. Rather, the mediator assists the parties in resolving the dispute. The more information the mediator obtains, the greater the likelihood of settlement. After the joint session, the mediator will meet privately with each side in "caucuses" that are, essentially, ex parte communications. Caucusing can begin before the mediation, and attorneys should feel comfortable calling a prospective mediator to determine if (s)he is appropriate to mediate the case.

Continued, Page 6

"Debunking," from Page 5.

Myth No. 4: When the Case Has Not Settled at the Conclusion of the Mediation Session, the Parties Proceed to Litigation.

Most cases that go to mediation will settle. Some of those cases, however, may require additional effort after the formal mediation session has ended. Mediation is an ongoing process. Although progress towards settlement may come to a standstill on a particular day, future settlement is still possible. If the potential for settlement exists, the determined mediator will continue his/her efforts. Evidence Code section 1125 recognizes the reality that some cases need the extra effort after mediation, and makes post-mediation discussions inadmissible. A good mediator is the last one to give up on settlement. His or her tenacity will result in an agreement most of the time.

Steven H. Kruis graduated with honors from the University of Notre Dame in 1977. Selected as a 1978-79 Rotary International Scholar, he studied in London, England, and subsequently received his Juris Doctor degree from the Notre Dame Law School in 1980. Since 1997, he has been affiliated with Markus ♦ Kruis ♦ Mediation and serves as a full-time neutral mediating real property, employment, injury, and other disputes throughout Southern California.

How many mediators does it take to change a light bulb?

First of all, let's be clear that it isn't the mediator's function to change the light bulb.

The mediator will explore with the light bulb how it feels about the on and off nature of its job, its unhappiness at always having to work nights, and its relationships with the other parties, including the new light bulbs that it feels are a threat to its position.

The mediator will talk to the new light bulbs, reframing and normalizing their observation that the principal light bulb is completely out of its box, and identifying that their real issue is that being picked on one at a time constantly undermines their team spirit.

The darkness seems quite hostile to all the light bulbs and keeps telling them to go and unscrew themselves. The mediator will allow it to vent its anger and express its distress at how it always feels unwanted.

The mediator will help guide the darkness and the light bulbs, both new and mature, to a solution reflecting their new understanding of each other. Bright sparks will realize that you'll have to be left in the dark now because the final outcome is confidential.

http://www.consensusmediation.co.uk/mediationjokes.html

Meet Your Board

David Henry is a partner in the Orlando office of Swartz Campbell, LLC and a Florida Supreme Court Certified Civil Mediator. He is the immediate past chairman of the Florida Defense Lawyer Association (FDLA) ADR Committee. After graduating from the University of Florida College of Law in 1988, David was a law clerk at the Fifth District Court of Appeal. His litigation and mediation practice has been diverse. He has helped resolved complex commercial disputes, catastrophic personal injury cases, insurance coverage claims, premises and products liability, D&O and E&O claims, intellectual property litigation, and a myriad of real estate, title and business disputes. He was the program chair of the FDLA – Florida Academy of Professional Mediators (APM) ADR Symposium in 2010. He is a frequent public speaker to insurance and bar industry groups including the Society of Certified Insurance Counselors, Defense Research Institute, the West Palm Beach Trial Lawyers Association, the Orange County Bar and the Professional Insurance Agents of Florida. He has written and published on agents E&O, mediation practice and ethics. He is a nationally recognized expert on insurance for intellectual property and agents & brokers liability. dhenry@swartzcampbell.com

Seven Steps to Effective Mediation

By: Diana Santa Maria and Marc Gregg

Settling a case before trial often involves mediation.

In its most basic form, mediation is a process in which a neutral third party called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is a non-adversarial process designed to help the disputing parties reach a mutually acceptable agreement.

In mediation, decision-making authority rests with the parties. The role of the mediator is to assist them in identifying issues, fostering joint problem solving, and exploring settlement options. Since each party wants to mold any settlement to its own benefit the actual process can combine elements of show-and-tell and poker.

Whether mediation before trial is court ordered or voluntary, lawyers have a duty to their clients to maximize the potential for settling fairly and equitably, Of course, not all cases can be settled. Where it is clear there is absolutely no chance of settlement, you should ask the court to be excused from mediation to avoid wasted effort and any unnecessary expense.

However, even when a case does not resolve in mediation, the experience may prove invaluable because the information that is gleaned during negotiations may compel the parties to take a new approach to the case. Mediation affords an attorney the unique opportunity to evaluate an opponent's style and the issues an opponent will be emphasizing at trial. It will also allow the attorney to assess how well an opponent responds to the weaknesses in a case. This is often the same kind of information lawyers seek through depositions and carefully planned discovery requests.

The following tips can help produce a successful mediation:

1. Choose a mediator carefully.

Opinions differ on the importance of choosing a mediator. Some attorneys believe that the choice has little or no bearing on the outcome, so they give little thought to this part of the process. However, we believe that choosing an appropriate mediator is as important and deserves as much of a lawyer's attention as selecting jurors for trial. Unlike at trial, the parties at mediation settle the case among themselves rather than submitting to the decision of a judge or jury. However, whether in trial or mediation, lawyers are obligated to provide clients with the same level of care, be it in selecting jurors or in selecting a mediator. Lawyers who have a working knowledge of the mediators in the local circuit and who carefully consider mediators' personality styles, backgrounds, and suitability for a given case are paving the way for a successful mediation. A mediation is essentially a negotiation between the parties and is governed by the same principles that apply to any negotiation. The process varies depending on the personalities, goals, and strategies of the participants including the mediator. To a great extent the personality styles of the participants determine the outcome. Since the mediator's job is to facilitate a resolution that the parties and their counsel working alone cannot accomplish, the mediator's style can be a great aid - or a great impediment - to the negotiation.

Understanding personality characteristics and negotiating styles will give you an advantage at mediation. Negotiating styles may be identified and grouped according to four basic personality types: directors, influencers, steady types and compliant types.

Directors, as their name suggest, want immediate results. They accept challenges and they make things happen. Directors seek power and authority, prestige and challenge. They need others to weigh the pros and cons of an action and calculate risks.

If you know that certain parties or their counsel are directors, selecting a directing mediator is likely to bring mediation to a quick, but perhaps premature, conclusion. Any settlement would tend to be accomplished quickly, but your client could get shortchanged in the process.

Continued, Page 8

Influencers are articulate "people person" types who make favorable impressions on others. They want to be popular, and social recognition is important to them, as is freedom of expression. Influencers need others to seek out the facts and focus on the tasks at hand.

An influencing type mediator may be able to keep a mediation socially lubricated, so that directing parties do not reach an impasse or walk out too soon. The chances for a settlement between two directing parties would tend to be increased with a well-respected, influencing type mediator.

Steady types are patient people who focus on getting the job done. They want security and prefer the status quo unless valid reasons indicate change is necessary. Steady types need others who can react quickly to unexpected change and extend themselves in new ways to meet the challenges of an accepted task.

A steady-type mediator could be particularly effective when the parties are influencers, providing a patient focus on the facts and the job at hand. Any settlement would be more likely to account for all the facts and needs of the parties. Details that otherwise might be overlooked by influencing or directing types will more likely be covered.

Compliant types tend to concentrate on key details. They focus on key directives and standards. They want a sheltered environment with standard operating procedures and security. Compliant types need others to delegate important tasks and expand their own authority.

A compliant type may be most useful in mediation between director and influencer parties, accepting delegation of various tasks and providing no challenge to the parties' desire for control and expression. In this situation, a settlement would likely take into consideration the concerns and fully articulated positions of the parties. The compliant-type mediator, under the circumstances, would act more as a messenger between the parties.

The implications of this kind of analysis for the mediation process are readily apparent. The point is that the process and outcome of any mediation will depend in large part, on who the participants are. So, it is important to select a mediator appropriate to the psychodynamics of a particular case, given the parties, issues, and counsel involved.

2. Prepare for mediation, and know the client's bottom line.

Prepare and plan the mediation as if you were preparing for trial. Show confidence, commitment, and professionalism at every stage of the process. Remember, the opposing party is evaluating all aspects of the mediation.

Be prepared and prepare your client, because the possibility always exists that *the* mediation will reach an impasse. Be sure the client is prepared to discontinue the process if it appears futile.

Know the client's bottom line. Confirm it beforehand and be clear about this. If you are ambivalent on this point, your ambivalence will be construed as less than a full commitment to the client's position. Be prepared to end the mediation if it becomes clear that the client's bottom line will not be reached.

An exception to this rule occurs when new information emerges that materially affects the client's position. You then need to be prepared to work with the client to agree *on* a new bottom line so that the mediation can continue.

Clients who are well informed about the process are more relaxed and make a better impression. Ensure that the client knows the purpose of mediation, the gamesmanship involved, and the likely goals and strategies of the other party.

Clients need to know that they are an integral part of an effective presentation and that they should display an appropriate attitude during the mediation despite any negative feelings they have toward the other party. Clients should come to your office appropriately attired and ready to finalize strategies at least two to three hours before the mediation begins.

Communicate clearly to the client what the odds of a successful outcome are if the case goes to trial. The client is relying on your guidance to make informed decisions. Analyze all offers from the other side with realistic expectations.

Make counter-offers that consider the client's bottom line, the appropriateness of the last offer discussed, as well as the history of the mediation's give and take. However, do not consider how long the mediation has already taken.

Continued, page 9

"Seven Steps," from Page 8.

Mediation can reach a good result at any time, be it 1 hour or 23 hours into the process. Always try to approach each point in the negotiation with fresh energy to avoid mental traps that could adversely affect the client.

3. Negotiate at a time and place that is advantageous.

Avoid negotiations that take place too early or too late in the day or in too close proximity to other unrelated, important events, such as an important hearing on the same day. You need to be able to adjust your schedule to stay longer than planned for your client if the mediation is flowing and purposeful. Ensure that all the key participants are as focused and alert as possible. At minimum, the mediation should take place on neutral, comfortable ground that is convenient to counsel, client and mediator.

You and your client should arrive early to familiarize yourselves with the environment and the surrounding facilities. Avoid bringing along the entire case file, but do have all supporting documents, such as accident reports, medical records, applicable case law, and economic loss analysis. If necessary, also bring appropriate support staff to assist with document retrieval.

When possible, use this time to set up visual aids that will keep the mediation visually lively. Make sure all electronic equipment is operational and correctly positioned. In personal injury cases, use blow-up exhibits of the client's injuries and other key pieces of evidence. Mount on poster board and visually enhance important documents and critical medical records, just as you would for trial. A little extra expense and attention to these details could make a tremendous difference in the way your case is evaluated by your opponent.

4. Share information strategically.

By the time a case reaches mediation, quite a bit of information has already been disclosed by each side, particularly if the case has been litigated for a while. Before putting the matter into suit, you may have presented the other party with a demand package that disclosed your theory of liability and outlined your client's damages. At the mediation, you should build the initial presentation on this previously disclosed information, emphasizing the elements that support a favorable settlement.

Continued, page 10

The Florida Mediation Institute Names 2012 Board of Directors

The FMI continues to grow to serve Florida's mediators. The interest in mediator continuing education, and the response to the FMI continuing education programs has been resounding. The FMI Board is expanding the focus of this organization to a national audience, while maintaining the mission of providing exceptional CME opportunities to Florida mediators. The FMI welcomes its new Directors and thanks the founding officers and Directors ("*") for their vision, efforts, dedication and focus in bringing this organization to the fore in mediation education and information.

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"Seven Steps," from Page 9.

It is possible that the other party and the other party's counsel have taken a relatively routine approach to the case until the mediation. Use mediation to hammer home your case, exposing the reasons why the plaintiff will win big at trial.

Address your case's potential weaknesses, but also explain why the strengths of your position outweigh any weaknesses and why you will obtain a favorable verdict at trial. Let the other side see how the case will play to a jury. In some cases it may be advantageous to show a short video highlighting the strengths of the case. The video should include excerpts of depositions of key experts and before-and-after witnesses, scenes of the client before and after the injury, newspaper articles noting the client's achievements, and accolades awarded to the client before the injury. These can take any form desired as there are no evidentiary rules at mediation.

Remember, there are no guarantees that the case will be settled. Even though each party should arrive at mediation prepared to resolve the case in good faith, part of the other side's motivation may be to prepare for trial – not to actually resolve the case. Do not disclose any more elements of your position than you have to in order to achieve a satisfactory settlement that is fair to all the parties.

On a related note reserve some information to use later in the mediation. A successful mediation may take hours to resolve. If you allow your opponent to understand your position too early, he or she will make an offer based on that understanding. Withholding some information allows you to reveal your position in stages, and a more satisfactory settlement for all parties is likely to result, based on a better understanding of your client's position.

5. Prepare the mediator.

Several weeks before the mediation, prepare a written overview of the case – for the mediator's eyes only – that gives a quick, accurate reference to all pertinent information, and hand-deliver it to the mediator immediately before the mediation. Stamp it confidential, because this is your work product, which reflects your mental impressions of the case.

For example, in a personal injury case, include the client's name, date of the collision, current age and age at the time of the collision, and employment information and earnings on the date of injury. Also provide the facts of the case, counsel's theory of liability and the other side's defenses, as well as why those defenses fail or don't materially affect a favorable outcome for your client. In addition, give a detailed description of the client's current damages, including all injuries, the impact on the client's life, the assessments of all treating physicians and other out-of-pocket and earnings losses.

Include a detailed description of the client's future prospects. Provide specific information about the client's future economic losses, including medical needs and earnings capacity losses prepared by an economist or vocational rehabilitation consultant. Also give a summary of the insurance limits or resources available from the other party and any coverage issues that may apply.

A good mediation should be impartial, which implies a commitment to aid all parties, not any individual party, in moving toward an agreement. This commitment is mandatory in Florida, which has adopted mediator qualification requirements and to our knowledge is the only state to implement a disciplinary process for mediators. Nothing in this obligation, however, precludes the mediator from making a professional determination that the case should be resolved on one party's terms. In fact, any agreement based on the mediator's impartial view of the merits of each side's case will be entirely appropriate from the perspective of the mediator's statutory or ethical obligations, as long as the mediator remains impartial.

If you are comfortable with and respect the mediator, let him or her be your sounding board. When meeting privately with the mediator, be candid when discussing any offers the other side may have made. If uncertain, ask the mediator for strategic input as to what the next move in the process should be.

Mediation statutes generally provide that, with certain very limited exceptions, nothing that is said to a mediator during private caucus may be disclosed to the other party or anyone else without the disclosing party's consent, and the confidentiality of all mediation proceedings, including any disclosure of records or materials, must be maintained. This confidentiality requirement encourages open and honest negotiation by the parties.

A good mediator will recognize the strengths and the weaknesses of the plaintiff's case --and the defendant's -- and steer both disputing parties toward a fair and equitable result.

Continued, Page 11

Mediator Resources

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Mediate.com
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ADR Resources
http://www.adrr.com/

National Institute for Advanced Conflict Resolution
http://www.niacr.org/pages/mediation_resources.htm

Mediation Resource Center
http://mediationresourcescenter.com/CT

Mediation Center
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For Their Support of the FMI and its Educational Efforts for Mediators

"Seven Steps," from Page 10.

6. Use the mediator as a messenger.
Certain information cannot be conveyed to the other side without evoking adverse -- or even hostile -- reactions. For example, a non-negotiable aspect of your position can rarely be brought directly to the other party without causing that party to raise an equally non-negotiable position. This can be unfortunate, because these delicate facts may be the key to a successful negotiation. By expressing this information to the mediator in private and encouraging the mediator to communicate it to the other side, potentially explosive reactions may then be defused.

The mediator's job is to move the parties off their initial positions toward settlement. Provide the documents, facts, or theories that go to the heart of the other party's weaknesses to gain additional leverage for your client. Doing so helps bring the other side closer to a fair settlement.

Although being candid with a good mediator is important, let the mediator discover all the case facts over time. A mediator who understands the plaintiff's bottom line too soon will spend less time exploring available options and may miss an opportunity to effect a more equitable settlement.

A mediator who arrives at a gradual understanding of the plaintiff's position will be more likely to engage in new methods of problem solving to settle an old and frustrating problem. Remember, mediation is a journey for all the participants, and shortcuts may shortchange the process, possibly to the client's detriment.

For example, there is often a chance --however slight -- that you could be underestimating the value of your case. In fact, the opponent may be willing to pay more than your client's bottom line. By allowing the mediation process to run its course, both sides may facilitate a creative solution in which the parties reach an unexpected -- but mutually agreeable --settlement.

7. Seal the deal in writing.

A clearly written agreement is the goal of mediation. Ensure that this document carefully describes the intent and agreement between the parties and is signed by all parties and their counsel. The time frame for all payments should be clear, as should any unacceptable release terms. This way, elements of the settlement not explicitly addressed in the written agreement will be unenforceable.

Continued, Page 12

"Seven Steps," from Page 11.

The agreement should he written by one person, with input from each of the parties. This reduces the opportunity for error that can result when too many hands create a document. The agreement can be comprehensive or merely memorialize the basic elements of the settlement depending on how the parties wish to construct the binding aspects of the agreement. At a minimum, the agreement should ensure that all the key elements of the settlement, including the respective obligations of the parties, are sufficiently detailed so as not to be subject to interpretation later. Ambiguity can kill the deal.

Given the evolving trend toward mediation as a viable and sometimes mandatory exercise in dispute resolution, the future promises to test the traditional role of trial lawyers in ways that will challenge their imaginations and creativity. Trial lawyers need to be alert to maximizing the potential benefits that mediation may bring to their cases.

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Mediator Michael Crumpler discusses with an FMI lecturer while Mediator Wilbur Anderson looks on

Some Thoughts:

"A people that values its privileges above its principles soon loses both."

Dwight David Eisenhower

"For everything you have missed, you have gained something else, and for everything you gain, you lose something else."

Ralph Waldo Emerson

"Distance not only gives nostalgia, but perspective, and maybe objectivity."

Robert Morgan

"Quality, quality, quality: never waver from it, even when you don't see how you can afford to keep it up. When you compromise, you become a commodity and then you die."

Gary Hirshberg

The New Rule 1.720, How and Why Workers' Compensation is Different

By: David Langham

On November 3, 2011, the Florida Supreme Court adopted amendments to Florida Rule of Civil Procedure Rule 1.720 (SC10-2329). The calls and inquiries then began as to how this change affects mediation of workers' compensation cases. In a nutshell, this has no affect on workers' compensation mediations.

The development of workers' compensation rules has a somewhat complex history, which would make for a fairly good law school final examination on separation of powers and legislative delegation of authority. The Office of Judges of Compensation Claims is part of the Executive branch of Florida. *Jones v. Chiles*, 638 So.2d 48, 51-52 (Fla. 1994). It was created by the Legislative branch as a mandatory, in most employment instances, alternative to the tort system in which the vast majority of personal injury allegations proceed. Clearly, the legislature may delegate authority in this manner.

The Industrial Relations Commission (IRC), which housed the adjudicatory function of workers' compensation disputes in the 1960s recognized the need for some form of workers' compensation procedural rules to bring consistency to the processes and procedures. The IRC drafted rules and submitted them to the Florida Supreme Court for approval. In 1973, the Court adopted those procedural rules, and in 1974 the Florida Legislature amended Chapter 440 to specifically delegate workers' compensation rule-making authority to the Court.

In 2004, however, the Court concluded that the legislature did not have authority in 1974 to delegate this authority to the Court, and that the Court "lacks the authority to promulgate **rules** of **workers' compensation** procedure." Amendments to the Fla. Rules of Workers' Comp. Procedure, 891 So.2d 474, 477 (Fla. 2004). This opinion contains a more detailed recitation of the history of workers' compensation rule development. In the end, however, the Court held that the authority to promulgate procedural rules lies currently with the Division of Administrative Hearings (DOAH), and not with the Courts.

With seven years passed since that decision, the relationship of workers' compensation disputes to the Rules of Civil Procedure would presumably be "old hat." However, with the publication of the changes to Rule 1,720, the inquiries began, from lawyers, judges of compensation claims and mediators alike.

Rule 1.720 as amended, clarifies what constitutes attendance at a mediation. The attendance requirements may be altered by the parties through a written stipulation or by order of the court. Intertwined within that attendance provision is a series of statements regarding the "full authority to settle," which is not new, but which clarifies the requirement that a representative of any insurance carrier attend with the same full authority. The Rule then addresses "full authority" by adding paragraph (C):

> (c) Party Representative Having Full Authority to Settle. A "party representative having full authority to settle" shall mean the final decision maker with respect to all issues presented by the case who has the legal capacity to execute a binding settlement agreement on behalf of the party. Nothing herein shall be deemed to require any party or party representative who appears at a mediation conference in compliance with this rule to enter into a settlement agreement.

The Rule further requires that each party file written identification of the representative and affirm therein the existence of "full authority."

> (e) Certification of Authority. Unless otherwise stipulated by the parties, each party, 10 days prior to appearing at a mediation conference, shall file with the court and serve all parties a written notice identifying the person or persons who will be attending the mediation conference as a party representative or as an insurance carrier representative, and confirming that those persons have the authority required by subdivision (b).

Continued, Page 14

"Workers Compensation," from page 13.

The failure to file this certification, or the failure of the identified representative to appear creates a rebuttable presumption of "failure to appear," Rule 1.720(f). The Commentary to Rule 1.710 reinforces the parties' ability to conform mediation to their particular needs by stipulation:

> The concept of self determination in mediation also contemplates the parties' free choice in structuring and organizing their mediation sessions, including those who are to participate. Accordingly, elements of this rule are subject to revision or qualification with the mutual consent of the parties.

The Workers' Compensation Rules of Procedure are found in Florida Administrative Code section 60Q. The Rule regarding attendance at a workers' compensation mediation is Rule 60Q6.110(5)

> (5) The following persons shall attend the mediation conference: the claimant; the claims representative of the carrier/servicing agent, which representative must have full authority to settle the issues; the employer, if uninsured; the insured or self-insured employer, if the employer/servicing agent does not have full authority to settle the issues; and the attorneys for the parties. The appearance of an attorney for a party does not dispense with the required attendance of the party. No party shall appear at the mediation conference by telephone unless such appearance is approved in advance by the mediator. Any party appearing by telephone has stipulated to be bound by that party's attorney of record's signature on the mediation report.

Note that the "full authority" requirement is part of this rule, although such authority is not as specifically defined as in the Civil rule.

Also note that the workers' compensation rule is focused upon "full authority to settle the issues," not necessarily the workers' compensation case. Workers' compensation cases are often serial in nature, with various claims for specific issues being brought into the litigation system at various stages of each particular case. All issues in a case may be settled in a "global settlement," but as often a workers' compensation mediation will only resolve the claimed entitlement to some particular benefit or benefits available under the law.

Finally, note that telephonic appearance at mediation is specifically contemplated by Rule 60Q6.110(5). Whether an attorney or party is permitted to attend mediation telephonically in workers' compensation is specifically up to the mediator:

> (a) The mediator shall have discretion to allow any party and/or that party's attorney of record to appear at the mediation conference by telephone upon the party's written request furnished to the mediator and the opposing party or, if represented, the party's attorney of record no fewer than 5 days prior to the mediation conference. The expense of telephonic attendance shall be borne by the person or party attending by telephone.

The potential for telephonic appearance at mediation is not specifically stated in the Civil Rule, but certainly that potential is within the power of the parties to stipulate, both according to the Rule and the commentary quoted above.

Is workers' compensation mediation different? The short answer is yes. The reasons are related to the very nature of workers' compensation and its serial process by which various benefits are claimed through the course of an injured worker's recovery from, and the lingering effects of, a work injury or illness. More succinctly, though, workers' compensation mediation is different because the 60Q rules say those mediations are different. Those rules are focused upon the resolution of issues, not cases. Those rules accommodate the potential that a single workers' compensation case may be litigated, and therefore mediated, repeatedly on various singular issues. Therefore those rules afford the mediator discretion in determining when telephonic attendance is or is not appropriate for various participants.

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FMI Board Member Ross Stoddard lectured at the FMI 2011 on mediator ethics.

The stimulating discussion didn't stop at the breaks.