MEDIATION INFORMATION FOR LEGAL PROFESSIONALS

What is Mediation?

According to section 44.1011(2), Florida Statutes (2012), mediation is

> *a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decisionmaking authority rests with the parties.*

According to Florida Rule for Certified and Court-Appointed Mediators 10.210:

> *Mediation is a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.*

The statute and rule define mediation as a process which encourages and facilitates dispute resolution by using a mediator who must have no connection to the case, must be able to remain impartial throughout the process, and must encourage the parties to make their own decisions.

Mediation is an informal process in which anything may be discussed as agreed by the parties. In mediation, the parties are not limited to only discussing issues raised by the pleadings.

Mediation frequently is, but does not have to be, in connection with a lawsuit. While mediation may be ordered by the court, section 44.102, Florida Statutes, it may also be voluntarily initiated by the parties either before or after filing a lawsuit. Further, there are statutes that call for mediation when no lawsuit is pending.

For example see links:

Homeowners' Associations § 720.311, Fla. Stat. (2012), Condominiums § 718.1255, Fla. Stat. (2012), and Mobile Home Park Lot Tenancies § 723.038, Fla. Stat. (2012).

***Attendance at Mediation*:**

The court may order a part or all of a case to mediation. In that case, the parties must *attend* the mediation but they are *not required to come to an agreement*. If a party fails to appear at a scheduled mediation without first having obtained the court's permission, sanctions may be imposed by motion by an opposing party or on the court's own motion. [Fla. R. Civ. P. 1.720(b)-(f) (see pages 108-109), Fla. Sm. Cl. R. 7.090 (see page 11), Fla. R. Juv. P. 8.290(l)(1)-(5) (see pages 112-113), Fla. R. App. P. 9.720(a)-(b) (see pages 143-144), Fla. Fam. L. R. P. 12.740(d) (see page 74) & 12.741(b)(2) (see page 75)].

Research has shown that "bringing people to the table" often gets them talking to one another and settling their dispute, even if previous attempts at settlement were not successful.

Mediation is conducted in accordance with statutes, rules and procedures:

There are statutory provisions, ethical rules, and procedural rules which apply to court ordered mediations and to all certified mediators regardless of the setting.

Lawyers should familiarize themselves with these statutes and rules in order to serve their clients best. [Fla. Stat. ch. 44, Rules 1.700 – 1.750 (see pages 106-112), Fla. R. Civ. P.; Small Claims Rules; Rule 8.290 (see page 111), Fla. R. Juv. P.; Rule 12.610 (see page 59), 12.740 – 12.741 (see pages 74-75), Fla. Fam. L. R. P.; and the Florida Rules for Certified and Court-Appointed Mediators].

Confidentiality and Self-Determination in Mediation:

In Florida, confidentiality and self-determination of the parties are of utmost importance to the courts. The courts have been very strict in upholding these principles.

- The *Mediation Confidentiality and Privilege Act,* sections 44.401, 44.402, 44.403, 44.404, 44.405 and 44.406, Florida Statutes, applies in all but a few types of mediations.

- The Florida Supreme Court has promulgated rules relating to self-determination of the parties [Florida Rule for Certified and Court-Appointed Mediators 10.310 (see page 11), see also rule 10.420(b) (see pages 19-19)].

Initiating the Mediation sessions:

Upon commencement of the mediation sessions, rule 10.420(a) (see page 18), requires the mediator to deliver (and therefore the parties to listen to) an orientation at the initial mediation session. If subsequent sessions are desired or needed, this orientation may need to be repeated if any new parties or participants are in attendance.

During the orientation, the mediator is required to:

- Explain the mediation process,
- Describe the role of the mediator ,
- Explain that the process is consensual,
- Explain that the mediator has no authority to impose a resolution or make decisions, and
- Explain that communications are confidential with certain exceptions.

The parties will then be encouraged by the mediator to negotiate in an attempt to resolve their agreement.

What are some advantages to Mediation?

1. A mediator facilitates negotiations.
2. Mediation is confidential.
3. Mediation agreements are enforceable.
4. Mediation gives the parties flexibility.
5. Mediation is not an adversarial process.
6. Settlement decisions are made by the parties.
7. Mediation may result in less time, cost and stress than litigation.
8. In mediation the parties are in control of the outcome.
9. Mediation is an opportunity for understanding.

1. *A mediator facilitates negotiations*

   One major advantage of mediation is the involvement of a neutral who is not connected to the dispute to assist the parties in communicating. Even if the parties have tried previously to work out their differences or negotiate their issues but were unsuccessful, bringing in an impartial person (mediator) often can assist the parties in easing their communications (listening, speaking, etc.) and help keep them focused. A mediator guides the process and gently assists the parties in breaking down the barriers to resolution. This enhances the opportunity for the parties to enter into a settlement agreement.

2. *Mediation is confidential*

Mediation is most typically held as a result of the filing of a lawsuit and the court referring the parties to mediation. If the mediation was ordered by the court or if the mediation is conducted by a Florida Supreme Court certified mediator, the *Mediation Confidentiality and Privilege Act* (the Act), Chapter 44, sections 44.401, 44.402, 44.403, 44.404, 44.405 and 44.406, Florida Statutes, applies to all "mediation communications" "except as provided." See § 44.405(4)(a). This means that, unless an exception applies, all "mediation communications" are both confidential and privileged.

In this context, "confidential" means "A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel." See id. § 44.405(1). Likewise, privilege under this Act has the same meaning as it does under the Florida Evidence Code. If all parties to a mediation waive confidentiality as to some or all mediation communications, those communications may be revealed and are not privileged.

Confidentiality is designed to make it safe for the parties to discuss all issues without fear of disclosure. It is important to note there are some exceptions to the umbrella of confidentiality. See id. § 44.405. Additionally, when a public entity is involved, lawyers should familiarize themselves with Florida's Government in the Sunshine laws for exceptions to confidentiality (Fla. Stat. ch. 119 (2012), Public Records and Fla. Stat. ch. 286 (2012), Open Government).

Generally, once an agreement is reached in mediation, there is no confidentiality or privilege attached to a signed written agreement unless the parties agree otherwise.

In mediations not connected to a lawsuit, the Act does not automatically apply unless conducted by a certified mediator, section 44.402(c), Florida Statutes. In those settings, the mediator may ask the parties to agree in writing to abide by the Act.

3. *Mediation agreements are enforceable*

If, during a mediation, a written agreement is signed by all parties, that document is a legally binding contract.

4. *Mediation gives the parties flexibility*

Mediation provides an opportunity for creative solutions. The parties may tailor a settlement agreement specific to their interests and individual needs. Unlike the court, the parties are not bound by issues raised in the pleadings. With mediation, the parties can craft a "win-win" resolution.

5. *In mediation the parties are in control of the outcome*

Mediation differs from dispute resolution processes in which the neutral, such as the judge or an arbitrator, makes a decision. In mediation, the parties make the decisions, not the mediator. This concept is referred to as "self-determination" and is highly valued by the courts in Florida. Regardless of the mediator's educational or professional background the mediator cannot give legal advice nor express opinions as to how the court will rule. The mediator can explore alternatives with the parties and is there to facilitate the communication of the parties in an effort to assist them in coming to a voluntary resolution of their issues.

While an attorney is responsible for advising the client on legal rights and obligations during a mediation, it is the client, not the attorney, who is the decision maker during a mediation. See below:

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

(a) Lawyer to Abide by Client's Decisions. *Subject to subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.* ***A lawyer shall abide by a client's decision whether to settle a matter.*** *In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify. (Emphasis added).*

There are times when an attorney is not present during mediation. In those situations, best practice would suggest that the attorney give legal advice on anticipated issues prior to the mediation.

One of the benefits of the parties making their own decisions is that they are not gambling on a decision made by the judge or jury.

6. *Mediation may result in less time, cost and stress than litigation*

Mediation often takes less time than litigation. Mediation may result in an agreement within a matter of hours or days, rather than months or years of court proceedings. As a result, mediation can be less costly in money and emotions for your clients. Even if only a partial agreement is reached at mediation, court time and fees required to decide the remaining issues may be less.

7. *Mediation is an opportunity for understanding*

Mediation may be the first time the parties (and their lawyers) all sit down together to hear each other's perspective on the issues. Whether an agreement is reached, the parties will have a better idea of what brought them to this point and what might be done to bring about a settlement with which all parties can be comfortable.

Another advantage of mediation is that the parties are not limited only to those issues addressed in the pleadings. Upon agreement of all the parties, any other issues can be discussed and resolved. This can make mediation a more satisfying and holistic method of resolution for the parties.