The Ethical Civil Trial Mediator: The Letter, the Spirit and the Practice

By Rodney Max

The successful civil trial mediator can be nothing short of ethical. To be anything less will destroy his or her practice. The playing field must at all times be balanced. The effort on behalf of the plaintiffs must be equivalent to the effort on behalf of the defendants. The efforts to get each side to its respective goals must be accompanied by a level of trust that will allow a mediator to help the parties move from their goals to common ground and resolution.

Our profession can be mentally, emotionally and physically draining. The art of actively listening and thereafter communicating with appropriate empathy, interest and objectivity takes 100 percent focus without time for a lunch break, afternoon exercise, or a call to your spouse. Our profession is a lonely one. After 10 to 12 hours of successful negotiation, the parties may go home; however, the civil trial mediator must prepare for the next day by reading position statements and getting familiar with the people, their issues, and the status of the case for the next day. You crawl into bed late at night to get five to seven hours of sleep only to get up in the morning refreshed, energized and ready to take on the challenges of new resolution.

Our ethics stand as our common thread of camaraderie. Our ethics stand as a means by which we can all conduct ourselves for the benefit of one another. Our ethics allow us to work for the betterment of our practices, specifically, and our profession, generally. I have always maintained the attitude that if all mediators can conduct their process at the highest level of integrity and ethical conduct, it will serve for the benefit of all of us. There are more disputes and more cases than any of us know what to do with. The question is, will people trust the mediation process to give peace a chance? In whom will they place their trust to mediate? Will your calendar be reserved over the next 10 days or the next six weeks? Our ethical standards stand as the pillars to our glorious profession, which provides citizens an opportunity for self-determination in an impartial, confidential process. I am honored to be a part of this profession, and that honor translates into a strict observance of our ethical standards. Those standards have a "letter," "spirit," and a "practice." This article will tie the three together in defining the ethical civil trial mediator.

There may be different viewpoints based on different perspectives: academic, sole practitioners, independent contractors, or exclusive mediators with a for-profit or not-for-profit agency. Although this will not change the level of ethical standards, I recognize that there are other views to the approach that I have incorporated in my practice within my law firm. The following background is critical to your understanding of my perspective.

I have been blessed with a full-time civil trial mediation practice. I am called on to mediate primarily multiple-party and/or class-action cases involving personal injury, wrongful death, complex commercial, employment, environmental and public issue disputes. My calendar is reserved generally six to eight weeks in advance.
I began this journey in 1981. After several years of a commercial litigation practice, I found the need on behalf of my clients to explore the world of mediation and arbitration. I sought and received training by the American Arbitration Association in both areas. Over the next seven years, I utilized mediation and arbitration as an adjunct to my litigation practice. Occasionally I was called upon to arbitrate or mediate cases for others.

In 1988 I was asked by the Alabama Bar Association to look into the feasibility of more formally implementing mediation. With the help of my state Bar's Alternatives to Dispute Resolution Task Force, I drafted the Alabama Civil Court Mediation Rules for review and approval by a number of other state bar committees. After three years of review, they were submitted to the Alabama Supreme Court where, they received final approval in 1992. At that time, I had mediated and/or arbitrated approximately 100 cases in a diverse number of areas from simple contract cases to anti-trust and trademark infringement cases and from divorce cases to personal injury.

However, beginning in 1992, I began receiving regular phone calls as to my availability as to an even wider range of pending civil actions. I had the opportunity to mediate a number of visible cases that captured the public's attention to the concept of mediation. Attorneys from around the state began to inquire if I could assist them in their cases. With no intent of creating a mediation practice, I began to take on these requests. From one mediation a month to one mediation each day, I have, for the past six years, become a full-time civil trial mediator.

UWWM's offices are user-friendly, and the attorneys and their clients who come to our neutral setting are greeted with friendly smiles, warm hospitality and an amicable environment within which to resolve their cases.

Our offices are set up to provide a number of amenities, from breakfast to lunch and dinner, to coffee, cold drinks, and yes, even wine in the evening! Our facility in Birmingham is designed to accommodate large, multi-party mediations (where we have mediated in excess of 70 parties) and to handle three to four mediations at a time (with growing room available).

As one of the pioneers of mediation in Alabama, I have also had the philosophy that mediation is bigger than any one individual or any one firm. I have made myself and my firm available to other attorneys and firms who seek to understand how we, as attorneys, can grow this profession in a responsible, ethical and, yes, even profitable way. I wish to share that ethical vision with you in the context of The Ethical Civil Trial Mediator - - The Letter, the Spirit, and the Practice.

The Process

I choose to address the process first because it is first. It is more important than any one individual mediator, any one mediation firm or association, and more important than one set of conflicting parties or court that will otherwise adjudicate their issues. If the process can be maintained at the highest level of professional responsibility, it remains available for conflicting parties to utilize with full confidence of its impartiality, confidentiality, and means for self-determination.

1. Self-Determination:

The Model Standards of Conduct for Mediators states as follows: Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary uncoerced agreement. Any party may withdraw from the mediation at any time. (I. Self-Determination, Model Standards of Conduct for Mediators).

The Alabama Code of Ethics for Mediators similarly recognizes this self-determination in four parts:

(a) Parties' Right to Decide. A mediator shall assist the parties in reaching an informed and voluntary agreement. Substantive decisions made during mediation are to be made voluntarily by the parties.

(b) Prohibition of Coercion. A mediator shall not coerce or unfairly influence a party into entering into a settlement agreement.

(c) Misrepresentation Prohibited. A mediator shall not intentionally misrepresent material facts or circumstances in the course of a mediation.

(d) Balanced Process. A mediator shall promote a balanced process and shall encourage the parties to participate in the mediation proceedings in a non-adversarial manner.

(e) Responsibility to Nonparticipating Parties. A mediator may promote consideration of the interests of persons who may be affected by an agreement represented in the mediation process. (Standard 4 Self-Determination, Alabama Code of Ethics for Mediators).

The Florida Standards of Professional Conduct similarly cite as follows:

(a) Decision-making. Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties to reach informed and voluntary decisions while protecting their right to make decisions for themselves.

(b) Coercion Prohibited. A mediator shall not coerce or improperly influence a party to make a decision or continue participating in mediation if the party is unwilling to do so.

(c) Professional or Personal Opinions. A mediator shall not attempt to interfere with a party's self-determination by offering professional or personal opinions regarding the outcome of the case.

(d) Misrepresentation Prohibited. A mediator shall not intentionally or knowingly misrepresent material facts or circumstances in the course of conducting a mediation.

(e) Postponement or Cancellation. If a party is unable to exercise the right of self-determination for psychological, physical or other reasons, a mediator shall postpone or cancel mediation until such time as all parties are willing and able to resume. (10.031 Self-Determination, Standards of Professional Conduct, Florida Rules for Certified and Court-Appointed Mediators).

The above-cited standards represent the letter of professional ethics. The spirit of these rules can be understood by the comments that accompany the standard:

The mediator may provide information about the process, raise issues, and help parties explore options. The role of the mediator is to facilitate a voluntary resolution of the dispute. The parties shall be given the opportunity to consider all proposed options.

A mediator cannot personally insure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals who are appropriate to help them with informed decisions. (I. Self-Determination, Model Standards of Conduct for Mediators).

The Florida Standards comment:

Mediation is a process to facilitate consensual agreement between parties and conflicts and to assist them in voluntarily resolving their dispute. It is critical that the parties' right to self-determination (a free and informed choice to agree or not to agree) is preserved during all phases of mediation. A mediator must not substitute the judgment of the mediator for the judgment of the parties, coerce or compel an unwilling participant to make a decision, knowingly allow a participant to make a decision based on misrepresented facts or circumstances, or in any other way impair or interfere with the parties' right of self-determination.

While mediation techniques and practice styles may vary from mediator to mediator and mediation to mediation, a line is crossed and ethical standards are violated when any conduct of the mediator serves to compromise the party's basic right to agree or not to agree. (10.031 Self-Determination, Committee Note, Part 2 Standards of Professional Conduct, Florida Rules For Certified and Court-Appointed Mediators).

The practice of self-determination is very consistent with both the letter and the spirit as set forth above. In a civil trial setting, attorneys may not have been able to communicate. A neutral can help with those communications. Sometimes the parties (or representatives of the parties) have

not been as engaged as is necessary during the course of litigation. Mediation provides an opportunity for a hands-on experience and process of re-evaluation. Some attorneys or their parties are looking for a neutral who, upon invitation, can provide an objective third-party analysis of possible outcomes without offering his or her personal or professional opinion.

In practice, the parties to a mediation will each have their own goals of resolution. More times than not, these goals are not the same. Plaintiffs see it from their viewpoint as do the defendants from an opposing viewpoint. Using the numerous criteria for principled negotiation , an artful, yet ethical mediator can pose objective inquiries to review opportunities as well as risks for the purpose of finding common ground. The successful civil trial mediator achieves resolution, not by coercion or third-party opinionating. Rather, once the mediator allows the parties to "build their own reasonable ball park" of resolution with their own "reasonable goals" he or she may facilitate a resolution by exploring common ground through questions, options, and alternatives. I have been able to bring together gaps of millions of dollars with verdict or judgment analyses, with "interests analyses," and when requested, with a mediator's proposal.

How is the requirement for self-determination affected by the professional advice of the mediator? The ethical standards in both Alabama and Florida speak to the limitations on professional advice. The general rule is:

A mediator shall not provide information the mediator is not qualified by training or experience to provide. . . .

A mediator may discuss possible outcomes of a case, but a mediator may not offer a personal or professional opinion regarding the likelihood of any specific outcome except in the presence of the attorney for the party to whom the opinion is given. (Standard 7 Professional Advice, Subsections (a) and (d), Alabama Code of Ethics for Mediators.)

The Florida Standard similarly cites:

A mediator shall not provide an opinion. However, a mediator may provide information about the process, draft proposals, point out possible outcomes of a case, and help parties explore options. (Rule 10.037 (a) (1), Part 2 Standards of Professional Conduct, for the Florida Rules for Certified and Court-Appointed Mediators).

The spirit and the practice of these rules allow a mediator to facilitate the process for the parties as actively as the parties jointly request upon being fully informed of their options. My job in achieving resolution is simply to let the parties know what those options are. If they choose not to use them, they will negotiate with or by sharing their own evaluations. To the extent that they request a third-party analysis, I am as available as they mutually agree.

2. Impartiality and Conflicts of Interests.

I must begin here with a practice point. A mediator will not make a living being anything other than absolutely, totally impartial. A mediator will not mediate beyond one case if that impartiality is breached. The existence of impartiality is as much "a given" to a civil trial mediator as a bat and ball are to a baseball player. You can't survive without them.

The Model Standards of Conduct for Mediators addresses impartiality and conflicts of interests as follows:

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw. . . .

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and to reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

The mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related manner, or in an unrelated manner under circumstances which would raise legitimate questions about the integrity of the mediation process. (II. Impartiality; III. Conflicts of Interests, Model Standards of Conduct For Mediators).

The Alabama Code of Ethics For Mediators similarly cites:

A mediator shall be impartial and shall advise all parties of any circumstances that may result in a possible bias, prejudice or impartiality on the part of the mediator. Impartiality means freedom from favoritism or bias in work, action, and appearance. The impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward an agreement. (Standard 5. Impartiality and Conflicts of Interest, Alabama Code of Ethics For Mediators.)

The Florida Standard likewise provides:

Impartiality means freedom from favoritism or bias in word, action, or appearance. Impartiality includes a commitment to aid all parties, as opposed to any individual. A mediator shall maintain impartiality but may raise questions for the parties to consider the reality, fairness, equity and durability and feasibility of the proposed options for settlement.

A mediator shall withdraw from mediation if the mediator is no longer impartial.

A mediator shall neither give nor accept a gift, favor, loan, or other item of value to or from a participant in any mediation process. During the mediation process, a mediator shall not solicit or otherwise attempt to procure future professional services from a party. (Rule 10.033 (a)(b) and (c), Part 2, Standards of Professional Conduct, Florida Rules For Certified and Court-Appointed Mediators).

A mediator shall not mediate a matter which presents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the mediator and the parties, their representatives, or the subject matter of the dispute compromises or appears to compromise the mediator's impartiality.

The burden of disclosure of any potential conflict of interest rests on the mediator. Disclosure shall be made as soon as practical after the mediator becomes aware of the interest or relationship giving rise to the potential conflict of interest.

After appropriate disclosure, the mediator may serve if all parties agree. If there is a conflict of interest which clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the parties.

A mediator shall not create a conflict of interest during the mediation. During a mediation, a mediator shall not provide any services which are not directly related to the mediation process. (Rule 10.034 (a), (b), (c), and (d), Part 2, Standards of Professional Conduct, Florida Rules For Certified and Court-Appointed Mediators).

The "spirit" of these rules is set forth in the official comments:

The mediator shall avoid conduct that gives the appearance of impartiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose any and all potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed. (Comments to II. Impartiality, and III. Conflicts of Interest, Model Standards of Conduct For Mediators).

The spirit as addressed by the Florida Standards is as follows:

A mediator has an affirmative obligation to maintain impartiality through the entire mediation process. This rule does not preclude a mediator from giving or accepting deminimus gifts or incidental items provided to facilitate the mediation.

The duty to maintain impartiality arises immediately upon learning of a potential engagement for providing mediation services. A mediator shall not accept or continue any engagement for mediation services in which the ability to maintain impartiality is reasonably impaired or compromised.
In the event circumstances arise during the course of a mediation which would reasonably be construed to impair or compromise a mediator's impartiality, the mediator is obligated to withdraw. (Committee Note, Rule 10.033 Impartiality, Part 2, Standards of Professional Conduct, Florida Rules For Certified and Court-Appointed Mediators).

The question becomes how to bring the letter, the spirit and the practice together. This is a critical issue when you are in a law firm with 120 attorneys in four different cities representing clients in a number of different contexts. What I have learned is that attorneys and their clients come to mediate with the mediator, not the firm.

I have a standard procedure for identifying all conflicts, actual, potential, or apparent. I disclose these in my initial communication to the attorneys. I ask that they advise their client of these and provide me with an affirmative statement of waiver. I invite any questions or clarifications. Thereafter, I receive a waiver as part of the position statements of the parties. Again, at the mediation, I have a formal waiver form for signature of not only the attorneys but their clients as well.

Since I have been a full-time mediator, I have only been precluded from serving on fewer than a dozen cases. In fact, I have even been requested to mediate on cases where my partners were representing one or the other sides. This has been at the express request of the opposing attorney and his client. I have specifically provided that the waiver apply not only to the mediation, but any subsequent litigation.

Again, the attorneys and their clients come to mediate with me, individually, not my firm. We have an unbendable rule of the separateness and confidentiality of my files and my work product and my firm respects that separateness without exception.

By special design and practice, the administrative procedures of our mediation center make an express statement of neutrality.

3. Confidentiality.

As stated above, confidentiality is a paramount element to the success of the process. The "letter" is exemplified by the standards, which state:

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances, the mediation and any agreement they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties unless required by law or other public policy. (V. Confidentiality, Model Standards of Conduct For Mediators).

The Alabama Code of Ethics for Mediators similarly sets forth the "letter" as follows:

A mediator shall preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information gathered during the mediation.

A mediator shall store and dispose of records relating to mediation proceedings in a confidential manner and shall insure that all identifying information is removed and the anonymity of the parties is protected when materials included in those records are used for research, training, or statistical compilations. (Standard Six, Alabama Code of Ethics For Mediators).

The Florida standards similarly set forth the "letter" regarding confidentiality:

The mediator shall maintain confidentiality of all information revealed during the mediation except where disclosure is required by law.

Information obtained during caucus may not be revealed to the other party by the mediator without the consent of the disclosing party.

A mediator shall maintain confidentiality in the storage and disposal of records and shall not disclose any identifying information when materials are used for research, training or statistical compilation. (Rule 10.035 (a) (b) and (c), Part 2 Standards of Professional Conduct, Florida Rules For Certified and Court-Appointed Mediators).

The spirit of these rules is exemplified in the comments to the Model Standards:

The parties may make their own rules with respect to confidentiality or the accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.

If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.

In order to protect the integrity of the mediation, the mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or the settlement offers. The mediator may report, if required, whether the parties appeared at scheduled mediations.

Where the parties have agreed that if all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator. (Comments Part 5 Confidentiality, Model Standards of Conduct For Mediators).

Through practice, God has given me a great ability to forget. Attorneys or parties will frequently ask me to recall a mediation I did several weeks ago. I can only smile and explain the supernatural dilemma that God has ordained on me. On a more serious note, the reality of

confidentiality is indeed an important element to achieving resolution. The ability to resolve a particular case may be may be subordinate to the ability to maintain its confidentiality. I have seen confidentiality protect not only a national or international corporation, but also a plaintiff who does not want friends and relatives to know of the outcome. Confidentiality can also be an asset to an otherwise public corporation, institution or governmental agency. While ultimately the "sunshine" must be shown on such ultimate resolution, the confidential means of achieving that resolution is of great mutual benefit to the parties engaged in the process. Whether issues of negligence, breach, discrimination, or the like, a mutual disclosure of respect between the parties can not only resolve the immediate conflict, it can keep a community at peace instead of disruption.

In conclusion, self-determination, impartiality, and confidentiality are the pillars that make the process of mediation the "darling" of dispute resolution generally, and civil trial mediation specifically.

The Mediator

1. Qualifications and Commitments:

While the process is of paramount concern, the quality of the mediator must be of like importance. Toward this end, the Model Standards require:

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers himself or herself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that the mediator who is assigned to the parties have the requisite training and experience. (IV. Competence, Model Standards of Conduct For Mediation).

The Alabama Code of Ethics requires:

A mediator is obligated to acquire knowledge and training in the mediation process, including an understanding of appropriate professional ethics, standards, and responsibilities. Upon request, a mediator is required to disclose the extent and nature of the mediator's education, training and experience.

It is important that mediators continue their professional education as long as they are actively serving as mediators. A mediator shall be personally responsible for ongoing professional growth, including participation in such continuing education as may be required by law or rule of an appropriate authority.

An experienced mediator should cooperate in the training of new mediators, including serving as a mentor. (Standard 9 (a)(b) and (c). Alabama Code of Ethics For Mediators).

A mediator shall be candid, accurate, and fully responsive to a court concerning the mediator's qualifications, availability, and other matters pertinent to his or her being selected. A mediator shall observe all administrative policies, procedural rules, and statutes that apply to mediation. The mediator shall refrain from any activity that has the appearance of improperly influencing a court to secure placement on a roster of mediators for appointment to a case. (Standard 2, Alabama Code of Ethics For Mediators).

The Florida Standards speak to the mediator's responsibility to the parties, to the mediation process, to the courts, to the mediation profession, and to other mediators and professionals.

The spirit and practice of these rules are concurrent: Mediators have obligations to the parties, to the courts, and to the profession. Our individual and collective commitment to the process, to the parties, to the court, and to each other ensures the endurance of the mediation process.

As a matter of practice, each year I engage in specialized continuing legal education in the area of mediation. I have had the great honor of participating in Harvard's Negotiation Project for two different summers. I have also had the privilege of attending Pepperdine University's Strauss Institute for Dispute Resolution Advance Mediation Course. In addition, I have attended the American Bar Association's Alternative Dispute Resolution Committee seminar, as well as seminars sponsored by the CPR Institute for Dispute Resolution, the American Arbitration Association, and the Society of Professionals in Dispute Resolution. It is impossible to go to all of these. But one or two a year (especially in the university setting) assists in not only sharpening a mediator's skills, but in validating what we do on a daily basis. I commend the above programs to each of you.

As to commitment, it must be absolute. The parties, their counsel and the courts must be able to rely on the mediator's commitment to full resolution. Any wavering from this absolute commitment interferes with the unique role of the mediator to serve as the voice to encourage resolution. Through all obstacles or hurdles, the mediator must remain the positive force that maintains that a negotiated resolution is a better option than litigation.

I have learned that mediation is not an event. It is a process. Thus, at the end of a mediator's day (or night), gaps in positions or evaluations simply require additional work-discovery, motions, or simple deliberation. Whether through the mediator, the attorneys, or the parties, further consideration for dialogue or negotiation should be pursued. This may occur within days of the mediation or as late as following a verdict or while awaiting an appeal.

In the words of Yogi Berra, "It's not over until it's over." My absolute commitment extends beyond the day of mediation to periodic yet timely post-mediation caucuses with counsel, separate or collectively. When the attorneys and their clients select me, they "adopt" me as the "designated resolver." I never quit - - unless requested otherwise. That commitment distinguishes my practice and that of Upchurch Watson White & Max.

B. Fees.

Yes, there is a "letter", "spirit", and "practice" with regard to fees of mediators. Under the Model Code:

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable, considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time acquired, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement. (IV, Model Standards of Conduct For Mediators).

Under the Alabama Code of Ethics, fees are addressed as follows:

A mediator occupies a position of trust with respect to the parties and the court system. In charging for services and expenses, the mediator must be governed by the same high standards of honor and integrity that apply to all other phases of the mediator's work. A mediator shall be scrupulous and honest in billing and must avoid charging excessive fees and expenses for mediation services.

A mediator shall maintain adequate records to support charges for services and expenses and shall make an accounting to the parties or to the court upon request.

No commissions, rebates or similar remunerations shall be given to or received by a mediator for referral services for mediation or related services.

A mediator shall not charge or accept a contingent fee or base a fee in any manner on the outcome of the mediation process.
A mediator may specify in advance minimum charges for scheduling or conducting a mediation session without violating this Standard.

When a mediator is contacted directly by the parties for mediation services, the mediator has a professional responsibility to respond to questions regarding fees by providing a copy of the basis for charges for fees and expenses.

Mediators have a professional responsibility to provide competent services to persons seeking their assistance, including those unable to pay for their services. As a means of meeting the needs of those who are unable to pay, a mediator shall provide mediation services pro bono or at a reduced rate of compensation whenever appropriate. (Standard 8 (a) - (g), Alabama Code of Ethics For Mediators).

The Florida standards are similar:

A mediator occupies a position of trust. Fees charged for mediation services shall be reasonable and consistent with the nature of the case.

A mediator shall be guided by the following general principles in determining fees:

(1) Time charges for mediation services should not exceed actual time spent or allocated.

(2) Charges for costs should be for those actually incurred.

(1) All fees and costs should be appropriately allocated between the parties.

(2) When time or expenses involve two or more mediations on the same day or trip, the time and expense charges should be prorated appropriately.

A mediator shall give the parties a written explanation of any fees and costs prior to mediation. The explanation shall include:

(1) the basis for and amount of any charges for services to be rendered, including minimum fees and travel time;

(2) the amount charged if the participants postpone or cancel mediation sessions and the circumstances under which such charges will be assessed or waived;

(3) the basis and amount of charges for any other items; and

(4) the parties' pro rata share of mediation fees and costs if previously determined by the court or agreed to by the parties.

A mediator shall maintain records necessary to support charges for services and expenses and shall make an accounting to the parties or to the court upon request.

No commissions, rebates, or similar remuneration shall be given or received by a mediator for a mediation referral.

A mediator shall not charge a contingent fee or base a fee on the outcome of the process. (Rule 10.038, Part 2, Standards of Professional Conduct, Florida Rules For Certified and Court Appointed Mediators).

The spirit of these rules is again fairly straightforward: Set and disclose all fees, expenses and other charges from the outset; be accountable for same; maintain records for purposes of accountability; and provide pro bono when appropriate and possible. The practice is also straightforward: Some charge on a hourly basis to be divided by the parties, other charge fixed fees to be divided by the parties; and others charge per-party, per-hour rates. I utilize a combination of per-party, per-hour and fixed fees. At this time I am charging $120 per party, per hour for a two-party mediation. If it is a three-party mediation, it is reduced to $90 per party, per hour. A four-party mediation is $80 per party, per hour. A five-party mediation is $70, per party per hour, and so forth.

Instead of setting a rate that is just divided by the parties, I am setting a reduced individual rate with a higher collective potential. I believe that as mediations become multi-partied, they become more complex, requiring more skill and expertise of the mediator. In addition, the utilization of our facilities is multiplied. The more parties, the more rooms, the more amenities, and the more overhead. Likewise, when I travel out of state, I believe there is a reasonable premium that can and should be considered by my absence both from my office and from home. In mediating multiple-cases, or class actions, I implement a fixed fee per side. In this way, the fee can be distributed by the attorneys among the numerous parties represented.

When you are engaged in mediation as a full-time professional, each day is precious. If it is lost by a postponement, cancellation, or a prior settlement of a case, I lose the day and the revenue. Accordingly, I believe that a reasonable security deposit is appropriate for any day secured. If that day is canceled or postponed within 21 days, I will apply this security deposit unless I can otherwise fill the date. Outside the 21 days, the security deposit is retained for any new date or returned if the mediation is canceled.

I am at all times very sensitive to the attorneys and their parties in implementing this security deposit policy. In fact, by my personal discussions with the attorneys, I turn this in to a marketing opportunity with positive ramifications for the attorneys, their clients and myself. The establishment of a security deposit policy provides the leverage to cover your date, or alternatively, to create a marketing opportunity that you would not otherwise have.

The security deposit also provides a means of lowering my accounts receivables. In other words, when the mediation is completed, I apply the security deposit toward the mediation fee earned and simply bill for the balance owed. Having a security deposit in hand allows for an up-front payment upon conclusion of the mediation.

I provide at least two pro bono mediations (at least eight hours) each year. I make this available through the state and/or federal courts. I also have chaired the Alabama Dispute Resolution Committee by which I give of my time without charge to attorneys and their clients in fee disputes.

Conclusion

During my time as a mediator I have been totally committed to the advancement of mediation, not only for myself and my firm, but for all who wish to engage in the honor of its purpose -- the advancement of resolution by the parties themselves through an impartial, confidential mediation process. I take great pride in watching it grow for all of us.

With more conflict than all of us can handle, the "pie" of mediation opportunities is not limited. Its only limitation is the quality of the process that we make available. The higher that quality, the more we benefit.

The letter, spirit and practice of our ethical charge is as critical to our existence as any standards of ethics of any profession. However, these ethics do not exist in a vacuum. They require practical implementation and practice.

As we ask conflicting parties and their attorneys to trust the process, that process and those who are its guardians must be trustworthy. The practical implementation of the letter, and spirit of our standards allows ethical civil trial mediators the opportunity to earn that trust. It becomes our responsibility to maintain it.