the Briefs

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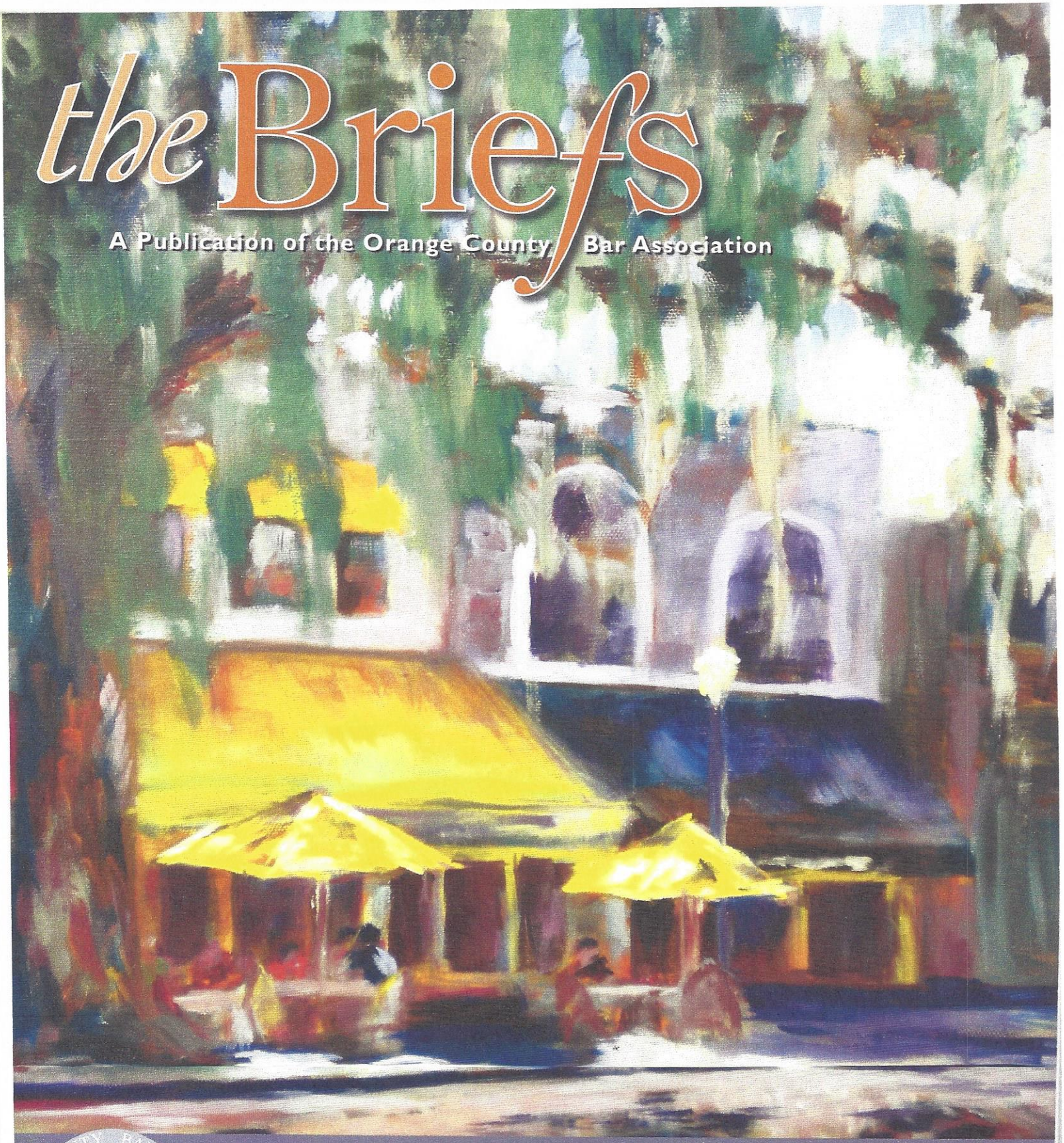

Park Avenue Repose, Painting by Kimberly A. Ashby, Esq.

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The Challenge of Good Faith Mediation in Florida

In Florida, once upon a time, Supreme Court certified mediators knew of no statutes, rules, or common law governing court-ordered mediation to be conducted in good faith: mediation communications were confidential except as provided by Florida law, mediators were required to report the absence of an agreement without comment, and mediators were not permitted to report failure of parties to mediate in good faith.

In Advisory Opinion 2012-005, Florida Supreme Court's Mediator Ethics Advisory Committee (MEAC) specified that a certified mediator may disclose a party failed to negotiate in good faith or willfully failed to appear at a court-ordered mediation *as required by the local rules of the U. S. Bankruptcy Court for the Middle District of Florida.* The MEAC opinion relied on the Florida Rules of Procedure, which provide that "[a] mediator shall comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation." [Rule 10.520]. Mediators were advised to highlight in their opening statement that the federal bankruptcy court's requirement of good faith is an exception to the parameters of mediation confidentiality found in Florida court rules.

For more than a decade, legislatures and the judiciary nationwide have mandated good faith mediation in the belief that the threat of sanctions promotes more productive participation and reduces the backlog of cases. Legislative and judicial authority to mandate mediation and to impose sanctions has not been in dispute. Nor is there any dispute about the separation of judicial and legislative authority, which provides the U. S. Bankruptcy Court the inherent power to override Florida's Mediation and Confidentiality Act. Like it or not, it appears mandated good faith mediation is here to stay.

The U. S. Bankruptcy Court for the Middle District of Florida is silent as to whether a certified mediator has an *affirmative duty* to probe into the good faith conduct of the parties. The mediator has not been instructed to evaluate in depth a party's level of participation, willingness to make a reasonable offer, and substantive bargaining position. As a practical matter, the constraints of the mediation process, as we now know it, would tend to limit the ability of a mediator to make a proper evaluation – one that is more than a subjective opinion. In any event, a probe to ascertain good faith is not the Bankruptcy Court's primary motivation for mandating mediation nor is it intended to be the function of the mediator. Until the Court provides definitive guidelines, the mediator must recognize good faith mediation as an ambiguous concept.

Thus, the Bankruptcy Court has imposed a novel responsibility upon the certified Florida mediator, adjudicative in nature, which, upon reflection, not only challenges the mediator's ability to otherwise maintain confidentiality, but also to remain impartial, preserve self-determination, encourage open and effective communication, and foster continued trust in both the mediator and the process. All the while, the mediator must be mindful not to appear to exert a coercive influence upon the parties to settle. Good faith mediation still is a voluntary process and the parties have a constitutional right to a trial.

With respect to the Court's order requiring the mediator report a party who "willfully" failed to appear (who perhaps the mediator never met), apparently the mediator may assume a reported failure to appear will be presumed by the Court to be willful. However, when all parties personally appear with full settlement authority following a satisfactory prior exchange of information, the Court has not stated this conduct conclusively constitutes good faith. Presumably, good faith needs to be independently verified. A particularly engaging ethical issue is the obligation of a certified mediator to ascertain the good faith of a party who appears without actual or purported full settlement authority. To certified Florida mediators, this circumstance has familiar ramifications; however, the Bankruptcy Court with paramount authority has not provided any direction.

To meet this unique challenge, a certified mediator must be circumspect. To cut to the chase, a mediator's report to the Court of a party's failure to negotiate in good faith ought to be based solely on *objectively verifiable and convincing fact*, uninfluenced by emotion, surmise, or personal bias. It goes without saying, should any dispute arise relating to the conduct of mediating in good faith, the mediator may be called upon to testify in a later proceeding.

There are many reasons to define and differentiate the principles of good faith mediation, not the least of which is to preserve the public perception of the core values of traditional mediation as promulgated in Florida. We need a dialogue and your comments are invited…

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