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Mediation Notes

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Using the Power of the Robe to Further Mediation

Early in my career I had my first trial in federal court, and we had a good argument for directed verdict at the close of the plaintiff's case. Before the plaintiff reached that point, the Judge asked me if I would give her the benefit of my anticipated motion for directed verdict. I stood up and told her in my best "how clever is this" voice (as a second year associate in my first federal trial), that I did not want to give her the benefit of my anticipated motion until the plaintiff had formally closed his case (lest he be able to fill the holes). The law clerk sat still, the judge paused and then sternly, but politely, asked if I understood why she was dressed in a black robe and whether I might want to reconsider. Papers ruffling, "No problem your Honor. " Arteries in my neck resembling the visage of a salamander in August. Recess was declared after my awkward argument, prompting lead counsel to lean over and whisper, "First argument before this judge–smooth move, Henry." We did secure a voluntary dismissal when court resumed. I sheepishly drove home feeling lucky and relieved.

Lawyers need nudging from the bench from time to time. Mediation practice in Florida evolved that way. The state and federal courts made mediation a required "step" on the path to trial in the mid-1980's. This cultural shift in mediation practice occurred because of a push given by the judiciary, not the bar. It did not happen because insurers or trial lawyers asked for it. Under-funded judges with crowded dockets and the success of mediation in family courts were the driving forces for mediation in civil suits. After the implementation of the Rules of Civil Procedure to include mediation (here in Florida, Rules 1.7010 – 1.730) there were for a time "motions to dispense with mediation" as permitted by Rule. Some lawyers resisted; they didn't see the benefit right away. We do not see those motions anymore but it is a telling reflection of how lawyers viewed mediation.

Courts can and indeed must be the nudge forward once again. This time to set mediations earlier in the life of the case, and to require a second mediation in a case of any size. The mediation should not be at the tail-end of the discovery period after countless motions and hearings. Most mediations can comfortably occur within 90 days after joinder of all parties–before the cases get really expensive and experts have to be retained. A second mediation can come later in the case if warranted. Of course, cases differ but generalities are true and useful here. Mediations come too often too late.

Some may find it jaw-droppingly ponderous that in some jurisdictions mediation is "optional" at the discretion of the parties (really the lawyers). It costs the court nothing but they don't require it. Other than the expense, what could be the objection? It is not much more costly than a deposition. Even if the success rate in nascent jurisdictions was 40-50 percent (low by Florida standards) you will have thinned the docket and eliminated some misery and delay in resolution.

In a recent case I handled, I was delighted to receive a case management order from the Northern District that encouraged scheduling mediation well before the court-imposed deadline. Let's hope this is a trend. Forcing early mediation mandates that the parties communicate with one another in a constructive way as they should have before suit. Formal discovery takes a lot of time and money and does not include much of the information needed to reach resolution. Depositions are limited by what can and cannot be asked. In prior issues of this publication

we noted the value of "irrelevant" and often inadmissible information at mediation. What is the least amount of information you need to mediate? That's the question for the courts to put to the parties. A large part of discovery has little value to mediation but creates large costs to be overcome at settlement. Of course, the clients have to "want" to settle.

Mediation turns on practical considerations, wants and present needs–not motions to compel, discovery practice or fodder for juries or experts. Our current system of mediation has evolved little in the past 35 years. It will be incumbent upon those wearing the black robes to nudge mediation practice and advocacy forward once again, with more efficiently-designed mediations earlier in the life of the dispute.

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