Mediation, Arbitration and Mindfulness

by Jack Kirschenbaum

What is mindfulness you ask? Well, we'll get to that in a minute.

Bringing a matter of litigation to trial in the Circuit Court of Brevard County is both expensive and time consuming. Additionally, the uncertainty and the stress of litigation provides great anxiety for clients and attorneys. No matter how prepared the attorney is, how well intentioned the client might be, and how astute the Judge has become, litigation is always an arduous adventure. Alternatives to litigation therefore, can be viable avenues to both obtain "justice" and protect and enforce our client's interests.

So what do mediation and arbitration have to do with mindfulness?

Mindfulness is the process of actively noticing new things. It puts you in the present. It makes you more sensitive to contexts and perspective, it's the essence of engagement. [1] "Mindfulness means paying attention in a particular way, on purpose, in the present moment and non-judgmentally. Mindfulness is a practice of being acutely aware of what is taking place in the present moment."[2] Much has been written lately about mindfulness including the greater portion of the April, 2016 Florida Bar Journal being dedicated to it. Long considered "hippy dippy: stuff, mindfulness is now a mainstay of both judicial, legal and business regime courses and practices. It is particularly useful in the stressful, uncertain area of litigation. By becoming mindful of your client's financial, intellectual, emotional and legal position, and being mindful of your experience, the facts of your case, the law, yours and the court's calendar, the alternative advantages to fully litigating a case by means of mediation and arbitration become apparent.

Mediation and arbitration are the perfect settings for mindfulness. Chapter 44 of the Florida Statutes provides these alternatives to judicial action. Arbitration, both court ordered and non-binding arbitration and voluntary binding arbitration, as well as mediation are provided for under the statute.

As we all know, and as many of us have experienced, mediation is a process where a neutral third person conducts a settlement conference facilitating discussions between the parties. Mediators encourage settlement by allowing, in a confidential setting, the parties and attorneys to discuss fully the strengths and the weaknesses of their cases. It allows for resolutions to be achieved that might not be otherwise available should the matter proceed to trial. The process usually begins by the parties and attorneys convening in one conference room. After introductions by the mediator and the participants, each side generally provides an opening statement stating its position and the remedy it is seeking. In many cases, the parties separate into adjoining conference rooms and the mediator, caucusing privately with each side, discusses and probes each party's case, shuttling offers and counter-offers between the separated parties until a mediated agreement can be reached. It is estimated that as high as 80% of the cases that go to mediation in Brevard County are settled.

Mediation provides a less expensive, less stressful, more certain and self-controlled result to matters of dispute. Even if the case does not settle, the door is open through which further mediation or settlement discussions can be pursued prior to the necessity of trial. And even if the case does not settle, mediation assists the parties in understanding the other parties' facts and positions, and allows them to better understand the weaknesses and deficiencies in their own case so that issues can be clarified for trial.

Arbitration is a process whereby a neutral person or panel is selected by the parties to consider the facts and the law as presented by the parties and render a decision that, based upon prior agreement of the parties may be binding or non-binding on the parties. Arbitration is at times called a mini or private trial and allows for the expert in the subject matter of the dispute to more thoroughly consider the case and therefore render a more knowledgeable decision. Arbitration often allows the parties quicker and less expensive access to a binding fully considered decision.

So how can mindfulness assist with mediation and arbitration? It is, as we all know, the attorney's responsibility to fully understand the client's litigation issues, but to also understand and appreciate the client's financial, emotional and intellectual capabilities. The attorney must be mindful of the client's best interest and how is the best way to resolve and solve the client's problems. Mindfulness is the process by which the attorney can turn all of her attention and all

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of her senses and her conscious and subconscious mind to the facts of this case, the setting of the mediation or arbitration, the body language of the participants, the verbal and non-verbal communications being employed, to fully understand the dynamics and the needs of the parties. This assists to shape and hopefully resolve the case. Mindfulness allows us to exclude the baggage of the past and the worry about the future and focus on the present to take full advantage of all the opportunities available to advise and assist our client to achieve their goals and to help them resolve their disputes. Mindfulness is another tool, and a powerful tool, available to attorneys that when used properly, can enhance the attorney's legal and people skills.

Litigation is terribly expensive, immensely time consuming, frighteningly uncertain and always stressful. The demands placed on our judiciary to get cases to trial, particularly in the civil and family law divisions, often lead to great delay and to unanticipated results. In advancing, protecting and enforcing our client's interests and representing them vigorously and professionally, alternative dispute resolution avenues can and should be considered.

There are any number of excellent mediators and arbitrators who are members of our Brevard County Bar Association and there are articles and seminars available to learn about mindfulness and its application to the legal practice. I would recommend them both.

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[1] Ellen Langer in the March, 2014 issue of The Harvard Business Review

[2] John Kabat-Zinn