

# **Giving Peace a Chance: The Creative Use of ADR Mechanisms and Techniques to Facilitate Private Dispute Resolution**

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# **Discussion of Early Dispute Resolution in Private, Trust and Estate disputes.**

Overview – Interactive – Q & A

Probate, trust and estate disputes present a wholly different set of challenges and require creative mechanisms and technique tailored to the nature of the dispute.

# Special Problems of Probate Disputes

Closely-held family businesses

Real estate

Creditors

# Special Problems of Probate Disputes

Protection of Minors

Number of interested parties (beneficiaries or  
persons who want to be)

Taxes

# Cautionary Tales

A Home for the “Aged and Indigent”

# Cautionary Tale No. 2

“Sibling Rivalry”

# Cautionary Tale No. 3

“Punishing the Disobedient Daughter”



# Cautionary Tale No. 4

“Taking Care of Mother”

# Key Florida Statutes

Chapter 44 (Mediation, arbitration and voluntary trial resolution)

Fla. Stat. § 736.401 (Enforceability of arbitration provisions)

Fla. Stat. § 736.0412 (Non-judicial modification of an irrevocable trust)

# Key Florida Statutes

Fla. Stat. § 736.0415 (Reformation of trusts to correct mistakes)

Fla. Stat. § 736.04115 (Judicial modification of an irrevocable trust when modification is in the best interests of beneficiaries)

# Key Florida Statutes

Fla. Stat. § 736.04113 (Judicial modification of an irrevocable trust when modification is not inconsistent with settlor's purpose)

Fla. Stat. § 736.0416 (Judicial modification of trust to achieve settlor's tax objectives)

# **Non-Judicial Modification of Irrevocable Trusts by Agreement**

Fla. Stat. § 736.0412 permits (with some exceptions) the modification of an irrevocable trust created after December 31, 2000:

After the settlor's death

with unanimous agreement of the trustee and all qualified beneficiaries

Modification is not prohibited by a spendthrift clause or trust provision that prohibits amendment or revocation of the trust

# Arbitration Provisions in Wills and Trusts

Fla. Stat. § 731.4011(1) provides:

A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, **is enforceable.**

# What is ADR?

## Alternative-Dispute-Resolution

**KEY:** Parties to a dispute do not have to have a pre-existing agreement to use an ADR mechanism. They can agree on one at any point in the dispute.

# General Characteristics of Disputes

Disputes begin with the reality (or the perception) of conflicting interests over rights and obligations involving money, power, control, or relationships



# General Characteristics of Disputes

Particularly in the early stages, a dispute is characterized by mistrust, lack of communication, miscommunication, anger, resentment, and a stubborn desire to prevail

# **The Non-Financial Costs of Disputes**

Diversion of time/emotional resources – **stress**

**Destruction** of long-standing relationships

Lack of finality precludes constructive relationships and new initiatives

# Common Obstacles to Resolution of Disputes

Mistrust, misunderstanding, and  
miscommunication between parties

Misunderstanding and miscommunication  
between client and attorney or other professional  
advisor

One side's position is without merit

Interference by third parties

# **What Are the Advantages and Disadvantages of Litigation, Arbitration and Mediation?**

# Advantages of Litigation

Definition of Issues

Full discovery of all necessary facts

Irrelevant issues excluded

# Advantages of Litigation

Parties have their “day in court”

Correct decision on the law

Finality

# Disadvantages of Litigation

Time-consuming and expensive battles over pleadings and motions

Expensive discovery of facts, many of them useless or irrelevant

Expensive battles over what information is relevant and admissible

# Disadvantages of Litigation

Time – day in court may be years away

Judges, like juries, can make mistakes

Finality takes time – years – if there is an  
appeal and retrial



# Advantages of Arbitration

Less expensive than litigation (generally)

Less time-consuming than litigation (generally)

More flexible rules

# Advantages of Arbitration

Finality – no appeals (generally)

Relaxed rules of procedure and evidence –  
fewer disputes

Decision-maker can be selected who is  
experienced in the subject matter of the  
dispute

# Disadvantages of Arbitration

Can be as expensive and time-consuming as litigation

Compromise decisions (can be an advantage)

Can be prolonged over months, defeating expectations of early resolution

# Disadvantages of Arbitration

Selection of an arbitrator can be contentious and time-consuming

Arbitrator may be imposed on you

Decision may not be final after all

# Advantages of Mediation

Can result in significant savings in time and money

Can preserve valuable relationships

Can produce creative resolutions not available in court or arbitration

# Advantages of Mediation

Provides an opportunity for the parties to be heard by a neutral disinterested party who provides a “reality check”

Can resolve all disputes (generally)

Finality and certainty

# Disadvantages of Mediation

Case may not settle during the first mediation session (or ever)

**BUT ...**

# Benefits of “Unsuccessful” Mediation

The real issues can be identified and separated from the emotional issues

The impediments to a resolution can be identified

Negative energy and destructive emotions can be at least partially defused



# Benefits of “Unsuccessful” Mediation

Communication barriers can be lowered

Everybody can check their expectations  
against reality

Litigation may be less complex and  
contentious

# Time is Everything – Mediation as a First Resort

Mediation can precede both litigation or arbitration  
(which are mutually exclusive)

Mediation can occur during or after litigation or  
arbitration

Mediation is valuable in any dispute whether or not it  
will ever be litigated or arbitrated.

# What Qualities in a Mediator Matter ?

Experience in probate litigation and mediation (ability to communicate reality and options)

Creativity and the ability to identify options and develop solutions

Ability to inspire confidence and trust in participants

# What Qualities in a Mediator Matter?

Neutrality

Patience and persistence

# Conclusion

Q & A

Thank you.

## Michael J. Dewberry

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### Practice Area

Mr. Dewberry practices in commercial litigation, including all types of business litigation and dispute resolution, disputes involving contracts, real property, insurance, health care operations and litigation, peer review and credentialing, risk management and employment issues, and professional licensing and discipline. He also handles employment litigation, including discrimination, sexual harassment, wage and hour, employment contract and non-competes and other restrictive contracts.

### Education

- Florida State University, B.A., 1969
- University of Florida, J.D., 1976

### Awards and Distinctions

- AV-Rated, Martindale-Hubbell
- *Florida Trend Magazine*, “Legal Elite” (Commercial Litigation Category), 2004-2009
- Designee, *Florida Super Lawyers* (Business Litigation Category), 2006-2009
- Designee, *The Best Lawyers in America* (Health Care Law; Labor & Employment Categories), 2006-2009

### Legal Certifications

- Certified Mediator, Florida Supreme Court
- Certified Mediator, U.S. District Court, Middle District of Florida



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## **Bar Association Memberships**

### **Section 1.**American Bar Association, Section Memberships:

- (a) Health Care Law Section
- (b) Litigation Section
- (c) Employment Law Section
- (d) Dispute Resolution Section

### **Section 2.**The Florida Bar

### **Section 3.**Jacksonville Bar Association

## **Court Admissions**

### **Section 4.**Florida State Courts

### **Section 5.**U.S. District Courts, Northern District and Middle District of Florida

### **Section 6.**U.S. Court of Appeals, 11<sup>th</sup> Circuit

## **Professional and Community Involvement**

### **Section 7.**Dispute Resolver Panel Member, American Health Lawyers Association

### **Section 8.**Member, Florida Circuit-Civil Mediator Society

### **Section 9.**Master, Chester Bedell Inn of Court

### **Section 10.**President, Jacksonville Bar Association, 1989-1990

### **Section 11.**Board of Governors, Jacksonville Bar Association, 1984-1980

### **Section 12.**Florida Georgia Blood Alliance

- (a) Outside General Counsel, 1978-Present
- (b) Chairman of the Board, 1990-1994
- (c) Honorary Director, Board of Directors, 1985-1995

