

legal trends

Florida's law allowing judges to order mediation instead of a trial has gotten national attention. How Toro Co. avoided costly litigation.

Cutting Legal Fees

By John D. McKinnon



For at least one Florida lawyer, the state's nationally known mediation laws have helped him land a nationally known client.

Over the last four years, attorney Miguel A. Olivella, Jr., of Daytona Beach-based Cobb, Cole & Bell has used his Florida mediation experience to develop an award-

winning settlement program for the Toro Co., maker of lawn mowers, weed cutters and wood chippers.

Mediation allows both sides in a dispute to present summaries of their claims to a neutral third party and receive recommendations on how to settle without going to trial. In the early 1990s, Toro became interested in the

idea as a way of trimming its fast-growing litigation costs. It turned to Olivella, then a Central Florida litigator, after he settled a couple of injury cases for the company within weeks of getting the files.

Toro's new program gave Olivella first crack at handling virtually all the Minneapolis-based company's personal-injury litigation

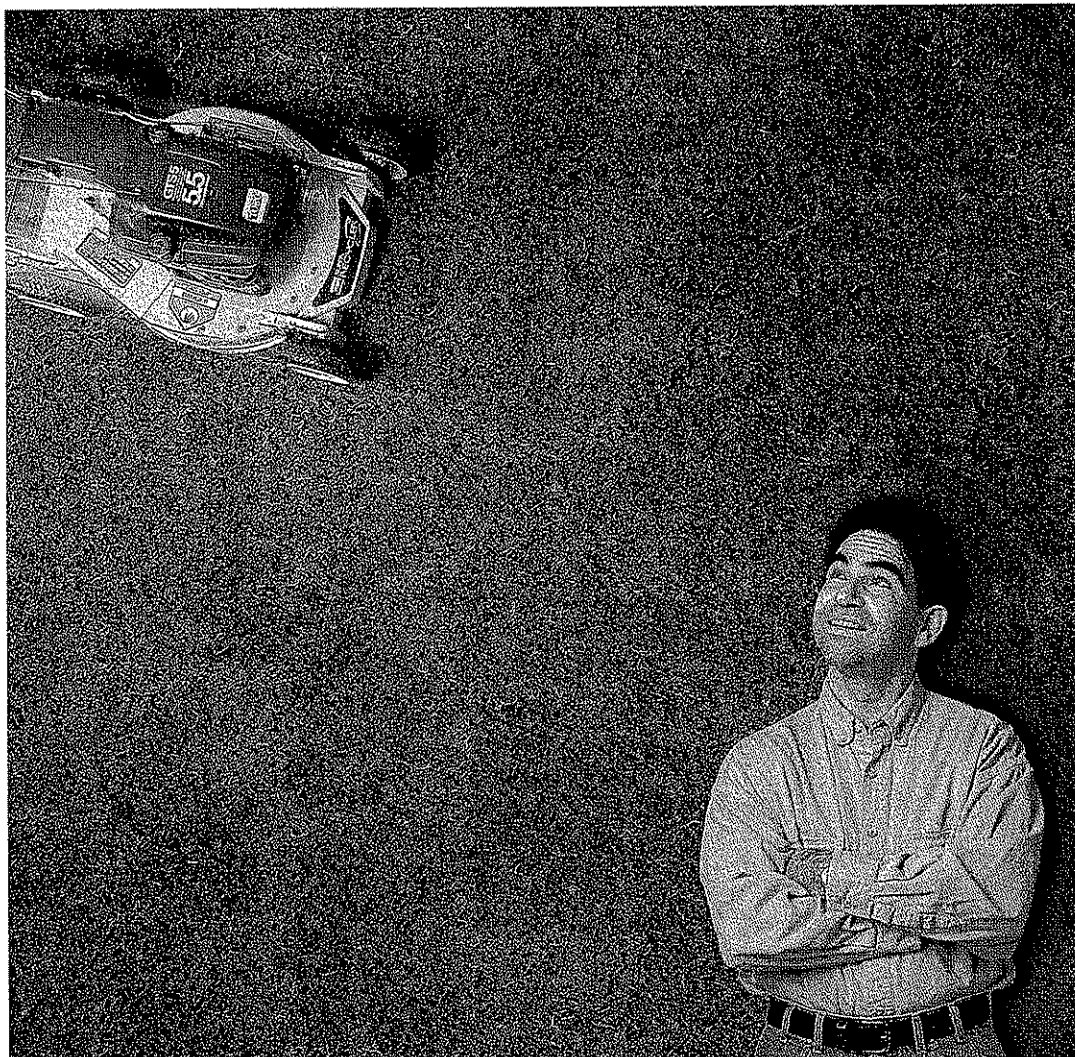
around the country.

Olivella says Florida's laws, which allow judges to order cases into mediation, gave him "a leg up" over other lawyers in the Toro representation. "Right off the bat, I was much more familiar with how to obtain the result desired by the client — i.e., a settlement," says Olivella, 41, a former Florida assistant attorney general who's now a partner in his firm's Tallahassee office.

So far, Olivella's association with Toro has produced more results than even he had hoped. Of the 125 files he's handled, 95% have reached a settlement. And a recent study by Toro showed that the program had lowered the company's average cost per claim by \$45,000. That's more than \$5.5 million in direct litigation costs saved. Further, the company says that it also has saved \$1.8 million a year in reduced insurance costs. To date, that's a total savings of \$10.9 million.

The results recently landed the company an award from the New York-based CPR Institute for Dispute Resolution, a business-backed group devoted to finding lower-cost

"Toro thinks I walk on water," says Miguel A. Olivella, Jr., a 41-year-old partner in the Tallahassee office of Cobb, Cole & Bell.



SCOTT BROUWER AND DAN GAYE PHOTOGRAPH

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alternatives to traditional litigation.

For Toro, the program helped solve a problem that went beyond the usual unjustified claims by people who stuck their hands in running lawn mowers. In addition, Toro was finding that its own litigation lawyers around the country too often were racking up large numbers of billable hours defending claims to the hilt, only to do an about-face and recommend settlement just before trial. That was forcing Toro to pay high legal expenses of its own, plus plaintiff's costs that were inflated by high legal expenses, too.

Other defense lawyers told Toro that the lengthy preparations were necessary to evaluate claims adequately. But Olivella thought differently. Together with Toro Assistant General Counsel James J. Seifert and other officials, he developed a system for gathering the crucial facts of a case quickly. Now when Toro gets wind of a consumer claim, Olivella quickly offers the claimant's lawyer the opportunity to question company engineers, in exchange for a similar statement from the injured consumer. That saves months or years of costly discovery and expert investigation. As an additional incentive, the statements can't be used as evidence in court if the mediation breaks down. That makes plaintiff attorneys more willing to expose their clients to searching questions so early in the game.

Another important feature of the program: Olivella serves on a flat-fee basis, thus removing any incentive to generate hours. "I have no pot of gold at the end of the rainbow, so I go all out," he says.

While the results achieved from mediation in the case of Toro might be unwelcome news for some tradition-minded litigators, it could represent the beginnings of a new niche for Florida attorneys. They've gained lots of valuable experience in mediation since landmark 1987 legislation that made the state a pioneer in the area.

"Florida really is leading the nation in court-annexed mediation," says University of Florida law professor Robert Moberly. Cobb, Cole & Bell has created an entire practice group for court alternatives, headed by attorney John J. Upchurch. Firm lawyers conduct training sessions for would-be mediators. Olivella himself is helping to develop the firm's practice in mediation representation. Other big Florida firms also are rapidly expanding their mediation services.

The state moved to mediation in part to save on judicial resources, but also because studies showed people prefer the results it produces. Since Florida's program went into effect, trial rates have dropped, Moberly says, while the number of mediations has begun to reach significant levels. Exact numbers aren't available, but the state Center for Dispute Resolution estimates that 25,000 or more civil cases in circuit court — the highest state trial court — are referred to mediation each year. Florida has roughly 500,000 circuit-level civil filings annually.

Recently, a whole new law school, Florida Coastal School of Law, started in Jacksonville with the stated purpose of augmenting the traditional law school curriculum by training new generations of lawyers in mediation and other alternative dispute resolution techniques.

Unfortunately, some critics say, the Florida mediation system may be taken over by lawyers with all the problems that entails. The reason is that the Florida Supreme Court's rules strongly favor an attorney in the role of mediator for non-domestic civil cases, unless the parties demand someone else. Most other states allow a broader range of backgrounds for mediators.

The Toro program is especially suited to big companies that generate considerable litigation. But Olivella believes more and more clients will begin demanding similar techniques.

"I'd like to think I have some unique quirk of personality or talent that's directly responsible for this success, but I'm not God's gift to law," he says. "Toro thinks I walk on water. But I tell them it's not me; it's the program." □

Property Rights

What is believed by some observers to be the first claim under the state's 1995 property rights law has been filed with the St. Johns Water Management District in Palatka. Not surprisingly, it comes from a developer who also is a lawyer, Edward C. Tietig of Palm Bay. Tietig says he lost virtually all the value of his investment in a 40-acre tract because of a wetlands declaration and other decisions by government regulators. The 67-year-old says he's lost so much on the property — he's claiming \$350,000 — that he was forced to come out of retirement and reopen his law practice. "I've

gone back into the practice of law specializing in suing government agencies," he says. "It's given me a new career." The controversial property rights law gives a property owner the ability to sue state or local government when its actions unreasonably devalue the owner's property. □

Expanding Firm

The Orlando firm of Gray, Harris & Robinson has announced two mergers in 1996 that bring it to 54 attorneys. The first, with the Melbourne firm of Nohrr & Nohrr, helped strengthen the firm's Brevard County presence. The second, with the firm of Wilbur E. Brewton, represents the firm's foray outside of Central Florida. Brewton is a high-profile lawyer and lobbyist who's known in government circles for his representation of parimutuel interests. □