

# Right the Lens, Write the Agreement: Reconciling the Ethics Behind Party Decision-Making

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# Learning Objectives

1. Identify various impediments to meaningful exchange in the mediation setting
2. Distinguish between two main frameworks for party decision-making: utilitarian v. deontic
3. Outline “MID” method (i.e., Mitigate, Innovate, and Dedicate) for re-establishing communication channels between/amongst parties & identify its foundations in the mediator’s ethical responsibilities

## Florida Rules for Certified & Court-Appointed Mediators

*Effective August 2021*



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# Mediation Case Study

José (a wealthy pro se plaintiff) v. Alex (attorney representing defendant HOA)

- José is suing his HOA for \$8000.00
- According to the complaint, a month ago, José's vehicle (a brand-new Aston Martin Vantage convertible) was allegedly damaged when the gate surrounding the community in which he lives "malfunctioned and closed on [his] baby"
- The alleged incident occurred when he was driving home from the dealership, having just purchased the car



# José v. Alex

- José brought:
  1. Demand letter he submitted to the HOA board
  2. Before-and-after pictures of the vehicle: one from the dealership website and close-up shots of two deep scratches on the front-left quarter panel of the car (timestamped 15 minutes after the alleged incident)
  3. A verified estimate for repairs
- The HOA had sent José a response letter a week before the scheduled mediation confirming “the gate was and is functioning properly”; however, the security camera – which would have captured the alleged incident – was broken.
- Once the mediation commenced, José was visibly upset and complained about, *inter alia*, a “demeaning and heartless” HOA insurance-company adjuster with whom he had conversed.
- Ignoring José’s frustration, Alex said, “We would consider resolving this today but only if there is a legal justification for doing so.”

# Impediments To Effective Communication

- Language
- Negotiation styles
  - Competitive v. Collaborative
  - Position-based v. Interest-based – think: *Getting to Yes*
- Contrasting personality traits (i.e., introvert v. extrovert)
- Body language (e.g., “quiet bodies” v. “hand-talkers”)
- Gators v. Seminoles 😊
- Any others?



# Additional Communication Impediment

## Contrasting Ethical Lenses

- The way in which each party “sees” the conflict; these often affect the basis/rationale for parties’ decision-making
  - José asserts “I feel” statements
    - aka, invoking utilitarian phraseology
  - Alex references the law
    - aka, invoking deontic phraseology



# Two Kinds Of “Right” can ...

## Contrasting Ethical Lenses:

(1) Utilitarianism: consequence-based normative ethical theory focusing on the comparative happiness of individuals affected

- E.g., Mill’s conception of the Greatest Happiness Principle
  - In practice: more emotion-based

(2) Deontology: rule-based normative ethical theory focusing on duty/obligation pursuant to a given rule or code

- E.g., Kant’s Categorical Imperative, The Florida Statutes, Federal Penal Code, etc.
  - In practice: more reason-based





# ...Equal A Wrong In The Mediation Setting

Reference points are thus at odds with one another:

- A utilitarian party (e.g., José) couches their statements/views the issue(s) pursuant to their happiness or unhappiness
  - (1) “That car was ‘my baby.’”
  - (2) “I’m so upset with how that claims adjuster treated me.”
  - (3) “I’m moving outta that community!”
  - (4) “I’ll continue suing them – I don’t care how long it takes nor if I lose!”
- A deontic party (e.g., Alex) couches their statements/views the issue(s) pursuant to an *impersonal* perspective
  - (1) “We’re only paying if he can prove something.”
  - (2) “His claim is not worth anywhere close to \$8K if anything at all.”
  - (3) “No judge or jury will side with him based on his version of ‘the facts.’”
  - (4) “José may have ‘rushed the gate’ as it was closing; if so, liability falls on him alone.”



# The Paper Analogy

- Three volunteers
  - What color do you see?
- Key takeaway:
  - Competing ethical bases are like viewing a piece of paper through different sunglasses
    - Was anyone *incorrect*?



# Our Ethical Dilemma

- As dispute-resolution practitioners, how do we “bridge the gap” and create an interconnectedness of party perspectives without compromising their self-determination nor violating our ethical obligations?
  - The “common headache”?
    - Clearly not!
- Have parties meet in the MIDDle
  - M = Mitigate
  - I = Innovate
  - D = Dedicate



# Mitigate

(BEGIN IN CAUCUS)

- Validate the party's perspective
  - “It's evident this car was really valuable to you.”
- Shift the conversation to emphasize where the parties agree
  - “It seems the other side is willing to move under the right circumstances.”
    - NB: Regardless of how intractable the issue seems, the process of party overlap already began if, in your introduction you asked, “Do you both have authority to settle?” & “Can you agree to these ground rules?”
- Aristotle's maxim: “The mark of an educated mind is to be able to entertain a thought without accepting it.”
  - “Can you see why [José/Alex] holds that position?”

# Mitigate

## CONSISTENT WITH ETHICAL RESPONSIBILITIES:

### Florida Rules for Certified & Court-Appointed Mediators

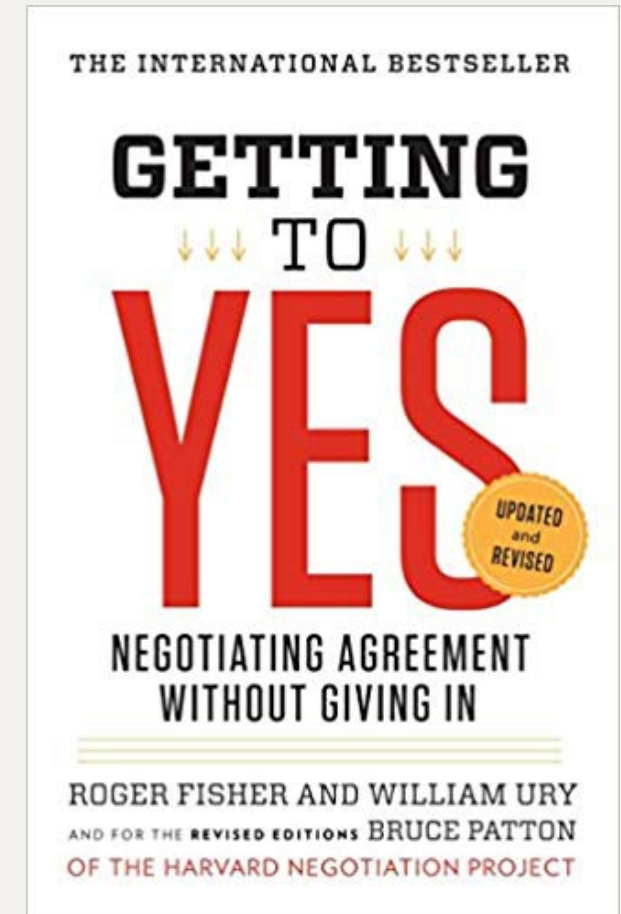
- Rule 10.220 Mediator's Role: The role of the mediator is to reduce obstacles to communication . . .

### The 2022 Florida Statutes

- 44.1011 Definitions
  - (2) "Mediation" means 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 . . .

# Innovate

- Think creatively – parties can agree on things a judge or jury could not necessarily stipulate
  - i) “Is there something we’re not seeing?”
  - ii) [to José in caucus] “You seem upset by your interaction with the HOA insurance-company adjuster. Would you like some sort of acknowledgement of that?”
- Remind parties that litigation often has a “stress tax” even with a favorable judgment
  - [to Alex in caucus] “What is the future cost of defending this – is there anything you’re willing to pay to be done with this today?”



Parallels *Getting to Yes* and the principled negotiation concept of “invent options for mutual gain”

# Innovate

## CONSISTENT WITH ETHICAL RESPONSIBILITIES:

### Florida Rules for Certified & Court-Appointed Mediators

- Rule 10.370 Advice, Opinions, or Information
  - (a) Providing Information. Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.
  - (c) Consistent with standards of impartiality and preserving party self-determination . . . a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense.
- Committee Notes 2000 Revision

A mediator may assist . . . by providing relevant information or helping the parties obtain such information from other sources. A mediator may also raise issues and discuss strengths and weaknesses of positions underlying the dispute. Finally, a mediator may help the parties evaluate resolution options and draft settlement proposals.

# Dedicate

- “Resolution” is more than just an endpoint – it ought to describe the mediator, too
  - Your MO is RHA
    - Resolute, humble authority
      - e.g., Prof. Josh Stulberg, who created Florida’s first county court mediator training program
  - “tenacious” v. “intense”
    - Is there a difference?
- “Zealous advocacy” for your “client”
  - The parties rely on your expertise in controlling and safeguarding **the process**
  - Can mean “inaction” – silence speaks
    - When a party says “no,” then it’s their turn to speak
- How long is too long?
  - Be mindful when the process becomes harmful – not helpful – to the parties
- Proper mediator posture . . .
  - . . . “colorless” glasses



# Dedicate

CONSISTENT WITH ETHICAL RESPONSIBILITIES:

Florida Rules for Certified & Court-Appointed Mediators

- Rule 10.350 Demeanor: A mediator shall be patient, dignified, and courteous during the mediation process.
- Rule 10.400 Mediator's Responsibility to the Mediation Process: A mediator is responsible for safeguarding the mediation process.

# José v. Alex – In Practice

Based on an actual Florida civil case I mediated in 2021 – though it didn't involve an Aston Martin 😊

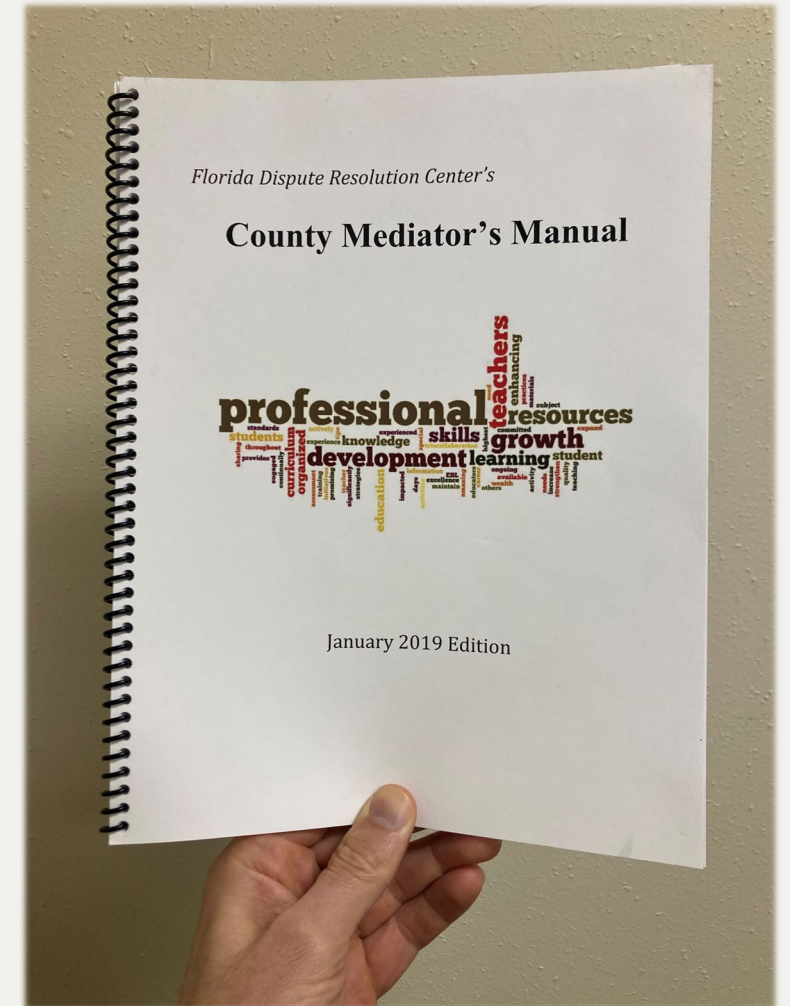
“MID” in action

- M: José acknowledged some responsibility.
- I: José said he was most upset with the insurance adjuster.
- D: After approx. two hours and two interruptions by the bailiff asserting the need “to wrap things up,” the parties signed an agreement stipulating a nominal monetary award and a formal acknowledgement from the insurance adjuster.
- José and Alex walked out together discussing their personal lives.

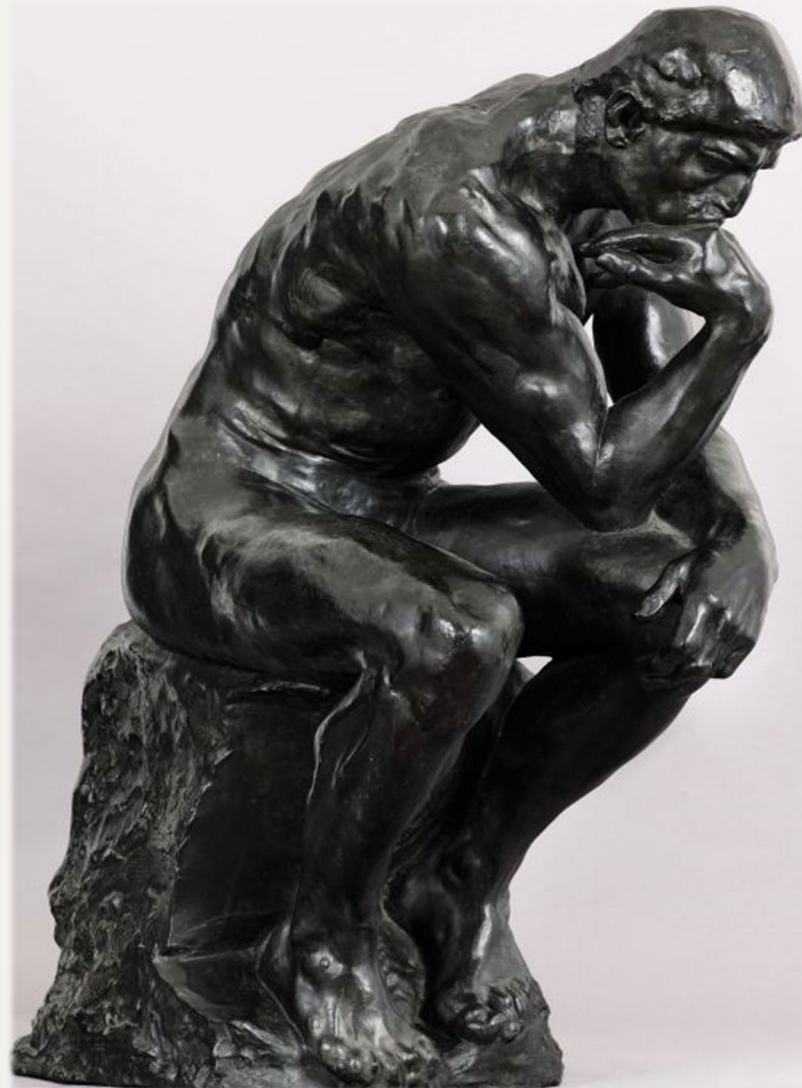


# Conclusions & Takeaways

- Expect conflict – without it there would be no need for mediation!
  - The analogy of Biosphere 2: Without adequate wind (i.e., a stress), tree roots were underdeveloped; ergo, trees were too weak to remain upright as they grew
- “The task of mediating is not easy but can be immensely fulfilling. Hopefully, you will continue to learn with each mediation you conduct.”
  - Florida DRC’s County Mediator’s Manual*, p. 97  
(Jan. 2019 Edition)



# Questions?



# Thank You!

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