



JOHN BALES

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NEUTRAL EVALUTAION BOOKLET

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APPRAISAL PROCESS BOOKLET

The purpose of this booklet is to provide you with some background information and suggestions about the mediation. **Please read the entire booklet before our pre-mediation conference and call me with any questions or comments prior to then.**

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The following provides a general overview of a typical APPRAISAL PROCESS:

I. Overview of the APPRAISAL PROCESS Process

A. What is APPRAISAL PROCESS?

APPRAISAL PROCESS (“NE”) is governed by Fla. Stat. § [627.7074](#). It is available to either party if a sinkhole report has been issued pursuant to Fla. Stat. § 627.7073. NE is nonbinding, but mandatory if a party requests it.¹ The insurance company bears the cost of NE. However, if a party chooses to hire a court reporter, that party bears such cost.²

The insurer must notify the policyholder of his right to participate in NE following either: 1) receipt of the insurance expert’s report or 2) denial of a sinkhole claim. The insurer must provide a consumer information pamphlet prepared by the Dept. of Financial Services either electronically or by mail. NE supersedes the alternative dispute resolution process under s. 627.7015³ but does not invalidate the appraisal clause of the insurance policy.⁴

The recommendation of the neutral evaluator is not binding on any party, and the parties retain access to the court. Evidence of an offer to settle a claim during NE process, as well as any relevant conduct or statements made in negotiations concerning the offer to settle a claim, is inadmissible to prove liability for the claim or its value.⁵ The neutral evaluator’s written recommendation, oral testimony, and full report shall be admitted in any litigation or

¹ Fla. Stat. § [627.7074](#)(4).

² Fla. Stat. § [627.7074](#)(6).

³ The ADR provision of Fla. Stat. § [627.7015](#) provides a mediation program for property insurance claims. Like NE, either party may request it and the insurance company bears the cost of this mediation program. One item to note is that under subsection (7) it states: “If the insurer fails to comply with subsection (2) by failing to notify a policyholder of its right to participate in the mediation program under this section or if the insurer requests the mediation, and the mediation results are rejected by either party, the policyholder is not required to submit to or participate in any contractual loss appraisal process of the property loss damage as a precondition to legal action for breach of contract against the insurer for its failure to pay the policyholder’s claims covered by the policy.”

⁴ Fla. Stat. § [627.7074](#)(3).

⁵ Except as provided in Fla. Stat. § [627.7074](#)(14), which allows a policyholder to use an insurer’s offer to pay to get attorneys’ fees if the NE award is higher than the offer to pay.

proceeding relating to the claim.⁶ This means it is automatically admitted, even if it does not comport with the rules of evidence! It is possible to file a motion in limine to have the words “neutral evaluator” omitted from trial.⁷ Neutral evaluators are deemed to be agents of the Dept. of Financial Services and have immunity from suit.⁸

B. How is APPRAISAL PROCESS Invoked?

Either party may invoke NE at any time, even after suit is filed.⁹ A request for NE may be filed with the department by the policyholder or the insurer on a form¹⁰ approved by the department.

C. How are Neutral Evaluators Chosen?

Upon receipt of a request for NE, the Dept. of Financial Services shall provide the parties a list of certified neutral evaluators.¹¹ The parties shall appoint a neutral evaluator from the department list and promptly inform the department. If the parties cannot agree to a neutral evaluator within 14 business days, the department shall appoint a neutral evaluator from the list of certified neutral evaluators. Upon selection or appointment, the department shall promptly refer the request to the neutral evaluator.

The department shall allow each party to disqualify two neutral evaluators without cause. The department shall also allow the parties to submit requests to disqualify evaluators for cause. Disqualification for cause may be based only on one of the following:

1. A familial relationship exists between the neutral evaluator and either party or a representative of either party within the third degree.¹²
2. The proposed neutral evaluator has, in a professional capacity, previously represented either party or a representative of either party, in the same or a substantially related matter.
3. The proposed neutral evaluator has, in a professional capacity, represented another person in the same or a substantially related matter and that person’s

⁶ Fla. Stat. § [627.7074](#)(13).

⁷ See MOTION IN LIMINE RE NEUTRAL EVALUATORS REPORTS AND OPINIONS filed on October 1, 2013 in the pleadings tab of the JBA -RESEARCH (Insurance Sinkhole Coverage) filed in TrialWorks.

⁸ Fla. Stat. § [627.7074](#)(17). This immunity from suit is as provided by Fla. Stat. § [44.107](#), which provides judicial immunity from suit for arbitrators, mediators, and mediator trainees. They have “immunity from liability arising from the performance of that person’s duties while acting within the scope of the mediation function.” However, there is no immunity if the mediator “acts in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.”

⁹ *Citizens Property Insurance Corp. v. Trapeo*, Case No. 2D13-2078, [order not final at time of citation], (Jan. 31, 2014). Filed in Research (Legal) tab of JBA -RESEARCH (Insurance Sinkhole Coverage) in Trialworks.

¹⁰ [Sinkhole Insurance Claims Request for Neutral Evaluation](#).

¹¹ A neutral evaluator is a professional engineer or geologist trained by the Dept. of Financial Services in Alternative Dispute Resolution. Neutral evaluators become approved by being a licensed engineer or geologist, completing a course in ADR, and being determined by DFS to be fair and impartial. Florida Administrative Code Rule [69J-8.004](#).

¹² A relationship within the third degree includes siblings, parents, grandparents, aunts/uncles, nieces/nephews, and great grandparents. See NMCourts, [Degrees of Family Relations](#).

interests are materially adverse to the interests of the parties. The term “substantially related matter” means participation by the neutral evaluator on the same claim, property, or adjacent property.

4. The proposed neutral evaluator has, within the preceding 5 years, worked as an employer or employee of any party to the case.¹³

D. What is the Process for APPRAISAL PROCESS?

Within 14 business days after referral to the selected neutral evaluator, the neutral evaluator shall notify the policyholder and the insurer of the date, time, and place of the NE conference. The conference may be held by telephone, if desired. The neutral evaluator shall make reasonable efforts to hold the conference within 90 days after the receipt of the request by the department. Failure of the neutral evaluator to hold the conference within 90 days does not invalidate either party’s right to NE or to a NE conference held outside this timeframe.¹⁴

NE is an informal process in which formal rules of evidence and procedure need not be observed. A party to NE is not required to attend NE if a representative of the party attends and has the authority to make a binding decision on behalf of the party. All parties shall participate in NE in good faith. The neutral evaluator must be allowed reasonable access to the interior and exterior of insured structures for which a claim has been made. Any reports initiated by the policyholder, or an agent of the policyholder, confirming a sinkhole loss or disputing another sinkhole report regarding insured structures must be provided to the neutral evaluator before the evaluator’s physical inspection of the insured property.¹⁵

The neutral evaluator shall make inquiry of the parties and conduct such independent investigation as the neutral evaluator finds reasonably necessary to determine the existence, nature, and scope of a sinkhole loss, and the nature, extent, and cost of repair and remediation.¹⁶ The neutral evaluator may also use the services of professional engineers and professional geologists who are not certified as neutral evaluators, as well as licensed building contractors, in order to ensure that all items in dispute are addressed and the NE can be completed. Any engineer, geologist, or contractor may be disqualified for conflict. The neutral evaluator may request the entity that performed the investigation pursuant to s. 627.7072 perform such additional and reasonable testing as deemed necessary in the professional opinion of the neutral evaluator.¹⁷ As a plaintiff’s lawyer, you should always demand testing to assure that his opinion is not based on faulty testing done by the insurance company’s expert. At a minimum, APPRAISAL PROCESS must determine:

- (a) Causation;
- (b) All methods of stabilization and repair both above and below ground;
- (c) The costs for stabilization and all repairs; and

¹³ Fla. Stat. § [627.7074](#)(7).

¹⁴ Fla. Stat. § [627.7074](#)(7).

¹⁵ Fla. Stat. § [627.7074](#)(5) and Florida Administrative Code, [Rule 69J-8.009](#)(3).

¹⁶ Florida Administrative Code, [Rule 69J-8.009](#)(4).

¹⁷ [E.S. 627.7074](#)(11).

(d) Information necessary to prepare a report as described below.¹⁸

At the conclusion of the APPRAISAL PROCESS, the neutral evaluator shall prepare a report describing all matters that are the subject of the NE, including whether, in his opinion, the sinkhole loss has been verified or eliminated within a reasonable degree of professional probability and, if verified, whether the sinkhole activity caused structural damage to the covered building, and, if so, the estimated costs of stabilizing the land and any covered buildings and other appropriate remediation due to the sinkhole loss. The evaluator's report shall be sent to all parties within 14 days after completing the NE conference.¹⁹

E. Effect of Neutral Evaluator's Decision and Parties' Responses

If the neutral evaluator verifies the existence of a sinkhole that caused structural damage and recommends the need for and estimates costs of stabilizing the land and buildings which exceed the amount that the insurer has offered to pay the policyholder, the insurer is liable to the policyholder for up to \$2,500 in attorney's fees for the attorney's participation in the NE process. The term "offer to pay" means a written offer signed by the insurer or its legal representative and delivered to the policyholder within 10 days after the insurer receives notice that a request for APPRAISAL PROCESS has been made under this section.²⁰

If the insurer agrees to comply with the neutral evaluator's report, and the policyholder agrees, payments shall be made in accordance with the terms of the insurance policy pursuant to Fla. Stat. § 627.707(5).²¹

If the insurer timely agrees in writing to comply and timely complies with the recommendation of the neutral evaluator, but policyholder rejects the recommendation of the neutral evaluator:

1. Insurer is not liable for extracontractual damages related to a claim for a sinkhole loss but only as related to the issues determined by the NE process. This does not affect claims for extracontractual damages unrelated to the issues determined by the NE process; and

2. The actions of the insurer are not a confession of judgment or admission of liability, and the insurer is not liable for attorney's fees under Fla. Stat. § [627.428](#) or other provisions of the insurance code unless the policyholder obtains a judgment that is more favorable than the recommendation of the neutral evaluator.²²

¹⁸ [F.S. 627.7074\(2\)](#).

¹⁹ [F.S. 627.7074\(12\)](#).

²⁰ [F.S. 627.7074\(14\)](#).

²¹ [F.S. 627.7074\(16\)](#). Note that Fla. Stat. § [627.707\(5\)](#) is the provision requiring a remediation contract.

²² [F.S. 627.7074\(15\)](#).

F. Effect of NE on Timelines

Invocation of NE tolls the 90 day deadline for entering into a remediation contract. Time begins to run again 10 days after the conclusion of the NE process.²³

Regardless of when noticed, any court proceeding related to the subject matter of the APPRAISAL PROCESS shall be stayed pending completion of the APPRAISAL PROCESS and for 5 days after the filing of the neutral evaluator's report with the court.²⁴

II. APPRAISAL PROCESS and Courts

A. Effect of APPRAISAL PROCESS on Filing Suit

Filing a request for NE tolls the applicable time requirements for filing suit for 60 days following the conclusion of the NE process or the time prescribed in Fla. Stat. §95.11, whichever is later.²⁵

B. Filing Suit While NE is Pending is Not Advisable Because: 1) Court Must Stay Proceeding; 2) Court May Grant Summary Judgment; and 3) Court May Deny Attorneys' Fees.

First, regardless of when noticed, any court proceeding related to the subject matter of the APPRAISAL PROCESS shall be stayed pending completion of the APPRAISAL PROCESS and for 5 days after the filing of the neutral evaluator's report with the court.²⁶ Florida courts have routinely stayed proceedings when APPRAISAL PROCESS is invoked after suit is filed.²⁷

Second, if the policy requires completion of NE prior to filing suit²⁸, and you file suit while NE is pending, the Court could grant dismiss the suit for failure to comply with conditions precedent. For example, in *Reyes v. State Farm Florida Insurance Company*, the court

²³ Fla. Stat. § [627.707\(5\)\(b\)](#).

²⁴ Fla. Stat. § [627.7074\(10\)](#).

²⁵ Fla. Stat. § [627.7074\(4\)](#).

²⁶ Fla. Stat. § [627.7074\(10\)](#).

²⁷ See [Canales v. Am. Sec. Ins. Co., 2010 U.S. Dist. LEXIS 54782 \(M.D. Fla. June 2, 2010\)](#); [Morejon v. Am. Sec. Ins. Co., 829 F. Supp. 2d 1258 \(M.D. Fla. 2011\)](#); [Cruz v. Cooperativa De Seguros Multiples De P.R., Inc., 76 So. 3d 394 \(Fla. Dist. Ct. App. 2d Dist. 2011\)](#); and [State Farm Fla. Ins. Co. v. Buitrago, 100 So. 3d 85 \(Fla. Dist. Ct. App. 2d Dist. 2012\)](#). See also unreported cases cited in *Morejon*: See *Ocasio v. American Sec. Ins. Co.*, No. 8:11-cv-02316-T-26MAP (Dkt. 11) (M.D. Fla. Oct. 26, 2011) (endorsed order "that the Clerk is directed to administratively close this case during the period of the stay, subject to the right of any party to file a motion to reopen"); *Gonzalez v. American Sec. Ins. Co.*, No. 8:11-cv-02199-T-27AEP (Dkt. 6) (M.D. Fla. Oct. 7, 2011) (ordering clerk to administratively close case during stay); *Agosto v. American Sec. Ins. Co.*, No. 8:11-cv-00790-T-17MAP (Dkt. 7) (M.D. Fla. May 2, 2011) ("ORDER granting Motion to stay pending the conclusion of the neutral evaluation process in accordance with § 627.7074(11). Therefore, this case is administratively closed pending the outcome of the process."); *Gongora v. American Sec. Ins. Co.*, No. 8:11-cv-00821-T-30MAP (Dkt. 6) (M.D. Fla. Apr. 27, 2011) (holding "[t]his action is stayed pending completion of the Neutral Evaluation Process of the Property."); *Canales v. American Sec. Ins. Co.*, No. 8:09-cv-1335-T-33AEP, 2010 U.S. Dist. LEXIS 54782, 2010 WL 2220066 (M.D. Fla. June 2, 2010).

²⁸ For an example of such provisions, see: [Cruz v. Cooperativa De Seguros Multiples De P.R., Inc., 76 So. 3d 394 \(Fla. Dist. Ct. App. 2d Dist. 2011\)](#).

granted the insurance company's motion for summary judgment based on the plaintiff's failure to timely submit a proof of loss statement. In *Reyes*, the plaintiff provided proof of loss 2 years after filing suit. The court noted that while the 60 day deadline was not dispositive, provision of the proof of loss was clearly a condition precedent to filing suit. The judge ruled: "I find specifically the conditions precedent to bringing this action were not met, and the carrier prevails as a matter of law."²⁹

Finally, filing suit while APPRAISAL PROCESS is pending could impair the ability to recover attorneys' fees. Florida law and Florida courts encourage early resolution of sinkhole claims where the parties disagree on valuation.³⁰ The courts encourage plaintiffs to "attempt[] to resolve any differences without resorting to formal legal action."³¹ This factor is of particular importance when considering the award of attorneys' fees to a prevailing plaintiff.³² In *Lewis v. Universal*, the court reasoned that "whether suit is filed before or after the invocation of the appraisal process is not determinative of the insured's right to fees; rather, the right to fees turns upon whether the filing of the suit served a legitimate purpose."³³

In *Travelers v. Meadows*, the court awarded fees to a plaintiff who filed suit while appraisal was pending because the plaintiff had legitimate reason to file a declaratory action to resolve a question relating to the appraisal process. In that case, the insurance company invoked appraisal pursuant to a policy provision. The appraisal process began. While appraisal was pending, plaintiff filed a declaratory action to assure that the appraisal would be governed by the Florida Arbitration Code so that plaintiff would be awarded attorneys' fees. Appraisal ended in plaintiff's favor and plaintiff filed a Motion to Confirm Appraisal Award before payment was made. However, the motion was heard after payment was made. The court confirmed the appraisal award. Plaintiff then filed a Motion for Entitlement to Attorney's Fees and Cost. The insurance company claimed that the underlying suit was primarily initiated as a vehicle for generating and seeking attorney's fees, rather than for any valid purpose. The court ruled that plaintiffs' involvement of the formal judicial system was not unnecessary. First, plaintiff had to initially retain counsel to compel the insurance company to accept coverage. Then, to assure that its rights were fully protected, plaintiff had to employ counsel throughout the lengthy appraisal process, which included filing a declaratory action to determine the procedures for conducting the appraisal and the entitlement to attorney's fees, and a later amendment to add claims for indemnification and bad faith. To no avail, plaintiff attempted to resolve any differences without resorting to formal legal action.³⁴

²⁹ See TRANSCRIPT.HEARING RE MSJ RE REPORT NOT PROVIDED PRESUIT filed in the Ancillary tab of JBA RESEARCH (Insurance Sinkhole Coverage). The judge was Jack Singbush, Circuit Judge for 5th Circuit, Marion County.

³⁰ [Cruz v. Cooperativa De Seguros Multiples De P.R., Inc.](#), 76 So. 3d 394 (Fla. Dist. Ct. App. 2d Dist. 2011) citing the neutral evaluation statute, [Fla. Stat. § 627.7074](#). [Goff v. State Farm Fla. Ins. Co.](#), 999 So. 2d 684 (Fla. Dist. Ct. App. 2d Dist. 2008) citing award of attorney's fees statute, Fla. Stat. § [627.428](#).

³¹ [Travelers Indem. Ins. Co. v. Meadows MRI, LLP](#), 900 So. 2d 676 (Fla. Dist. Ct. App. 4th Dist. 2005).

³² [Lewis v. Universal Prop. & Cas. Ins. Co.](#), 13 So. 3d 1079 (Fla. Dist. Ct. App. 4th Dist. 2009) and [Travelers Indem. Ins. Co. v. Meadows MRI, LLP](#), 900 So. 2d 676 (Fla. Dist. Ct. App. 4th Dist. 2005). wherein the courts noted that the insured had attempted to resolve the dispute without resort to the courts. The Lewis court observed that "these circumstances are not indicative of an insured who "raced to the courthouse" or who filed suit simply for the purpose of securing a fee award."

³³ [Lewis v. Universal Prop. & Cas. Ins. Co.](#), 13 So. 3d 1079 (Fla. Dist. Ct. App. 4th Dist. 2009).

³⁴ [Travelers Indem. Ins. Co. v. Meadows MRI, LLP](#), 900 So. 2d 676 (Fla. Dist. Ct. App. 4th Dist. 2005)

Furthermore, the legislature codified a penalty for refusing to cooperate with NE by limiting access to attorneys' fees if suit is filed. If the insurer accepts the neutral evaluator's recommendation but the policyholder rejects it and files suit, the insurer is not liable for attorney's fees under Fla. Stat. § [627.428](#) unless the policyholder obtains a judgment in court that is more favorable than the recommendation of the neutral evaluator.³⁵ In this situation, the insurer is also not liable for extracontractual damages related to the issues determined by the APPRAISAL PROCESS process.³⁶

While I can find no case on point regarding suit filed while APPRAISAL PROCESS is pending, I think that it is not worth the risk to do so. I highly recommend waiting until APPRAISAL PROCESS is complete before filing suit. The courts will definitely stay the proceeding immediately and will likely reprimand the plaintiff for bringing the court into the fray when the insurance company is trying to resolve the claim through a statutorily provided alternate dispute resolution forum.

C. Some District Courts Have Ruled that APPRAISAL PROCESS is Unconstitutional, but the Appellate Courts Have Ruled it Constitutional. The Supreme Court Has Not Addressed This Issue.

It should be noted that some district courts have ruled that the NE statute is unconstitutional. However, more recently, the 2nd DCA and the M.D. Florida have held the NE statute constitutional. The Merlin Law blog has been following these opinions.³⁷

For example, in *Anderson v. American Strategic Ins. Corp.*, judge Stanley Mills of the 6th Circuit (Pasco) entered an Order finding the NE statute unconstitutional because: 1) it requires automatic admission into evidence of the neutral evaluator's report without considering its relevancy, credibility, authentication, cross-examination, etc.; 2) it makes the neutral evaluator the trier of facts in determining whether a sinkhole exists beneath a structure and what method of remediation is proper; 3) the NE does not have to observe the rules of evidence or formal rules of procedure; and 4) all of which violates the right to due process by allowing the executive branch to adopt rules for procedure, rather than the court. Judge Mills concluded that only the Florida Supreme Court has the power to adopt rules for the practice and procedure in all the courts of the state.³⁸ Similarly, in *Benjamin v. Sunshine State Ins. Co.*, Judge James Arnold of the 13th Circuit (Hillsborough) entered an Order Declaring APPRAISAL PROCESS Statute Unconstitutional and Denying Stay of Case. Judge Arnold reasoned the statute is unconstitutional because: 1) it permits the executive branch (Dept. of Financial Services) to select a neutral evaluator to serve in litigation claims, regardless of whether he is qualified to render an expert opinion on the issues presented; and 2) this mandate contradicts

³⁵ Fla. Stat. § [627.7074](#)(15)(b).

³⁶ Fla. Stat. § [627.7074](#)(15)(a).

³⁷ Merlin Law Group, [Another Judge Follows the Trend Finding Sinkhole Neutral Evaluation Unconstitutional](#).

³⁸ *Anderson v. American Strategic Ins. Corp.*, Case No. 51-2011-CA-1136-WS/G, [Order Denying defendant's Motion for Neutral Evaluation and to Stay Litigation Pending Neutral Evaluation](#) (June 17, 2011). This has also been filed to the Legal Research tab of JBA -RESEARCH (Insurance Sinkhole Coverage).

Florida Evidence Code which empowers the Court to determine whether an expert is qualified to render an expert opinion.³⁹

Finally, in *Paz v. Florida Ins. Guaranty Assoc., Inc.*, judge Martha Cook of the 13th Circuit (Hillsborough) entered an Order Declaring APPRAISAL PROCESS Statute Unconstitutional, Denying Stay of Case, and Granting Plaintiff's Motion for Protective Order Preventing APPRAISAL PROCESS. Judge Cook used the same reasoning articulated by Judge Arnold.⁴⁰

However, other courts have found the law constitutional.⁴¹ In *State Farm Fla. Ins. Co. v. Buitrago*, the 2nd DCA found "no basis to conclude that the APPRAISAL PROCESS procedures outlined in section 627.7074 are unconstitutional in this instance." Additionally, the court held that the statute did not prevent a trial court from applying the rules of evidence to determine the admissibility of a neutral evaluator's written recommendation.⁴² The court noted that the stay provision of section 627.7074 had been previously upheld as constitutional in its previous decision in *Cruz* and the M.D. Florida's decision in *Morejon*.⁴³ The Florida Supreme Court has not addressed this issue.

III. Should We Invoke APPRAISAL PROCESS?

On January 26, 2014, I had a telephone conference with Larry Bache, an attorney working at the Merlin Law Group who specializes in sinkholes and other homeowners' insurance claims. He told me that we should never invoke APPRAISAL PROCESS on our own because: 1) NE limits the availability of attorneys' fees, and 2) it is inherently unfair because most of the evaluators on the list are biased in favor of insurance companies. He told me that the one exception is if the defendant is Citizens or Tower Hill. For these carriers, NE is useful to invoke. He noted that Citizens and Tower Hill will not settle, you must get a remediation contract or they will take it to trial and you will likely lose. So, the strategy for them is to sue for breach of contract, invoke NE for subsurface, get a contract for the subsurface repairs, then keep breach of contract for the failure to pay cosmetics, if necessary.

Based on a review of blogs, it appears that the general opinion of plaintiff's lawyers is that APPRAISAL PROCESS is not neutral. The primary concerns are: 1) most neutral evaluators on the DFS list are regular experts for the insurance companies; and 2) the neutral evaluator's report need

³⁹ Benjamin v. Sunshine State Ins. Co., Case No. 11 001915 Div. J., Order Declaring Neutral Evaluation Statute Unconstitutional and Denying Stay of Case (June 29, 2011). This has also been filed to the Legal Research tab of JBA -RESEARCH (Insurance Sinkhole Coverage).

⁴⁰ *Paz v. Florida Ins. Guaranty Assoc., Inc.*, Case No. 11-CA-005431 Div. G, [Order Declaring Neutral Evaluation Statute Unconstitutional, Denying Stay of Case, and Granting Plaintiff's Motion for Protective Order Preventing Neutral Evaluation](#) (July 14, 2011). This has also been filed to the Legal Research tab of JBA -RESEARCH (Insurance Sinkhole Coverage).

⁴¹ [Cruz v. Cooperativa De Seguros Multiples De P.R., Inc.](#), 76 So. 3d 394 (Fla. Dist. Ct. App. 2d Dist. 2011); [Morejon v. Am. Sec. Ins. Co.](#), 829 F. Supp. 2d 1258 (M.D. Fla. 2011); [State Farm Fla. Ins. Co. v. Buitrago](#), 100 So. 3d 85 (Fla. Dist. Ct. App. 2d Dist. 2012)

⁴² [State Farm Fla. Ins. Co. v. Buitrago](#), 100 So. 3d 85 (Fla. Dist. Ct. App. 2d Dist. 2012)

⁴³ [Cruz v. Cooperativa De Seguros Multiples De P.R., Inc.](#), 76 So. 3d 394 (Fla. Dist. Ct. App. 2d Dist. 2011) and [Morejon v. Am. Sec. Ins. Co.](#), 829 F. Supp. 2d 1258 (M.D. Fla. 2011).

not comport with the rules of evidence, and it is automatically admitted in court, creating potential problems of prejudice, irrelevancy, etc.

Joseph Porcelli wrote in his blog that “Florida’s Department of Financial Services approves neutral evaluators and the vast majority of these neutral evaluators toil diligently for insurance companies! Usually the same engineers that are most frequently used by insurance companies are on the list of approved neutral evaluators.”⁴⁴

Kristi Demers-Crowell wrote on Merlin Law Group’s blog that “[t]he vast majority of neutral evaluators on the DFS list are known insurance company expert witnesses, with a couple known to have served as property owner experts. Either way, it must be extremely difficult to be neutral when you have performed studies for your own clients in the very neighborhood where the APPRAISAL PROCESS is pending.” She also noted that because neutral evaluator reports are not subject to the rules of evidence, but are admissible in court, “there are also problems with the unfair prejudice rule (Fla. Stat. 90.403), hearsay (Fla. Stat. 90.801) and substantive due process under the Florida Constitution.” She also wrote: “If a neutral evaluator opines there is no sinkhole, and a policyholder declines to drop the claim, the statute excuses an insurance company from liability for extracontractual damages. Does this mean there can be no bad faith liability even if a jury finds an insurer wrongfully denied coverage for a sinkhole claim? How does this square with Florida’s Unfair Claims Practice Statute Section 624.155?”⁴⁵

The Byrne Law Group’s website states: “Most of the Neutral Evaluators approved by the Florida Department of Financial Services DO ALMOST ALL OF THEIR WORK FOR INSURANCE COMPANIES!!! In fact, the same testing companies most often used by insurance companies are listed as Neutral Evaluators! How neutral can these Neutral Evaluators be of one day they’re working for an insurance company, and the next day they’re evaluating or judging that same insurance company?”⁴⁶

As I see it, the pros and cons are as follows:

PROS	CONS
Insurance company pays for it.	Limit on attorneys’ fees if insurer agrees but policyholder rejects.
If NE verifies sinkhole and finds in excess of insurer’s last offer to pay, insurer must pay up to \$2,500 in attorneys’ fees.	Limit on extracontractual damages if insurer agrees but policyholder rejects.
	Most neutral evaluators on the DFS list are professional who regularly work for the insurance companies.

⁴⁴ The Sinkhole Blog, [Are Neutral Evaluations in Sinkhole Claims Really Neutral?](#) (January 18, 2013).

⁴⁵ Property Insurance Coverage Law Blog, Merlin Law Group, [Down and Dirty with Neutral Evaluation of Sinkhole Claims](#) (March 10, 2010).

⁴⁶ Byrne Law Group, [Neutral Evaluation](#) (Accessed on January 24, 2014).

[MEDIATION MATERIALS]

1. Purpose of a Mediation Conference

As discussed, the purpose of mediation is to bring the parties together with a mediator to determine whether the case can be resolved. A mediation conference can be a good opportunity to listen to and discover the opposing party's position and possibly settle your case. Of course, we will not know if the opposing party is prepared to seriously consider settlement, but at least we will hear their position.

2. Description of a Mediation Conference

Mediation is a confidential, informal conference where the parties to a dispute meet with a neutral, impartial person called a mediator, in an effort to reach a mutually acceptable agreement. A judge or jury is not present during mediation; only the lawyers, the parties, and the mediator. The mediator controls the mediation, but does not have authority to make a binding decision or force the parties to accept a settlement with which they are not satisfied. The mediator helps the parties voluntarily reach a settlement of the dispute. He or she is not to be biased in favor of either party, but may bring up positive and negative issues in an attempt to have all parties understand the entire case.

Typically, the parties sit at a table with the mediator in the head chair and the parties on each side. You will attend with your attorney and the opposing party is to attend with their attorney. Each side usually states their position in front of the mediator and the other parties. The mediator will then decide whether to have all parties remain in the same room or place them into different rooms and discuss the claims with each party separately. Please understand that this is a slow process and patience is an important part of trying to reach a resolution at mediation.

Mediation is designed to educate the parties about the facts and law involved in the dispute. This gives the parties the opportunity to understand both strengths and weakness of their position. In an attempt to encourage all parties to speak candidly, everything said is privileged and confidential. However, you should still be aware that all other parties are considering and evaluating every word that is said. Therefore, you must be careful about what you say.

Mediation can be effective because it enables those with the ultimate decision making authority - the parties, their attorneys, the insurance company representatives, and other interested parties to meet at the same time. If the parties do not reach an agreement at mediation, they can still pursue other options such as a trial. One of the strong motivators for trying to reach an agreement at mediation is that each party faces the uncertainty (the risk) of having a decision imposed upon them by someone else - the jury.

3. Dress and Appearance

Your appearance is important. The opposing attorney and jury's first impression of you will be your appearance and your attire.

- (a) Attire: Please dress in a business-appropriate manner. Below is a list of appropriate attire for mediation.

DO:

Woman:

- i. If you wear a dress, it should be no shorter than the bottom touching the top of your knee and no longer than mid calf.
- ii. If you wear a skirt, it should be no shorter than the bottom touching the top of your knee.
- iii. If you wear dress slacks, they should at least touch your ankles with a matching blouse.
- iv. Dress shoes, polished and unscuffed.

Man:

- i. Dress slacks with a collared shirt.
- ii. Dress shoes, polished and unscuffed.

DO NOT:

- i. Wear any jewelry. The only jewelry that should be considered are, but are not necessary, conservative earrings, a watch, a necklace, and/or a wedding ring.
- ii. Wear jeans, leggings, capris, t-shirts (including any shirts that have printed comments or wording), shorts, tennis shoes, thigh high boots, slippers, or flip flops.

- (b) Appearance (such as hair, makeup, nails, body piercings, tattoos)

DO:

- i. Wear hair clean and pulled back out of your face.
- ii. Wear light makeup.
- iii. Have neatly manicured nails, clean, fully polished, or unpolished.
- iv. Remove body piercings, i.e., nose ring, tongue ring, eyebrow ring. If you have your ears pierced more than once, please only wear one pair of earrings.
- v. Cover all tattoos, either by wearing long pants, long sleeve shirts, or if you wear a dress or skirt, wear dark colored pantyhose to match.

DO NOT:

- i. Have any visible tattoos or body piercings.
- ii. Wear heavy makeup.

4. **Suggestions for a Mediation and Pitfalls to Avoid**

A good “rule of thumb” is to conduct yourself as if a judge and jury were sitting in the mediation with you observing your behavior, listening to the questions and answers, and deciding the case on the basis of whom they believed and whom they liked more. A helpful perspective is to assume that the judge and jury are of diverse race, religion, and status in life. Assume that some would naturally like you and some would naturally dislike you. Obviously, this setting suggests caution and careful selection of words.

The main purpose of mediation is to try to settle your case. Please understand that the opposing counsel has other objectives as well, including the following:

- (a) They want to know how we plan to present your case. They are interested in knowing now how the trial will look.
- (b) They want to hear the “story.” This can reduce surprises at trial.
- (c) They hope to catch you in any type of misstatement so that they can claim at the mediation that you are not a truthful person, and therefore that your testimony should not be believed on any of the points, particularly at trial.
- (d) They want to look at you, observe your manner, and form an impression of the type of witness you will be in court. Perhaps this last consideration is the most important, for the lawyer is really trying to determine the probable effect your testimony will have on an impartial listener (the jury). Lawyers are discouraged when opposing witnesses are confident, informed, solid, and apparently unshakable.

The following is a series of general rules developed as a result of participation in hundreds of Mediations. Please review them carefully; they can be of assistance.

- (a) **Do not let the opposing party or opposing attorney get you angry or excited.** This destroys the effect of your testimony and you may say things that may be used to your disadvantage later. Attorneys sometimes try to get the opposing party mad hoping that he or she will say things that may be used against them. Under no circumstances should you argue with the opposing attorney.
- (b) **You are not required to give information that you learn in a conference with your attorney.** If you are asked a question that would require you to give such information, simply state that your answer would have to be based upon information learned from your attorneys and say nothing more.
- (c) **Never joke during mediation.** Humor may not be apparent and you may look crude or cavalier about the truth. Avoid flippancy. Never use profanity—not even “hell” or “damn.” Never use racist, sexist, ethnic, religious, or other slurs. (This is easy if you remember to conduct yourself as if a jury were present.) A mediation conference is serious business.
- (d) **Before, during, and after mediation, do not chat with the opponents or the opposing attorney.** Remember, the other attorney and the opposing parties are not

your “friend” for purposes of this case. Do not let his or her friendly manner cause you to drop your guard. Also, while I will be “friendly” and professional, it does not mean that I believe they are acting reasonably. This is a decision that we will make as the mediation progresses.

I apologize for the length of these instructions. However, the mediation is important and I want to give you the benefit of these suggestions. Actually, mediation is not difficult if we are well prepared, confident, and relaxed. I believe that you will be more confident, well prepared, and relaxed if you read and re-read these instructions carefully and participate in your Pre-Mediation Conference.

5. Resist the temptation to give your side of the case

The time to present your case will come later—in a forum much more receptive than mediation with opposing counsel. You need not elaborate, explain, or justify any facts or allegations made during the mediation. Under no circumstances should you discuss your case with the opposing attorney or speak to me about your case while anyone else is present. If there is something you wish to discuss, ask me to speak with you in private so I can discuss it with you.