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TRASHING, BASHING, AND HASHING IT OUT: IS THIS THE END OF "GOOD MEDIATION"?*

JAMES J. ALFINI**

THE subtitle to this Article was suggested by the remarks of Albie Davis¹ at a workshop on Alternative Dispute Resolution (ADR) in the Judicial Environment held in Tallahassee, Florida, in February, 1988. The workshop was sponsored by the National Institute of Dispute Resolution and the Florida Dispute Resolution Center. It brought together national experts and Florida ADR and justice system professionals to discuss both the ramifications of 1987 Florida legislation² and subsequently promulgated supreme court rules.³ The legislation and rules gave Florida trial judges wide-ranging discretion to mandate mediation or arbitration for contested civil claims. Reacting in particular to a rule that would require mediators of nonfamily civil claims in circuit court to be either experienced lawyers or retired judges,⁴ Davis proclaimed this requirement "the end of good mediation."⁵

* Although the author has attempted to maintain his objectivity in discussing and analyzing the developments reported in this Article, it must be noted at the outset that he was a participant-observer for many of the events reported in Part I of this Article by virtue of his serving as Director of Education and Research of the Florida Dispute Resolution Center since its establishment in February of 1986. He also served as a member of both the initial Florida Supreme Court Mediation and Arbitration Rules Committee and the successor Standing Committee on Mediation and Arbitration, and for one year as a member of the Florida Supreme Court Mediation/Arbitration Training Committee.

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1. Ms. Davis is the Director of the Mediation Administration Office of the District Court of Massachusetts.
The ire expressed by Davis and certain other workshop participants over the requirement that mediators of larger civil cases be legal professionals should surprise no one. Most professional mediators agree that interpersonal qualities and performance, rather than professional or academic credentials, are the principal predictors of "good mediation." 6 Indeed, the "Florida model" has been subjected to considerable criticism in national mediation circles. 7 Although the

6. Any requirements concerning who can practice as a neutral should be based on performance. In establishing requirements, any certifying bodies or agencies maintaining rosters or lists of "acceptable" neutrals should emphasize the knowledge and skills necessary for competent practice, not the education or other method by which an individual acquired the knowledge or skills. See, e.g., COMMISSION ON QUALIFICATIONS, SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, PRINCIPLES CONCERNING QUALIFICATIONS 9 (1989) [hereinafter QUALIFICATIONS].

7. A prominent critic has been George Nicolau, while serving as President of the Society of Professionals in Dispute Resolution (SPIDR). Speaking at the Fifth New York Conference on Dispute Resolution in Syracuse on May 21, 1988, Nicolau argued against reliance on paper credentials in establishing mediator and arbitrator qualifications. He stated that experience, particularly in the industrial relations field, has demonstrated the utility of a party-driven, free market approach to qualifying neutrals:

The vast majority of the public is not as sophisticated as the industrial relations community and may well need greater protection against the charlatans and the incompetents than what the free market affords. The easy response to this concern is Florida's. But reliance on qualification criteria based mainly on academic credentials is patently exclusionary. Moreover, and this point overwhelms all others, such a response is clearly contrary to what our collective experience has already taught us. Every one of us in this room and everyone in this field knows first-rate mediators who are not lawyers, who are not psychiatrists, who are not MSW's or MA's. Ill-Considered Criteria Endanger Mediation, SPIDR President Warns, 2 ALTERNATIVE DISPUTE RESOLUTION REP. 244, 245 (July 7, 1988). For a response to Nicolau, explaining the Florida qualifications and training rules and the supreme court's rationale in imposing these standards, see Press, Florida Explains Court Rules In the Face of Continuing Controversy, 2 ALTERNATIVE DISPUTE RESOLUTION REP. 434 (Dec. 8, 1988).

In the wake of the Florida controversy, Nicolau called for the establishment of a SPIDR Commission on Qualifications. The Commission, chaired by Linda Singer, produced a report: Qualifying Neutrals: The Basic Principles, FORUM 3-10 (May 1989) [hereinafter Qualifying Neutrals]. In commenting on the Commission's report, QUALIFICATIONS, supra note 6, Singer once again singled out Florida for criticism in a published interview. When asked whether there had been an instance of a dispute resolver being stopped from practicing because of new laws, she responded: "Yes. In Florida, for example, many county court mediators who wished to be trained to mediate civil or family court referrals were precluded under new legislation from doing so by their lack of professional credentialing as lawyers, therapists, or accountants." Qualifying Neutrals, supra, at 11. However, the Florida legislation was silent on mediator qualifications, delegating that responsibility to the supreme court. FLA. STAT. § 44.306 (1987). Although the supreme court rules do require professional credentials for certification as a family mediator, no professional credentials are required for certification as a county court mediator. FLA. R. CIV. P. 1.760. Thus, county court mediators lacking professional credentials were not precluded from continuing to mediate in county court under either the legislation or the rules. In fact, all active mediators were permitted to continue to mediate regardless of their ability to satisfy the new qualifications requirements. FLA. R. CIV. P. 1.760(d).
Florida rules were recently revised to permit a limited freedom of mediator choice for disputants ordered to mediation, the basic requirement that certified circuit court mediators be either retired judges or experienced lawyers remains intact.

Indeed, the emphasis on professional credentials, coupled with the increasing willingness of Florida judges to order cases to mediation and require the parties to assume the costs, has spawned in Florida’s circuit courts a mediation industry populated by experienced trial lawyers and retired judges. As of September 17, 1990, 649 people had completed a forty-hour training program certified by the Florida Supreme Court. During 1989, 6,567 nondivorce civil cases were mediated in the eight circuit civil mediation programs that compile caseload statistics.

Professor Carrie Menkel-Meadow enunciates a different set of concerns about such developments. Analyzing and critiquing the national trend toward infusion of ADR processes into judicial systems, Menkel-Meadow is concerned that mandatory ADR programs “force people to use other processes of dispute resolution that may be subject to distortion within the adversary culture in which they are placed.”

This Article attempts a very preliminary assessment of these concerns in the context of the Florida experience. Part I traces the history and current status of court sponsored mediation programs in Florida.

8. FLA. R. CIV. P. 1.720(f) amended by In re: Amendment to Fla. R. Civ. P. 1.700-1.780 (Mediation), 563 So. 2d 85, 88 (Fla. 1990):
   Appointment of Mediator.
   (1) Within 10 days of the order of referral, the parties may agree upon a stipulation with the court designating:
      (a) A certified mediator; or
      (b) A mediator who does not meet the certification requirements of these rules but who, in the opinion of the parties and upon review by the presiding judge, is otherwise qualified by training or experience to mediate all or some of the issues in the particular case.
   (2) If the parties cannot agree upon a mediator within 10 days of the order of referral, the plaintiff or petitioner shall so notify the court within 10 days of the expiration of the period to agree on a mediator, and the court shall appoint a certified mediator selected by rotation or by such other procedures as may be adopted by administrative order of the chief judge in the circuit in which the action is pending.

9. FLA. R. CIV. P. 1.760(c)(1).

10. Data provided by Kim Ranck of the Florida Dispute Resolution Center. An additional 817 individuals had completed a certified 40-hour training program in divorce mediation, and 531 individuals had completed a 20-hour training program in county court mediation.

11. J. MASON & S. PRESS, FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM 5-6 (1990). Programs that compile caseload statistics exist in six of Florida’s 20 judicial circuits. Although many circuit civil cases were mediated throughout the remaining 14 circuits during 1989, caseload data from these circuits were not readily available.

Through interviews with mediators and lawyers participating in circuit court mediations, circuit mediation practices, styles, and strategies are assessed in Part II. Part III concludes that although circuit mediation practices reflect a fairly wide range of traditional mediator styles, certain institutional concerns and related practices threaten to transform mediation from a consensual to a coercive process.

I. COURT-SPONSORED MEDIATION IN FLORIDA

Considering that the nationwide interest in the mediation of court cases is of recent origin, Florida’s judicial system has a relatively long and rich history of experimentation with the mediation alternative. This history can be chronicled by considering three waves of interest over the past two decades: (1) during the 1970s attention was focussed on finding alternative means of processing “minor” criminal and civil cases; (2) the late 1970s and early 1980s witnessed the establishment of divorce mediation programs; and (3) the late 1980s saw an explosion of interest in the mediation of large civil cases at the trial and appellate levels. During each wave of interest, experimentation began at the local level and soon captured the attention of the Supreme Court of Florida and the Florida Legislature.

A. Minor Case Mediation

The early wave of interest in mediating minor disputes was propelled by calls at the national level for judicial experimentation with dispute resolution alternatives. Encouraged by the endorsement of national groups such as the American Bar Association (ABA) and the availability of Law Enforcement Assistance Administration funding, Citizen Dispute Settlement (CDS) programs were established in various Florida locales in the mid-1970s. Indeed, the first chair of the ABA’s Special Committee on the Resolution of Minor Disputes was Miami attorney Sandy D’Alemberte. Although the CDS programs initially concentrated on the mediation of minor criminal cases, some soon began to handle small civil claims.

By 1978, ten CDS programs were fully operational and the Supreme Court of Florida created a Special Advisory Committee on Dispute Resolution Alternatives in January of that year. Among the purposes


14. This history of the growth of Florida interest in minor case mediation is taken from an article by Bridenback, Palmer & Planchard, Citizen Dispute Settlement: The Florida Experience, 65 A.B.A. J. 570 (1979) [hereinafter Bridenback].
of the Committee were the assessment of existing CDS programs, the dissemination of guidelines for the creation of new programs, and the development of comprehensive orientation and training mechanisms for these programs. The services of Joseph Stulberg, a nationally prominent mediator, were subsequently enlisted to develop orientation and training materials. These efforts represented one of the first statewide initiatives at institutionalizing judicial mediation programs.

In 1985, the Florida Legislature gave formal recognition to these programs in legislation providing for their establishment by the chief judge of a judicial circuit and their governance by a local council. The legislation limited the mediator's liability and stated that all communications during mediation sessions were to be privileged and confidential.

The 1988 supreme court rules imposed, for the first time, training and internship requirements for the certification of mediators handling minor civil claims in Florida's county courts. County court mediators were required to complete a minimum of twenty hours in a training program certified by the Supreme Court of Florida, observe a minimum of four mediation conferences conducted by a court-certified mediator, comediately a minimum of three mediation conferences with a certified mediator, and conduct a mediation conference under the observation of a certified mediator. The rules included a "grandfather clause" that permitted those who had served as mediators for at least one year before January 1, 1989, to continue serving as a mediator, notwithstanding that they had not yet completed these training and internship requirements. However, these mediators were required to satisfy the training and internship requirements within six months of the date the supreme court certified a training program appropriate to their needs.

15. Id. at 573.
17. Bridenback, supra note 14, at 573.
18. Ch. 85-228, § 2, 1985 Fla. Laws 1537 (codified at Fla. Stat. § 44.201 (1987)).
21. The rule was subsequently changed, inter alia, to drop the comediatement requirement and increase the "solo" requirement from one to four under the observation and supervision of a certified mediator. Fla. R. Civ. P. 1.760(a) amended by In re: Amendment to Fla. R. Civ. P. 1.700-1.780 (Mediation), 563 So. 2d 85, 90 (Fla. 1990).
Recognizing the importance of having adequate training programs available for mediators in court sponsored programs, the Supreme Court of Florida allocated funds to conduct an initial series of regional training programs throughout the state and created a Mediation/Arbitration Training Committee in 1988.\textsuperscript{24} To conduct the regional training programs, the court awarded a grant to the "Coalition for Florida Mediation Training," an ad hoc group of nationally prominent mediators including Michael Lewis, Linda Singer, John Moore, and Josh Stulberg. Coordinated by Orlando attorney David Strawn, the Coalition conducted training programs in Miami, Tampa, and Tallahassee during the summer of 1988. Each program consisted of a twenty-four-hour core training session for all participants and two separate tracks consisting of sixteen hours for persons seeking certification as divorce or circuit court mediators. A total of 175 individuals received supreme court certified training in these regional training sessions.

Because the regional training programs were intended to serve as prototypes for subsequent training programs, individual sessions were videotaped, and the Supreme Court Mediation/Arbitration Training Committee, working with the Florida Dispute Resolution Center, considered how videotaped segments and training materials developed for the regional programs might be "packaged" for use in subsequent training sessions. The training committee was also charged with, \textit{inter alia}, establishing standards for certified training programs and reviewing the applications of training programs seeking supreme court certification.\textsuperscript{25} Acting on the initial recommendations of the training committee, the supreme court credited those individuals who successfully completed one of the regional training programs with having met the training requirements of the supreme court rules.\textsuperscript{26} Additionally, the court authorized the training committee to consider for certification the training courses offered by private training providers subsequent to January 1, 1983. The court also delegated to the chief judges of the various circuits the responsibility of certifying individual mediators, after considering whether they met the qualifications outlined in Florida Rules of Civil Procedure 1.760, including the successful completion of a supreme court certified training program.\textsuperscript{27}

\textsuperscript{25} \textit{Id.}
\textsuperscript{26} FLA. R. CIV. P. 1.770.
\textsuperscript{27} \textit{In re} Rules Governing Qualifications for Mediators and Arbitrators, Fla. Admin. Order (Sept. 23, 1988) (on file with Clerk, Florida Supreme Court). Subsequent legislation has provided for the statewide certification of mediators by the supreme court. FLA. STAT. § 44.102(4) (Supp. 1990).
Adopting subsequent recommendations of the training committee, the supreme court certified a "packaged" training program for county mediators, consisting of edited videotape and written materials developed during and after the regional programs. This program provided a cost-effective means of training county court mediators. In order to continue to serve as mediators, those who had been grandfathered in were required to complete a certified training program within a six-month period. The supreme court decided that the six-month period would commence on July 1, 1989. At present, therefore, all certified mediators of civil cases in Florida's court sponsored programs have completed training programs certified by the Supreme Court of Florida.

The past decade has seen considerable expansion in small case mediation in Florida. By 1989, there were twenty-one CDS programs in twelve of Florida's twenty judicial circuits. These programs mediated a total of 16,796 minor criminal and civil cases during that year. An additional eleven related programs handling exclusively minor civil matters exist in nine judicial circuits, mediating 8,832 cases in 1989.

These CDS and small claims mediation programs operate on relatively small budgets, generally using unpaid volunteers to provide mediation services at no cost to the parties. A 1986-87 survey revealed that most mediators in these programs are fairly well educated and hold relatively short mediation sessions. Although there are no educational requirements for these programs, most of the mediators have postcollege degrees. More than a third of the mediators reported holding sessions of thirty minutes or less, and fewer than twenty percent said their average session was ninety minutes or more. Less than

28. In re Rules Governing Qualifications For Mediators, Fla. Admin. Order (July 7, 1989) (on file with Clerk, Florida Supreme Court). These training materials have been provided to each of the local program directors. Representatives of the local programs have attended "Train the Trainer" sessions conducted by the Dispute Resolution Center to give these programs the capacity to train their mediators locally.

29. The supreme court also considered the development of "packaged" training programs for family and circuit court mediators. Ultimately, the court decided that these programs would be impractical because a number of privately sponsored training programs had been certified. Furthermore, the Supreme Court Training Committee believed that sufficient training resources were available through these private programs. Thus, the six-month period for grandfathered family and circuit mediators also began on July 1, 1989. Id. at 4.

30. J. Mason & S. Press, supra note 11, at 3-2 to 3-3.

31. Id. at 3-8.

32. Id. at 2-8.

33. For detailed descriptions of these programs and their caseloads, see id. at 2-1 to 3-13.

34. Alfini, Florida's Court Sponsored Mediation Programs: A Statistical Profile, 2 Fla. Dispute Resolution Center Newsl. 2-3 (Summer 1987).

35. Id. at 3.

36. Id.
ten percent of the mediators use caucuses (separate sessions) in more than half of their cases, and most said they never hold separate sessions with disputants.  

B. Divorce Mediation

The growth of divorce mediation programs during Florida’s second wave of interest has been no less dramatic than the growth of minor case mediation during the first wave. The first divorce mediation program was established in Broward County (Fort Lauderdale) in 1979, and by 1989 there were fourteen programs in twelve of the twenty circuits. The expansion of local programs undoubtedly was given a boost by a statute passed in 1982 authorizing the board of commissioners in each Florida county to establish a “family mediation or conciliation service” and to levy a service charge of up to two dollars on circuit court filings to support the county’s program.

A Supreme Court Commission on Matrimonial Law, established in 1982, recommended expanded use of mediation in cases involving custody and visitation issues. After hearing testimony from national experts on family mediation and representatives of programs in other states, the Commission observed that “evidence of the success of mediation programs in other states suggests that mediated settlements in marital disputes last longer and work better because the parties have helped craft the settlement and, therefore, have a greater stake in making it work.”

These events were brought about largely through the concerted efforts of a small group of circuit judges led by Judge Frank Orlando of

37. Id.
38. J. Mason & S. Press, supra note 11, at 4-1.
39. Id. at 4-4 to 4-6.
40. Ch. 82-96, § 2, 1982 Fla. Laws 233 (codified at Fla. Stat. § 44.101 (1987)). Although the statute and the programs themselves use the term “family mediation,” this connotes a much broader range of cases than these programs handle. I use the term “divorce mediation” because it more accurately describes the function these programs perform.
42. Id. at 5. Theoretically, mediation should be most appropriate in the divorce area because the divorce laws generally encourage “private ordering.” Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979). Also, the “continuing relationship” that divorcing parents will have by virtue of their children would appear to call for mediation’s “person oriented” intervention rather than adjudication’s “act oriented” intervention. Fuller, Mediation—Its Forms and Functions, 44 S. Cal. L. Rev. 305 (1971). However, some commentators have criticized divorce mediation for resulting in arrangements that undermine the legal status of women and render them vulnerable. M. Fineman, Dominant Discourse: The Professional Appropriation of Child Custody Decision-Making (1987); Lefcourt, Women, Mediation and Family Law, 18 Clearinghouse Rev. 266 (1984).
Fort Lauderdale.\textsuperscript{43} Intensely interested in improving the handling of family cases in circuit court, Orlando brought in a consulting team of nationally prominent mediators to speak to Florida bar and bench leaders in 1978. He subsequently supervised a one-year experimental program in Broward County that was paid for through a filing fee ordinance that preceded the 1982 statute.\textsuperscript{44} This program was to become the model for divorce mediation efforts in other Florida counties.

In addition to Judge Orlando's efforts, a further stimulus for the spread of court-sponsored divorce mediation programs in Florida was the in-state presence of a number of nationally prominent divorce mediators. The Florida-based organizational and training activities of these individuals were very influential throughout the late 70s and 80s. The first director of the Broward County program was O.J. Coogler, who made major contributions to the literature on divorce mediation.\textsuperscript{45} His successor, Aileen Hubert, has gained prominence in national circles particularly through her involvement with the Association of Family and Conciliation Courts.\textsuperscript{46} In the private sector, Florence Kaslow gained national prominence as president of the Academy of Family Mediators, founded the Florida Association of Professional Family Mediators, and contributed to divorce mediation literature.\textsuperscript{47}

Through the early efforts of Judge Orlando and the subsequent development of an in-state cadre of private divorce mediators, Florida's court-sponsored divorce mediation programs have developed a variety of methods of providing mediation services. The availability of funds, albeit rather modest, to operate divorce mediation programs through the filing fee levy has encouraged most of the programs to retain full-time or part-time staff mediators.\textsuperscript{48} Other programs refer cases to private mediators or contract with a private organization to deliver mediation services, and at least one program uses private attorneys who

\textsuperscript{43} Letter from Judge Orlando to the author (Apr. 22, 1991) [hereinafter Orlando].

\textsuperscript{44} Ch. 82-96, § 2, 1982 Fla. Laws 233 (codified at Fla. Stat. § 44.101 (1987)).

\textsuperscript{45} See, e.g., O. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT (1978).

\textsuperscript{46} The Association of Family and Conciliation Courts was founded in 1963. During the past two decades, it has promoted the expanded use of mediation in the family court setting through its publications and educational conferences.


\textsuperscript{48} For detailed descriptions of these programs see, J. MASON & S. PRESS, supra note 11, at 4-1 to 4-14.
mediate on a volunteer basis.\textsuperscript{49} In most of these programs, the parties are not charged for the mediation services.

The Florida divorce mediation programs in the fourteen counties that prepare caseload statistics reported that 8,243 cases had been mediated in 1989.\textsuperscript{50} Approximately seventy percent of these cases were referred before the divorce, and the remaining thirty percent involved postdivorce matters.\textsuperscript{51} Although most of these mediations were devoted solely to child custody and visitation issues, seven of the programs also handled cases involving equitable distribution issues.\textsuperscript{52}

C. Nondivorce Circuit Mediation

The third wave of interest in mediation differs from the first two waves in two significant respects. First, it has captured the interest of large segments of the Florida bench and bar to such an extent that they have become directly involved in the delivery of mediation services. Second, this direct involvement of legal professionals in mediation service delivery has resulted in the privatization of these services to an unprecedented degree.

Because the pathbreaking 1987 legislation and supreme court rules that precipitated the third wave of interest in mediation\textsuperscript{53} had limited the mediation of non-divorce civil cases in circuit court to retired judges and experienced Florida lawyers,\textsuperscript{54} the stage was set for greater involvement of legal professionals in mediation service delivery during the third wave. However, the Florida Legislature failed to appropriate funds to pay for these services on a statewide basis. The only public funds available for paying lawyer mediators for their services were those appropriated for a pilot program in the Eleventh Judicial Circuit (Tampa). Thus, lacking a clear financial incentive, it seemed unlikely that lawyers would invest the time and money necessary to become certified circuit court mediators.\textsuperscript{55}

\textsuperscript{49} Id.
\textsuperscript{50} Id. at 4-8.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 4-8 to 4-10.
\textsuperscript{53} See supra notes 2-3 and accompanying text.
\textsuperscript{54} See supra note 4 and accompanying text.
\textsuperscript{55} As originally promulgated, the supreme court rules required the lawyer or retired judge seeking certification to complete a 40-hour training program certified by the Supreme Court of Florida. FLA. R. Civ. P. 1.760(c)(1) (1989). Because these training programs typically are offered over a concentrated five-day period at a cost of $700-800, mediator certification represents a significant investment of time and money for a practicing lawyer. This investment was made more onerous by recent amendments to the rules that impose "mentorship requirements." In addition to the 40-hour training program, the lawyer seeking certification must now observe two circuit court mediations and conduct two mediations under the supervision and observation of a certified circuit mediator. FLA. R. Civ. P. 1.760(c)(3).
Subsequent events, however, have encouraged literally hundreds of legal professionals to become certified circuit mediators with the expectation that substantial mediation fees might be charged in these cases. During 1989, 6,567 nondivorce civil cases were mediated by circuit mediators in the eight circuit mediation programs that compile caseload statistics, and, by September of 1990, 649 people had completed one of the forty-hour training programs (certified by the Supreme Court of Florida) required for circuit court mediator certification.

What accounts for this sudden surge of interest by the legal community in mediating high stakes cases in the absence of public funds to reimburse them for their services? The most significant influence in shaping these events predated the 1987 legislation. In the two years before the legislation, James Chaplin, an enterprising Fort Lauderdale lawyer, had been mediating high stakes cases in Broward County. Initially, Chaplin charged no fee. However, as Chaplin "caught fire" and his services were used by judges in Broward County and the surrounding area, he founded Mediation, Inc., enlisted the services of other attorneys and former judges, and induced the judges to provide in their referral orders that the parties would pay the cost of mediation at the hourly rate set by the judge in the order.

Although referral orders setting the mediator's compensation rate and passing these costs on to the parties were permitted under the supreme court rules as originally promulgated, the rules contemplated this mode of mediation service delivery only "where appropriate." The usual modes of service delivery and compensation contemplated under the rules were by an uncompensated volunteer, a government employee, or by the parties' written agreement. Indeed, the usual

56. See supra notes 10-11 and accompanying text.
57. These are Chaplin's words. This brief history of Chaplin's experiences was developed from interviews and correspondence with Chaplin and former circuit judge Frank Orlando. Orlando was instrumental in convincing his judicial colleagues of the efficacy of circuit mediation. In an effort to overcome judicial skepticism, Orlando assigned 75 circuit civil cases to Chaplin. Chaplin took the cases at no cost and produced a 50% settlement rate. Orlando and Chaplin had been encouraged by the earlier efforts of retired Massachusetts Judge Albert Silverman in Palm Beach County. Orlando, supra note 43.
58. The mediator may be an uncompensated volunteer, a government employee or may be compensated according to the written agreement of the parties. In the absence of such written agreements . . . the mediator shall be compensated at the hourly rate set by the presiding judge in the referral order. Where appropriate, each party shall pay a proportionate share of the total charges of the mediator.
59. Id.
60. Id.
service delivery mode in county court mediation continues to be by an uncompensated volunteer. In divorce mediation, the usual delivery mode is by government employee or by private mediator compensated by the court. Nondivorce circuit mediation, on the other hand, generally is performed by private mediators whose fees are set by the court and paid by the parties; Chaplin originally initiated this type of arrangement. The usual mediation fee set by the court is $125 per hour.  

A recent rules change, intended to give the parties greater freedom to choose a mediator of their choice, apparently has opened the door to fee arrangements negotiated between the mediator and the parties. The rules now permit the parties to choose their own mediator (even one who does not meet the certification requirements of the rules) if they do so within ten days of the order of referral. This provides a mediator with an opportunity to negotiate a rate of pay higher than the rate usually set by the court, or, conversely, it gives the parties an opportunity to find a mediator who will accept a lower rate. One of the circuit mediators interviewed for this Article explained that he charges $200 per hour if sought out by the parties. Knowing this, some parties desiring this mediator’s services have tried to have the judge appoint the mediator at the close of the ten-day period so that the usual court-set rate of $125 would apply.

According to the mediation program directors in two of the larger judicial circuits with significant circuit mediation activity, the parties now select their mediator in most cases ordered to mediation. However, these program directors expressed disagreement with the rules revision that has permitted party choice. They explained that a few of the more popular mediators are now doing most of the circuit mediations and that the less popular mediators are getting less business. They thought this unfair in light of the investment of time and money that a lawyer must make to become certified.

Such attitudes suggest that circuit mediation has been privatized to an extent that resembles a franchise. In exchange for the lawyer’s

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61. See, e.g., form orders for appointing court mediators in Broward, Palm Beach, and Polk counties (on file with the clerk of each county’s court).
62. See supra note 8 and accompanying text.
63. See infra notes 66-67 and accompanying text.
64. Id.
65. A leading proponent of “privatization” views it as “the act of reducing the role of government, or increasing the role of the private sector, in an activity . . . .” E. SAVAS, PRIVATIZATION—THE KEY TO BETTER GOVERNMENT 3 (1987). Savas identifies the franchise as one alternative arrangement where the government arranges for direct services between private sector providers and the recipients of the services. For an excellent theoretical analysis of the trends towards privatization in the courts, see Garth, Privatization and the New Formalism: Making the Courts Safe for Bureaucracy, 13 LAW & SOC. INQUIRY 157 (1988).
investment of time and money to acquire mediator certification, the courts arrange for the direct delivery of mediation services by these private sector providers and their direct payment by the parties.

II. **THE END OF "GOOD MEDIATION?: AN EMPIRICAL ASSESSMENT**

Does the highly legalized and privatized mediation industry spawned during Florida’s third wave of interest portend the end of "good mediation?" To address this question, we must first determine how Florida circuit mediators mediate and then compare their mediation style(s) with the way mediation has traditionally been conducted. Toward this end, a preliminary assessment of circuit mediation practices was conducted by the Florida Dispute Resolution Center during the latter half of 1990.

**A. Methodology**

Information on circuit mediator attitudes and styles was acquired primarily through structured interviews with mediators and experienced attorneys who had cases before these mediators. Structured personal and telephone interviews with eleven mediators and nine attorneys were conducted between June and October of 1990. Most interviews lasted for approximately one hour; a few extended significantly beyond that time. Less structured discussions were held with many additional mediators and attorneys, as well as with circuit mediation program directors.

The principal criteria for selecting interviewees were their level of experience with mediation, geographic location, and legal background. Although only one of the mediators had been mediating for more than three years, all but two of the eleven circuit mediators had conducted at least 150 circuit mediations. All of the attorneys had represented clients in mediated cases involving at least three different mediators. Collectively, the mediators and the attorneys have been in-

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66. Although it would have been desirable also to observe these mediators in action, geographic and resource constraints made direct observations of mediation sessions logistically impossible. Although the attorneys were interviewed largely as a means of objective confirmation of information obtained through mediator interviews, the attorney interviews are by no means a surrogate for direct observation. We have therefore characterized this study as preliminary and would hope that resources will be available in the future to conduct a more extensive study permitting direct observations of mediation sessions.

67. The individuals quoted herein were guaranteed anonymity. Notes and records of the interviews are on file with the author.

68. Of the remaining two mediators, one had conducted 20 circuit mediations and the other had conducted six. The mediator with only six mediations was also a divorce mediator and had conducted many divorce mediations.
involved in mediations throughout Florida. One of the mediators is a statewide circuit rider, having conducted mediations in most of the state’s twenty judicial circuits.

While two of the other mediators might be characterized as regional circuit riders, the remaining eight mediate in one of five circuits with significant mediation activity. Eight of the mediators are experienced Florida trial lawyers, four of whom have given up their law practices to mediate on a full-time basis (three as independent contractors and one as a court employee). Two of the remaining mediators are retired judges from other states, and the third is a nonlawyer who was grandfathered in under the supreme court rules. Four of the nine attorneys are primarily defense lawyers, three are plaintiffs lawyers, and two stated that their practices were “mixed.”

Although the mediators were asked a number of questions about their backgrounds and attitudes towards court-sponsored mediation, most questions required them to describe their approach to mediation and how they conducted its various stages. The attorney interviews served as a check on the accuracy of the mediator self-reports. An additional check on the credibility of the mediators’ descriptions of their mediating behavior is the lack of conventional wisdom on the “right way” to conduct a mediation.69

B. The Mediation Setting: General Observations and Attitudes

Although the circuit mediators and attorneys reported positive experiences with a wide range of case types, the predominant case type ordered to mediation apparently is a personal injury case with a likelihood of settlement between $25,000 and $100,000. All of the mediators estimated that at least one third of their mediations involved personal injury claims, with six of the eleven mediators estimating that more than half were personal injury cases. Other frequently mentioned case types included construction, commercial contract, and real estate. Seven mediators reported having settled at least one case for an amount in excess of $1,000,000.

While all of the mediators and attorneys believed that mediation was appropriate for a wide range of substantive case types, neither mediators nor attorneys evidenced a group consensus as to those attributes that make a case most conducive to mediation. Although all believed that cases tend to be more conducive to settlement if liability is not in issue, some concluded that only cases devoid of real liability

69. See infra notes 76-109 and accompanying text.
issues should be mediated. Others refused to limit mediation to only these cases.\textsuperscript{70}

Similarly, there was no group consensus as to the point at which a case is ripe for mediation. Some felt strongly that mediation usually is a waste of time unless discovery is complete or very near completion. One mediator explained: "Attorneys have to know quite a bit about their case before they are ready to negotiate." On the other hand, others believed that many cases are ready for mediation before or soon after a claim is filed. Although the plaintiffs' lawyers were more likely to favor early intervention, one defense attorney agreed:

I think a lot of times they should probably go to mediation right off the bat . . . you're still at a stage where, from a defense perspective, you have not deferred a great deal of cost. And likewise from a plaintiff's perspective he has to put a lot of time and effort into the case which may make it easier to settle because you don't have to recoup all those expenses . . . . From the damages perspective, your damages are going to be there from day one and they shouldn't change.\textsuperscript{71}

Summing up the only real consensus on the appropriateness and ripeness for mediation issues, one mediator stated simply, "It depends." He explained that the lawyers have to have enough information about their cases so "that they can make reasoned decisions about liability and damages. This can be very early in the process to very late in the process."\textsuperscript{72}

While estimates of the length of mediation sessions were fairly uniform, estimates of success varied widely. Six of the eleven mediators estimated the average length of their sessions to be two-and-a-half hours, two estimated three hours, two estimated one-and-a-half hours, and one mediator estimated that fifty percent of his cases settle within one hour. These estimates of session length tended to be confirmed by the attorneys, all of whom placed the average length at between one and three hours. However, mediator and attorney estimates of success diverged. All of the mediators estimated that at least fifty percent of their cases settled at mediation, with five of the eleven placing their success rate at eighty percent or better. None of the attorneys estimated that more than half of their cases settled at mediation. Five placed the mediation success rate at approximately fifty percent, while the remaining four estimated less than fifty percent. An attorney who

\textsuperscript{70} See generally Menkel-Meadow, \textit{supra} note 12.

\textsuperscript{71} \textit{Supra} note 67.

\textsuperscript{72} \textit{Id.}
had been involved in more than 100 mediations stated that the success rate was "way less than fifty percent," and another attorney who had been involved in about fifty mediations estimated the success rate at "between thirty-three and forty percent, but that might be a little high."

Although the attorneys were less willing to estimate high settlement rates, most were no less positive than the mediators about the utility of mediation. A number of attorneys explained that they initially were negative about mediation, but they have since come around. Both plaintiffs' and defense lawyers tended to see mediation's biggest benefit as being "an eye-opener for the client," often validating or reinforcing the attorney's premediation advice to the client. As one attorney explained,

[P]erhaps one of the most important things about mediation is that the client who is sitting there listening to this generally comes away with a feeling that things are not as rosey, not as terrific, as they thought they were. . . . Frankly, it gives me a stronger position with the client—a sense that we're together.73

Another attorney stated:

I wasn't for mediation when it came out. I looked at it as another expense, another hurdle before we get to the courthouse. . . . However, I have settled some cases to the benefit of my client because of mediation. . . . Certainly, it has a role, and it's really turned out a lot more positively than I thought it would be.74

Although this statement reflects the general attitude of the attorneys we interviewed towards mediation, one attorney expressed concern because mediation is mandatory:

I think overall it's a good process. I think down here it's been distorted a little because it's mandatory down here in almost every county. . . . I think people, a lot of times, just go through the motions whereas if you have the choice to mediate, you're there because you want to be and because you think it will help.75

Although only a few attorneys expressed similar reservations about mandatory mediation, all attorneys and mediators interviewed did re-

73. Id.
74. Id.
75. Id.
port instances where parties show up for mediation and "just go through the motions." Although most felt that this was more of a problem in the past, when attorneys were less familiar with the process and tended to show up unprepared, most expressed a continuing need to address this problem within the mandatory framework.

Most of those interviewed believed that the problem of the nonplaying party is best addressed by imposing a mediation-in-good-faith requirement, with appropriate sanctions, on the recalcitrant party. When those who favored such an approach were asked to explain how a mediation-in-good-faith requirement might be imposed and enforced, all admitted that such a standard would necessarily be subjective. Yet, most felt that existing norms within the legal community would make such a requirement workable. One mediator summed up the general attitude:

Most attorneys have a pretty good idea whether it's good faith or bad faith. For example, showing up to mediation when you've got a serious injury with plenty of policy limits available and saying, "I've come here with $2,000 authority, that's all I've got and that's all we're putting on the deck today." I think almost all would agree that's not good faith. On the other hand . . . if it's a real difference of opinion on the value of the case, that's not bad faith. . . . We have a body of case law that tells you what bad faith is. If it's within some existing case where it's already been determined to be bad faith then you can have sanctions.

76. This mediation-in-good-faith requirement ostensibly would require more than the mere attendance of counsel and party representatives at the mediation session. This much is already required by Fla. R. Civ. P. 1.720(b) amended by In re: Amendment to Fla. R. Civ. P. 1.700-1.780 (Mediation), 563 So. 2d 85, 87 (Fla. 1990):

SANCTIONS FOR FAILURE TO APPEAR. If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion shall impose sanctions, including an award of mediator and attorney fees and other costs, against the party failing to appear. If a party to mediation is a public entity required to conduct its business pursuant to chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity. Otherwise, unless stipulated by the parties, a party is deemed to appear at a mediation conference if the following persons are physically present:

(1) The party or its representative having full authority to settle without further consultation; and
(2) The party's counsel of record, if any; and
(3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle without further consultation.

77. Supra note 67.
Although all agreed that the decision to sanction was necessarily a judicial prerogative, there was some disagreement over who should make the bad faith allegation to the judge. One mediator said that it should be done by "a report from the mediator," believing that "the mediator has the authority to do that if he deems it necessary."78

However, most of the mediators and all of the attorneys who favored a mediation-in-good-faith requirement said that it would be inappropriate for the mediator to recommend sanctions. They said that the bad faith allegation should be made by opposing counsel. When asked who should decide on sanctions, one mediator explained:

I think the court should on motion of the opposing counsel. I don't think the mediator should ever recommend sanctions. That's not his role. The attorneys are there to protect their clients' interests and I think it's up to them to move for sanctions.79

Those who favored sanctions were less clear, however, about how the judge would go about deciding whether sanctions were appropriate without compromising the confidentiality provisions of the statute.80

78. Id., Although some local court referral orders impose a mediation-in-good-faith requirement, they fail to provide guidance as to how such a requirement might be implemented. "Failure to appear and/or to participate in good faith may cause the Court to impose sanctions accordingly, including but not limited to dismissal of the cause." See, e.g., Dade County Order of Referral for Private Mediation (on file with Clerk, Eleventh Judicial Circuit, Dade County, Florida) (emphasis in the original).

79. Id.

80. FLA. STAT. § 44.102(3) (Supp. 1990):

(3) Each party involved in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding. Notwithstanding the provisions of s. 119.14, all oral or written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119 and shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise. This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.14.

An experienced retired judge mediator explained his position with regard to the apparent dilemma posed by the mediation-in-good-faith requirement:

I had a mediation that we set aside for five days. One of the major defendants had been written a letter by the plaintiff's attorney saying, "We're setting aside five days for this mediation. If you're not going to be prepared to mediate, please let us know. You're an integral part of the mediation." He came to mediation but was not prepared to mediate. They talked about sanctions but I have no authority to do that. That's the judge's department. They set up a hearing the next morning so that the judge will sanction him. They asked me to be there. If I'm asked to testify and tell what happened, I will. I also don't make any recommendations for sanctions unless I'm asked. If the court wants me to come down there to tell what happened, I'm always concerned because what happens in mediation conferences is off the record. Unless the court orders me to disclose it, I don't do it.

Supra note 67.
They merely expressed a general view that the judge could get enough information without destroying the integrity of the process.

The view that there should be a mediation-in-good-faith requirement was by no means a unanimous one. A healthy minority of both the mediators and the attorneys were either opposed to the concept or believed that it should be based on a limited, objective standard.

Among those who opposed a good faith requirement were some of the more experienced mediators and attorneys. The mediators tended to believe that the problem is over-stated, while the attorneys believed that any standard would necessarily be too subjective. One mediator downplayed the problem:

I think that we're making a big deal out of something that really isn't much of a problem. Most of the time when lawyers say "the other side is in bad faith," they're really saying that they're not doing what they want them to do. They're not valuing the case the way I value the case.  

A lawyer, on the other hand, recognized the problem but underscored his belief that any standard would be hopelessly subjective:

I don't consider it not mediating in good faith when you walk in and say, "We really don't think we have any exposure so we're not going to offer anything, we're willing to take that risk." I know there was one case where the mediator really got on them, attempting to assert that they were not bargaining in good faith because they were not ready to put another figure on the table.

A few of the interviewees would impose sanctions only in those cases where a party is represented at mediation by someone who does not have full settlement authority. One mediator expressed the belief that mediation would be "weak and ineffective" unless there was "some authority to bring the parties to the table with settlement authority." However, he said that he would limit the good faith requirement to "the objective standard—did they send someone with settlement authority?"

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81. Supra note 67.
82. Id.
83. Local orders directing parties to mediation in some of Florida's judicial circuits include the requirement that the party representatives have full settlement authority. Sanctions imposed pursuant to such an order were upheld on appeal in Semiconductors, Inc. v. Golasa, 525 So. 2d 519 (Fla. 4th DCA 1988).
84. For an analysis of some of the problems inherent in determining whether this "objective" standard has been satisfied, see Heileman Brewing, Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (Easterbrook, J., dissenting).
Our interviews with mediators and attorneys suggest that the perceived need for a mediation-in-good-faith requirement is fairly pervasive. However, there is virtually no consensus with regard to its scope or how it should be imposed or enforced.

C. Mediator Styles and Strategies

Does circuit court mediation—because it is mandatory and conducted by legal professionals—anticipate a deviation from traditional mediation styles and strategies? Our interviews with the circuit mediators and lawyers revealed three distinct styles. These three approaches to the mediation process are characterized as (1) trashing, (2) bashing, and (3) hashing it out.

1. Trashing

The mediators who employ a trashing methodology spend much of the time “tearing apart” the cases of the parties. Indeed, one of these mediators suggested the “trasher” characterization: “I trash their cases. By tearing apart and then building their cases back up, I try to get them to a point where they will put realistic settlement figures on the table.”

To facilitate uninhibited trashing of the parties’ cases, the overall strategy employed by these mediators discourages direct party communication. Following the mediator’s orientation and short (five to ten minutes) opening statements by each party’s attorney, the mediator puts the parties in different rooms. The mediator then normally caucuses with the plaintiff’s attorney and her client in an effort to get them to take a hard look at the strengths and weaknesses of their case. One plaintiff’s lawyer described the initial caucus:

The mediator will tell you how bad your case is . . . try to point out the shortcomings of the case to the parties and try to get the plaintiff to be realistic. They point out that juries aren’t coming back with a lot of money anymore on these types of cases. They ask you tough questions to get you to see where you might have a liability problem or the doctor says you don’t have a permanent injury so you may get nothing. They will try to get you to take a hard look at the deficiencies in your case that obviously I already know, but sometimes it enlightens the plaintiff to hear it from an impartial mediator.

85. Supra note 67.
86. Id.
Having torn down the case in this manner, the mediator will try to get the plaintiff and plaintiff's attorney to consider more "realistic" settlement options. The mediator then gives the plaintiff's lawyer and her client an opportunity to confer, while the mediator shuttles off to caucus with the defense.

The defense caucus is similar to that conducted with the plaintiff, except that the mediator may present the defendant with a new settlement offer if the plaintiff caucus has resulted in one. A defense attorney described the caucus:

During the defense caucus, the mediator will usually say, "Well you know they've asked for this figure and they think they have a strong case in this regard. Their figure is 'x.' They're willing to negotiate. They have told me that they'll take this amount which is obviously lower than the original demand"—if he has authority from the plaintiff to reveal that to you. If he doesn't, he won't say anything about that. He asks, "What do you think the case is worth? Why?"

... He'll then work through the case with us, pointing out outstanding medicals, lost wages and other special damages, then tallying them up and a certain percentage of pain and suffering and come up with a figure. And then they may discuss the strength of the case. I've had mediators say things to me in the caucus such as, "I was impressed by the plaintiff; I think they're going to be believable. Have you factored that into your evaluation of the case?" 87

If the trasher gets the defense to put a figure on the table that is closer to the plaintiff's current offer, the mediator will then shuttle back to the plaintiff.

Once the trasher has achieved the goal of getting both sides to put what she believes to be more realistic settlement figures on the table, she will shuttle back and forth trying to forge an agreement. If this is accomplished, the mediator may or may not bring the parties back together to work out the details of the agreement. One trasher explained that, once separated, he never brings the parties back together even at the final agreement stage.

On the whole, the attorneys appeared to accept, if not appreciate, the extreme caucusing methodology of the trasher. As one defense lawyer whose practice is limited to personal injury actions explained:

We communicate through the mediator. Personal injury is a very emotional type of practice where emotions run high. What we find is that the personalities of the attorneys come into conflict, the

87. Id.
personality of the carrier comes into conflict and the personality of
the adjuster comes into conflict. So it’s best to bring in a distance of
parties. To walk back and forth and give some insights to each
other.88

Mediators who employ a trashing methodology tend to draw on
their own experiences with the litigation process to get the parties to
take a hard look at their cases. Indeed, all of the trashers that were
interviewed are experienced trial lawyers. They call upon their own
experiences not only to expose procedural and substantive weaknesses
on both sides, but also to get the parties to consider the costs of litiga-
tion. One defense attorney explained that once the mediator points
out the weaknesses and has the party assess the costs of the litigation,
the mediator will say, “‘Do you guys really want to spend all this
money to take this case to trial?’ I see a lot of that which, for your
typical insurance company, is a very fruitful approach.”89 This same
lawyer, however, saw this approach as less effective when representing
government agencies: “It’s not nearly as fruitful because govern-
mental agencies, especially the sheriff, are such easy targets for law-
suits that nuisance value doesn’t really exist. If we don’t think we
have done anything wrong, we generally fight to the bitter end even if
we get clobbered.”90

If the trashing methodology is to be effective, the importance of
having a mediator with litigation experience was underscored by this
same attorney:

I’ve had two occasions where we had a mediator that had never
really litigated and had not dealt with the type of issues we were
dealing with. In both cases, he, I felt, completely misperceived the
issues and the possible exposure and liability. In one case, he thought
we had horrible exposure and we really didn’t, at least in my
opinion. In the other case, he thought we had a great defense
because there was a whole lot of things against us and we really
needed to settle.91

2. Bashing

Unlike the trashers, the mediators who use a bashing technique tend
to spend little or no time engaging in the kind of case evaluation that

88. Id.
89. Id.
90. Id.
91. Id.
is aimed at getting the parties to put "realistic" settlement figures on the table. Rather, they tend to focus initially on the settlement offers that the parties bring to mediation and spend most of the session bashing away at those initial offers in an attempt to get the parties to agree to a figure somewhere in between. Their mediation sessions thus tend to be shorter than those of the trashers, and they tend to prefer a longer initial joint session, permitting direct communication between the parties.

Most of the bashers interviewed were retired judges who draw on their judicial experience and use the prestige of their past judicial service to bash out an agreement. One of the retired judges explained that he emphasizes his judicial background during his opening statement to get them in the right frame of mind:

I introduce myself and give them my background because I think that's very helpful to litigants to know they're before a retired judge with a lot of experience. . . . I tell them that even a poor settlement, in my judgment, is preferable to a long and possibly expensive trial together with all the uncertainties that attend a trial.  

This mediator described the mediator's role as "one who guides," and explained why he believed that a retired judge makes an effective mediator: "If you're a retired judge you bring much more prestige to the mediation table than just an attorney because the people look at this attorney and say, 'I have an attorney; what do I need this guy for?' A judge they listen to."  

The notion that a mediator is "one who guides" suggests that the basher adopts a more directive mediator style than that employed by the trasher. The differences between the trasher and the basher in this regard were perhaps best revealed in their responses to a question we asked concerning the differences between mediation and a judicial settlement conference. The trashers tended to see the settlement conference judge as being much more aggressive than the mediator ("judges can lean on you, mediators I guess can, but they shouldn't"), while the bashers felt just the opposite. Another basher elaborated on his perception of the differences:

The judge has to be very careful. Because if he expresses an opinion, the next thing he knows he's going to be asked to excuse himself because one side or the other will think he's taking sides. In

92. Id.
93. Id.
mediation, you don’t have to worry about that. You can say to the plaintiff, “there’s no way the defendant is going to pay you that kind of money.” You can say things as a mediator that you can’t say as a judge.\(^4\)

As soon as the basher has gotten the parties to place settlement offers on the table, as one attorney explained, “there is a mad dash for the middle.” One of the retired judges described a case he had mediated that morning:

[T]he plaintiff wanted $75,000. The defendant told me he would pay $40,000. I went to the plaintiff and said to him, “They’re not going to pay $75,000. What will you take?” He said, “I’ll take $60,000.” I told him I wasn’t sure I could get $60,000 and asked if he would take $50,000 if I could get it. He agreed. I then went back to the defendant and told him I couldn’t settle for $40,000, but “you might get the plaintiff to take $50,000” and asked if he would pay it. The answer was yes. Neither of them were bidding against themselves. I was the guy who was doing it, and that’s the role of the mediator.\(^5\)

A defense attorney found this bidding process to be the most objectionable aspect of circuit mediation. He explained that it discouraged the responsible attorney from carefully evaluating her case beforehand and making an initial settlement offer that was both reasonable and realistic:

[T]his is one of my real complaints about mediation . . . mediation is a game . . . What mediation has done has said, “Look, if you do what you should do as a responsible attorney, what you do is establish a floor and when you get to the mediation, the mediator is going to expect you to move up.” Otherwise, his position is going to be “wait a minute, you didn’t come here with an open mind. You didn’t come in a position to negotiate in good faith.”\(^6\)

Another attorney found the bashing methodology totally inappropriate for complex, multiparty cases. The attorney offered as an example a groundwater contamination case in which he was involved. He said that the case involved a number of individual parties, insurance companies, and third party complaints against real estate companies. The mediation took place in a courtroom with a retired judge as

\(^4\) Id.  
\(^5\) Id.  
\(^6\) Id.
the mediator. The mediator sat in the front of the courtroom and the attorneys and their clients sat together, theater style:

We weren't even looking at one another. The mediator didn't have a clue as to what the case was all about. You'd think he would at least try to figure out who should meet with who and whether collateral issues could be dealt with. Just kind of organize the procedure. But he didn't even do that. The mediator was absolutely worthless. It is the fact that the parties were forced to get together to talk that may force some settlements. It's hard to believe that it would be because of anything the mediator did.

Although the basher style is the most directive of the three circuit mediation styles, it apparently is preferred by some attorneys in circuits where it is the predominant style. A mediation program director in one of these circuits explained that she has received complaints from attorneys who felt that the mediator assigned to their case was "not pushy enough." They said that the attorneys had come to expect mediators who would "hammer some sense" into the other side.

3. Hashing It Out

The third circuit mediation style can best be described as one involving a hashing out of a settlement agreement because it places greater reliance on direct communication between the opposing attorneys and their clients. The hashers tend to take a much more flexible approach to the mediation process, varying their styles and using techniques such as caucusing selectively, depending on their assessment of the individual case and the needs and interests of the parties. When asked to describe the mediator's role in one sentence, a hasher responded, "Facilitator, orchestrator, referee, sounding board, scapegoat."

The hasher generally adopts a much less directive posture than the trashers and bashers, preferring that the parties speak directly with one another and hash out an agreement. However, if direct communication appears counterproductive, the hasher acts as a communication link. One explained,

If the parties are at war, they communicate through me. If the lawyers are not crazy, they communicate with each other through me. If the lawyers are crazy, and the parties can talk with each other, they talk with each other. If nobody can talk, they communicate.

97. Id.
through me. My preference is that they communicate with each other.98

When asked how he gets the parties to communicate, the mediator elaborated:

I may caucus with them to find out if they can. . . . If they don’t want to, I don’t force them. If they want to communicate, I put them together and say, “OK, tell them what you told me, if you want to.” Or if it’s a really complex thing like a long list of demands, I don’t want to have to memorize it because I’m liable to misstate something. I simply say, “you tell them.” . . . I may warn the other side not to respond, just hear what they have to say, maybe ask questions, but don’t get defensive. Then I’ll take them out. Then I’ll get with the other side and say, “How do you want to respond to this? Do you want me to bring them in?”99

In addition to this more flexible orchestration of the process, the hasher is also unwilling to keep the parties at the mediation session if they express a desire to leave, unlike the trashers and bashers. When asked what he would do if the parties expressed a desire to leave the mediation session prematurely, a hasher responded, “Mediation is essentially a voluntary process even though they’re ordered to show up. . . . If they don’t want to go through the process or negotiate, they’re basically free to walk out.”100 None of the bashers and trashers was willing to give the parties this much latitude. They all expressed the view that it was the mediator’s prerogative to decide when the mediation session was over. As one basher explained, “It’s my decision to either declare it an impasse and have everybody go home or to continue. It’s not their decision. You have to reassert control.”101

The hashers also differed from the trashers and bashers in reporting a willingness to caucus separately with the attorneys or the clients if they believed it might facilitate settlement. One hasher explained:

Sometimes, I talk to the parties and say, “Do you mind if I talk to your lawyers alone? I want to go through some procedural matters so that this thing will go a little smoother and a little faster.” I ask the lawyers, “What do you want to do? How do you guys want to handle it?” Sometimes they say to me, “I really want you to talk to

98. Id.
99. Id.
100. Id.
101. Id.
my clients. They’re really unrealistic.” I say OK and then figure out how to do it. I don’t do it in an opening. I’ll do it in a caucus. I’ll get some tipoffs and leads by asking some questions of the counsel that leads me to do what I think he needs done. If his assessment is accurate.102

Flexibility apparently is the hallmark of the hasher style of mediation. Although hashers prefer to adopt a style that encourages direct party communication to hash out an agreement, they are willing to employ trasher or basher methodologies if they believe it to be appropriate in a particular case.

III. CONCLUSION

Trashing, bashing, and hashing it out—is this the end of “good mediation?” This question can best be addressed by examining the extent to which these mediation practices differ from those reported in the mediation literature.

A review of prominent mediation texts103 and empirical studies of mediator styles104 reveals little consensus as to what constitutes “good mediation.”105 Instead, they discuss a wide range of mediator strategies that include all three circuit mediation styles. Folberg and Taylor,106 for example, describe no less than thirteen mediation styles. Those they describe as “labor mediation”107 are similar to the trasher, “muscle mediation”108 to the basher, and “lawyer mediation”109 to the hasher.

Similarly, two empirical studies report on a variety of mediator styles. Kolb identifies two distinct mediator styles—dealmakers and

102. Id.
104. See, e.g., D. KOLB, THE MEDIATORS (1983); Silbey & Merry, Mediator Settlement Strategies, 8 LAW AND POLICY 7 (1986).
105. Indeed, one is hard-pressed to find in the literature a governing conception of the mediation process. See J. FOLBERG & TAYLOR, supra note 103; C. MOORE, supra note 103; D. KOLB, supra note 104; J. BERCOVITCH, SOCIAL CONFLICTS AND THIRD PARTIES: STRATEGIES OF CONFLICT RESOLUTION (1984). These works are reviewed in Sheppard, The Art and Science of Mediation, 4 NEGOTIATION J. 161 (1988).
106. J. FOLBERG & A. TAYLOR, supra note 103.
107. Id. at 131-132.
108. Id. at 135-136.
109. Id. at 133-134.
orchestrators—in her study of state and federal labor mediators.\textsuperscript{110} Like the trashers and bashers, the dealmakers (state mediators) tend to place heavy reliance on caucusing and have the parties communicate through the mediators.\textsuperscript{111} One dealmaker described the basic tactic used to strike a deal as "hammering."\textsuperscript{112} The orchestrator (federal mediator), on the other hand, employs a hasher style that emphasizes flexibility and direct communication between the parties, putting the burden on the parties to come to agreement.\textsuperscript{113} The Florida circuit mediation styles are also reflected in the typology of mediator styles constructed by Silbey and Merry based on their observations in three Massachusetts programs.\textsuperscript{114} Silbey and Merry identify two modal styles of mediation: bargaining and therapeutic.\textsuperscript{115} Their descriptions of the bargaining mode include styles similar to the trasher and basher, while descriptions of the therapeutic mode approximate the hasher's style.

Thus, the styles of Florida's circuit mediators apparently are similar to those reported in the mediation literature. One would therefore be hard-pressed to signal an end to "good mediation" on the basis of mediator behavior alone.

However, if one focuses on the emerging conception of the circuit mediation process in Florida, the question becomes more problematic. The mediation process is consistently described in the literature as consensual. Depending on the mediation setting, the style of the mediator, and the mediator's conception of his or her role, the mediator may be more or less directive and the parties may be more or less in control of the process, but the parties should always be free to decide when the mediation is to be terminated and on what terms.\textsuperscript{116} As we have seen, this conception of the mediation process is at odds with the attitudes expressed by some of the mediators and attorneys we interviewed. In circuit mediation, the parties are not only forced to the table by the mandatory character of the program, but, as we have noted, many mediators believe that it is the mediator's prerogative to decide when the session is over. Moreover, there appears to be an

\begin{footnotesize}
\begin{enumerate}
\item D. Kolb, \textit{supra} note 104.
\item \textit{Id.} at 25-28, 41-45.
\item \textit{Id.} at 24.
\item \textit{Id.} at 29-32, 41-45.
\item Silbey & Merry, \textit{supra} note 104.
\item \textit{Id.} at 19-25.
\item This point is trenchantly argued by Robert A. Baruch Bush of Hofstra University. In arguing for an empowerment and recognition mediator model, Professor Bush argues that permitting a mediator to determine when a mediation should be terminated disempowers the parties. Bush, \textit{Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation}, 41 U. FLA. L. REV. 253, 284 (1989).
\end{enumerate}
\end{footnotesize}
emerging notion that parties who do not "mediate in good faith" should be sanctioned. Although there is little or no consensus as to the meaning of "good faith mediation," the mere fact that this vague obligation is couched in legal terminology and apparently is sometimes held over the heads of recalcitrant parties may be distorting the mediation process, as warned by Menkel-Meadow.117

Although recent amendments to the Florida rules giving parties to mediation the freedom to choose their own mediator may reinforce the notion that mediation is a consensual process, imperatives imposed by the adversarial process most likely will continue to encourage a coercive element. As mediation increasingly is viewed by the Florida bar and bench as an integral part of the civil litigation process, pressures will mount to ensure a degree of procedural regularity and fairness. It will be argued that procedural mechanisms should be developed to ensure that the parties to a mediation approach it with an equal degree of seriousness so that parties and attorneys who invest considerable amounts of time and resources in preparing for a mediation session are not faced with opposing parties and counsel who are apathetic or refuse to play.

Therein lies the dilemma: How can the goals and demands of a consensual, nonadversarial process be reconciled with those of the highly adversarial context into which it is injected? This is the biggest challenge facing the ADR movement in Florida.

117. Menkel-Meadow, supra note 12 and accompanying text.