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Mediation Notes

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Another Mediation Myth Busted

Upon hearing of the impending second marriage of a friend, the great English laureate, Samuel Johnson, opined that a second marriage "represents the triumph of hope over experience." The same can be said of a second mediation.

When mediation became a mandatory feature of civil litigation in state and federal courts in Florida and elsewhere, the earliest of the case management orders requiring mediation had one critical error: they set one mediation date or deadline, and no more. So the lawyers, clients and insurance carriers complied and treated the scheduling of one mediation as the norm.

In my 25 years as a litigator and mediator, I have never seen a case management order that required parties to set two mediations. Yet, scheduling two mediations gives both sides twice the opportunity to settle. If both sides agree to a second mediation at the outset one doesn't have to worry about showing weakness or any unintended message should they later desire a second mediation. I, myself encourage all counsel to schedule two mediations when I serve as a litigator.

For the judicial system as a whole, a second mediation is a godsend. Settlements restore order for the parties and have tremendous benefits beyond the economics. Even a small increase in the percentage of cases settled at a second mediation reduces docket crowding and the burden on judges and clerks of court. Not to mention the satisfaction of the client in knowing it is over. If you really want to deep dive into the cost/benefit/efficiency calculus of litigation versus mediation, one might ask whether we should consider monthly mediation conferences by telephone. Sounds crazy by normal "one mediation" standards, but is it? There are other cultures that use mediation-style discussions over a period of weeks or months to resolve conflict.

Considering the tremendous cost of litigation and delay, I

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encourage judges and all litigators to schedule two mediations at the start of the case – one in the first 90-180 days, depending on the complexity of the case, and another after the pleadings are crystallized and some fair amount of discovery (fact gathering) has occurred. There is no one size fits all solution. We need to rid ourselves of the belief that one mediation is the norm. Scheduling the second mediation makes allowances for the unexpected. Perhaps your client's needs or priorities have changed. Perhaps their health is not good, their business floundering, or the fees and costs are unsustainable. After months of litigation, I have seen businesses initially keen on pursuing suit decide that litigation is an impediment to a pending merger or acquisition. Parties may feel the heat of the case and, upon further consideration, decide they don't like the expert testimony being offered against them and pressure the carriers to settle. A new decision may have affected insurance policy coverage interpretations. Personal injury plaintiffs may have children or parents in need of attention. Sometimes the case takes a weird turn for whatever reason. There are a host of reasons why the second attempt may be the charm.

The next great and simple judicial reform may be as simple as a second mediation. Nothing gives the client more control over their own destiny than mediation – and as lawyers and stewards of the judicial system, we owe it to the courts and our clients to give them that opportunity.