Professionalism as a Tool for Successful Mediation

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FIVE TOPICS TODAY RE PROFESSIONALISM

• 1. A brief overview of Professionalism in Florida
• 2. What is Professionalism Anyway?
• 3. The Mediator as Professional
• 4. The Negotiator as Professional
• 5. The Mediator as Surrogate Professional
History and Overview

“...while a canon of ethics may cover what is minimally required of lawyers, ‘professionalism’ encompasses what is more broadly expected of them—both by the public and the best traditions of the legal profession itself.”

The ABA Commission on Professionalism 1986
Chronology — evolution at work

- 1986 — ADA Commission of Professionalism: Study and Report
- 1986 — Professionalism — Let’s Keep it Alive by Patrick G. Emmanuel
- 1990 — The Florida Bar adopts the “Ideals and Goals of Professionalism”
- 1993 & 1995 — The Florida Bar commissions two separate attitude surveys of lawyers
- 1995 — The Florida Bar creates “The Standing Committee on Professionalism
- 1996 — Florida Supreme Court creates: “Commission on Professionalism” and “The Florida Bar Center for Professionalism” (Renamed in 2005 “The Henry Latimer Center for Professionalism”)
- 2013 & 2014 — The Supreme Court Creates a Code for Resolving Professionalism Complaints at the Circuit level
Supreme Court Commission On Professionalism and Civility

• The Supreme Court of Florida’s Commission on Professionalism and Civility serves as a **steering and long-range planning commission** for the creation and implementation of programs promoting the ideals and goals of professionalism.

• In addition to providing input, guidance and approval for the creation and implementation of professionalism programs and seminars, the Commission oversees the development of judicial professionalism programs and the promoting of professionalism in law schools.

• Presently has 36 members. Florida Supreme Court Justice R. Fred Lewis is the Chair
Standing Committee On Professionalism

• The scope and function of the Standing Committee on Professionalism is to assist the Commission and Center for Professionalism in implementing programs, events, and activities to promote professionalism throughout the state.

• Was responsible for the initial draft of the Code of Professionalism Expectations.

• Presently has 48 members
Henry Latimer Center for Professionalism

- **Coordinates** all Supreme Court Commission on Professionalism and Standing Committee on Professionalism projects and activities
- Serves as a **clearinghouse for research and information**
- Provides staff support for activities
- Serves as a research, writing and teaching resource for professionalism initiatives in Florida
- **Provides resources and information regarding professionalism** to members of the judiciary, the bar, law schools, local bar associations and other state bars
- Publishes ‘**The Professional,**’ a triannual newsletter that focuses on professionalism in the legal profession
Circuit Court and Local Professionalism Committees

• Each judicial circuit has a Local Professionalism Panel comprised of local attorneys who have been appointed for the purpose of **informally resolving complaints**.

• A local panel member will attempt to resolve a complaint informally if possible, or may choose to refer it to the Attorney/Consumer Assistance Program (ACAP) for further action.

• The **Attorney/Consumer Assistance Program** fields and screens complaints against members of The Florida Bar. Depending on the nature and severity of the professionalism complaint, ACAP may either resolve the matter informally or refer it to the appropriate branch office of The Florida Bar’s Lawyer Regulation Department for further action.
Standard of Professionalism

• “Members of The Florida Bar shall not engage in unprofessional conduct. ‘Unprofessional conduct’ means substantial or repeated violations of the Oath of Admission to the Florida Bar, The Florida Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar, or the decisions of The Florida Supreme Court.”

• * Note omission of Professionalism Expectations (1-30-2015)

Code for Resolving Professional Complaints, Fla Sup Court June 6, 2013
Rules Regulating Professionalism

• 1. Professionalism Expectations (approved by the Board of Governors 1-30-2015)
• 2. Oath of Admission to The Florida bar
• 3. The Florida Bar Creed of Professionalism
• 4. Guidelines for Professional Conduct
• 6. The Florida Bar Ideals and Goals of Professionalism
• 7. The Rules Regulating the Florida Bar
• 8. Decisions of the Florida Supreme Court
I’m not a lawyer. What’s this got to do with me?

• As mediators, whether we are lawyers or not, we are bound by mandatory Rules of Ethics.

• But professionalism goes beyond ethics into the realm of the aspirational.

• The professionalism aspirations of mediators and lawyers overlap and are hugely co-extensive.

• As mediators, we can learn much from those professionalism standards promulgated by The Supreme Court and The Florida Bar.

• A quick look at the Professional Expectations provides some insights.
Professionalism Expectations—Mandatory vs Aspirational

• “A lawyer should avoid the appearance of impropriety”

• “A lawyer must maintain and preserve the confidence and private information of clients.”

• “A lawyer should abstain from rude, disruptive, and disrespectful behavior. The lawyer should encourage clients and support personnel to do the same.”

• “Candor and civility must be used in all oral and written communications.”

• “A lawyer must not seek clients through the use of misleading or manipulative oral and written representations or advertisements.”

• “When employed by a new client, a lawyer should discuss fee and cost arrangements at the outset of the representation and promptly confirm those arrangements in writing.”
What Is Professionalism Anyway?

Wm Reece Smith, Jr.: Character, Competence & Commitment

Keith W. Rizzardi: Character, Competence, Commitment, Courtesy & Community Service

Howard Marsee would add Communication and Civility

The Henry Latimer Center for Professionalism: “Professionalism is the pursuit and practice of the highest ideals and tenets of the legal profession. It embraces far more than simply complying with the minimal standards of professional conduct. The essential ingredients of professionalism are character, competence, civility and commitment.”
For Those Interested in Further Reading

• 1. The articles, codes, rules and sources discussed in the forgoing slides (many can be found as links on the website of The Henry Latimer Center for Professionalism) ++


• 3. The Florida Bar’s Professionalism Handbook.

• 4. The Florida Bar v. Norkin, 132 So. 3rd 77 (Fla. 2014); and The Florida Bar v. Norkin, 183 So. 3rd 1018 (Fla. 2015). (A cautionary tale).

• 5. Quarterly issues of the PROFESSIONAL, an online publication of The Henry Latimer Center for Professionalism.
"A mediator shall conduct mediation sessions in an even-handed, balanced manner. A mediator shall promote respect among the mediation participants throughout the mediation process and encourage the participants to conduct themselves in a collaborative, non-coercive, and non-adversarial manner."

FRCCM Rule 10.410

"Other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediations services, however, these rules prevail over conflicting ethical standards to which a mediator may otherwise be bound. FRCCM Rule 10.650"
Professionalism is the heart and soul of successful mediation.

• We as mediators, through our conduct and communication skills, must convey to mediation participants that we are worthy of their trust.

• Mediation participants must see us as fair, honest, ethical, neutral, unbiased, impartial, knowledgeable, committed and professional.

• As mediators we lack any real institutional power.

• We must talk and act in ways that imbue us with interactional power—the assumed right to influence the shape of the final outcome.

• We are in the communication business.
We must early on and continuously establish our credentials to participate in someone else’s problem. We must skillfully convey:

- Who we are.
- That we are persons of character.
- What we can bring to the process.
- Why we are worthy of being heard.
- What experience has equipped us to serve.
- That we are bound by ethical restraints.
- That we are professionals.
The source of our selection provides us a jump-start.

- Court appointment or agreement of parties.
- We come clothed with some bona fides.
  - *I'm glad that the court/attorneys/parties asked me to work with you in resolving some of the problems in this case.*

- Participants want to know about us, especially the non-lawyers.
- Introduce self as part of a mutual introductions of all participants. (Academic background, professional experience, experience with type of case.)
Use biographical information to segue into other information

• “For 30 years, I was an attorney handling cases very similar to this one. I represented both plaintiffs and defendants, so I understand many of the issues in this case. However, having said that, it is important for you to know that I am not today acting as an attorney, or a judge or a jury. I make no decisions today.”

• “I have been a practicing psychologist for many years, and, although that is not my role today, what I learned from those years of experience helps me be a better mediator. A mediator’s job is.......”
Professional behaviors

• Professional office appearance
• Professional attire
• Articulate
• Polite
• Business-like
• Avoid slang and colloquialisms
• Organized presentation and format
• Formality befitting the stage of proceedings
Gravitas

- *(Latin)* solemnity or sedateness of manner or character; earnestness; seriousness as of a situation.

*Webster’s*
Divide the biographical information into small packages

• Not necessary to present an uninterrupted autobiography.

• Oblique reference. “Juries do a fine job, but they are almost certain to disappoint some party. In 40 years of trying case, I have lost cases I thought I would win and I have won cases I thought I would lose.”

• Dole out the information.

• Hang it onto other information.

• Provide some of it in caucuses.
ETHICAL

• Let them know we have ethical restraints.

• “The mediators’ canon of ethics requires me to tell you that today I’m not acting as a judge or jury…”

• “It would be unethical for me to tell you what discussions are going on in the other room.”
Vocabulary of ethics and professionalism

- Principles, principled
- Rules of conduct
- Honest, honesty
- Fair, fairness, fair-minded
- Correct
- Proper, improper
- Virtues
- Seemly
- Values
- Honorable
- Standards
- Fitting
- Just
Referee-like communication moves

• Opening session: who goes first?

• “We need to discuss a few ground rules at the outset.”

• Turn-taking: “One requirement is that only one person at a time may speak. I ask that no one interrupt the speaker. Everyone will have an opportunity.”

• Equal recognition of each party. (Eye contact, presentation time, note-taking)
Defining Our Role in Non-Technical Terms

• “My role today is to assist as a neutral in solving problems”
• “I try to provide a structure where we can all talk fairly and freely.”
• “I assist by asking the hard questions that maybe the parties haven’t considered yet or would rather avoid.”
• “I try to be an objective assistant in problem solving.”
• “I try to aid in candid discussions of the issues”
The power of adjectives

- Neutral/Fair
- Unbiased
- Impartial
- Even-handed
- Objective
- Unprejudiced
- Experienced
- Trained
- Expert
- Proficient
- Well-versed
- Seasoned
- Practiced
Use of Skillful Reframing

• Visibly attentive.
• Fair and balanced.
• If done poorly, can be detrimental.
• Must not appear to “buy into” one party’s viewpoint.
Ann: “There are some things that I don’t understand, and I think we’re moving too fast.”

Mediator: “That’s important for me to know. For a fair agreement, everyone needs to understand.”

John: “OK, but I hope there’s not going to be any stalling.”

Ann: “I’m not sure what he means by “stalling.”

John: “Well, if you don’t want to get a divorce, you can drag this thing out and go slow and pretend that you don’t understand.”

Ann: “I’m not interested in playing games or delaying, and I won’t.”
Mediator: “Well, I have to take both of you at your word, and I think you can check each other out. And John if you feel that’s an issue you can raise it at any time.”

Mediator: “Well, I understand both your concerns, and I want to make sure we all move at a pace that’s fair for everyone. John, if you at any time think that Ann is stalling, you can bring it up. Ann, if you at any time think that John is pushing for an agreement too quickly for you to understand, you can bring that up.”
Destructive Speech Acts

- Interruptions.
- Unexpected silence
- Failure to yield the floor.
- Ignoring a person.
- Disparate attention or recognition.
- Failure to remember name.
- Didactic or condescending language.
- Excessive devil’s advocacy.
- Revealing a personal desire for a deal.
“Approach each person on a human level with the hope that you can help them solve their problem. If you exhibit this behavior, you will release a persuasive kind of power reminiscent of the Pied Piper of Hamlin.”

• Herb Cohen, *You Can Negotiate Anything*
The Negotiator as Professional

“As a negotiator, a lawyer seeks a result advantageous to his client but consistent with requirements of fair dealing with others.”

Preamble: A Lawyer’s Responsibilities
Florida Bar Rules of Professional Responsibility
As mediators we absolutely must:

• Be totally conversant with sound negotiation techniques;
• Realize we are intermediaries in a negotiation process.
• Be able to distinguish professional negotiators from unprofessional, amateurish, poor and counter-productive negotiators; and
• Be able to minimize the impact of unprofessional conduct and unprofessional negotiation approaches.
“I’m going to tell you the real truth about negotiation. It is not about going to war. It is about talking, not screaming. Negotiation is the respectable art of persuasion between two parties, whether the person on the other side of the table is Henry Kissinger or your local used-car salesman.”

• Bob Woolf, *Friendly Persuasion*
The truly professional negotiator knows that negotiation is persuasion and that we don’t persuade by:

- Intimidating
- Badgering
- Shouting
- Insulting
- Degrading
- Knows almost instinctively that he/she doesn’t have to be disagreeable in order to disagree.
Knows that negotiation begins when he/she has their first contact with their adversary

- Works continuously to foster an atmosphere of good will.
- Avoids creating an atmosphere of animosity and distrust.
- By the time they get to mediation, their adversary respects them.
Comes to the mediation totally prepared:

• Knows all the facts, issues and law.
• No loose ends.
• Is not lazy or careless with his statement of facts, issues or law.
• Is prepared to field the adversary’s and the mediator’s probing inquiries.
• Has thoroughly informed their client of all risks, of the mediation process, and has avoided creating any unreasonable expectations.
Adheres to the “Golden Rule."

- Deals candidly and fairly with everyone.
- Expects that they will deal candidly and fairly with him/her.
- Commands dignity and respect by exhibiting dignity and respect.
Doesn’t expect capitulation without negotiation

• Knows that perceptive people won’t communicate with them unless reciprocal risks take place.

• Wants to gain information.

• Knows that people won’t share information with them unless they incrementally share information with them.
Is careful of their choice of voice and language:

- No rough, loud or profane language.
- Refined humor only.
- Pleasant voice. Polite.
- No “demands.” (proposals, suggestions, etc)
- No ultimatums.
- No “take it or leave it.”
- No “I’m insulted.”
At all times remains calm and cordial

• Doesn’t whine.
• Doesn’t get emotional without a goal.
• Doesn’t take things personally.
• Doesn’t raise their voice.
Maintains a positive, “I’m here to make a deal” attitude
Cultivates a spirit of cooperation
Has over time developed a reputation for integrity, honesty, candor and fair dealing
Exhibits compassion. Acknowledges the human side of the problem
Doesn’t violate their adversary’s trust. Knows that trust is too hard won to squander
Actively listens

- Gives visual and audible signs of listening.
- Doesn’t interrupt.
- Let’s them have their say.
- Doesn’t denigrate.
- Understands the concepts of “venting” and “face.”
Avoids overstating or misstating their case, or over reaching – and thereby losing credibility.

Is patient of other’s foibles and of the pace of negotiations.

Knows how to resist uncontrollable urges.
Creates intellectual and not “visceral” opponents

• “A visceral opponent is an emotional adversary, who not only disagrees with your point of view, but disagrees with you as a human being…. Once you make visceral opponents, they tend to stay with you a long time, for they are difficult to convert… Avoid making a visceral opponent the way you would avoid a contagious disease.”

• Herbert Cohen, You Can Negotiate Anything
"The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute. The ultimate decision-making authority, however, rests solely with the parties." [Emphasis added]

Rule 10.220, Florida Rules for Certified & Court-Appointed Mediators.
As mediators we must be able to reduce the obstacles posed by unprofessional conduct, poor negotiation technique, and unprofessional negotiation approaches.

- Requires us to recognize problems before they escalate
- No easy formulae or algorithms
- Demands of us all the sensitivity, diplomacy, communication skills, and creativity we can muster.
The most difficult problems to correct will usually occur during joint sessions

- Accumulated animosity, distrust and ill will between parties or lawyers
- Intimidating, badgering, shouting, insulting, or degrading remarks
- Poorly prepared lawyers/negotiators
- Sloppy or careless recitation of facts, law or issues
- Emotional outbursts or displays
Before the joint session

• Read any pre-mediation summaries. Hints of problems? What problems?

• Have a telephone conference or face-to-face conference with the lawyers prior to mediation. Ferret out both explicit and implicit problems.

• Caucus before the joint session if problems suspected.

• Before the joint session, candidly and separately discuss difficulties with the opposing lawyers. Get commitments where possible.

• May consider dispensing with joint session.
During joint session:

• Try to de-fang problems with your introductory remarks to the joint session. “You are certain to hear things you disagree with.”

• Set rules for the opening remarks (no interruptions, no outbursts, periodic breaks if requested).

• Interrupt potentially disruptive pathways with mediator questions and re-framing. “Let me make sure I understand.”

• Take breaks when things appear to be headed in a counter-productive direction. Talk with lawyers/negotiators privately.

• Be prepared to privately ask whether certain conduct is helpful.

• Terminate joint session if necessary and go directly into caucus.
In caucus:

- Talk privately with lawyers who are unprepared or reciting sloppy facts, issues or law. (“Are you sure that’s correct?”)
- Socratic method:
  - “Is this going to be counter-productive?”
  - “Would you consider this instead?”
  - “How well is that going to be received in the other room?”
  - “Are you prepared to let animosity/emotions stand in the way of a good settlement for you?”
Don’t be a parrot!
We are not mere messengers

- Through **skillful reframing**, we can often soften disruptive or counter-productive messages
  - “As I understand it, you want me to tell them……”
  - “Your last proposal was not well-received.”
  - “It might be more helpful if we said……”
  - “The most valuable service I can perform for everyone today is to prevent your missing each other through miscalculation.”
- We can convey positions without clothing them with a party’s animosity, vitriol and counter-productive comments.
In the final analysis

We, as mediators, will often encounter disruptive, counter-productive, amateurish or unprofessional negotiators. We cannot negotiate for them, but we can reduce the damage their unprofessional conduct has on the mediation process. By recognizing unprofessional and poor negotiation approaches, we increase the chance of successfully resolving disputes. Through our own professionalism and example, we improve both our profession and the mediation process.
Select Bibliography On Negotiation


