

April 2018

What Happens in Florida Does Not Happen Elsewhere

If you participate in a mediation outside the state of Florida or your local venue, you will find widely disparate customs and practices that warrant your attention and some investigation.

1. Joint Opening Statements. This is common in Florida but not elsewhere. A joint session is a valuable opportunity to speak to the other side. Do not dispense with a joint session.
2. Evaluative Mediation Styles. While the Florida rules governing mediators are intended to prohibit evaluative comments by the mediator (e.g., stating an opinion on the value of the case), in other jurisdictions the lawyers WANT the mediator to offer an opinion and it is widely understood to be acceptable.
3. Use of federal magistrates as mediators. This is problematic because they are judicial officers, not true neutrals, and you do not know what will leak back to the District Judge. Private mediators are preferable, particularly if you are pro hac vice.
4. Parties do not prepare mediation statements, and the attorneys for the parties do not share mediation statements with each other. There is very little premediation communication in other states. You should give and solicit a position statement.
5. The confidentiality and privilege rules are different. Some jurisdictions have a "good faith" requirement that can lead one side or the other to seek sanctions and cry foul over inadequate offers, or whatever perceived bad faith they believe has occurred. Those rules are philosophically suspect and inconsistent with the right of self-determination, which is a polite way of saying good faith requirements are tools for subjective second guessing by courts, which is dangerous; but you need to be mindful of good faith rules when heading out of town.
6. Parties expect the mediator to determine when the mediation is

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over. In Florida, we ask the mediator to declare an impasse. Mediators should not end the mediation unless one of the parties requests an impasse.

7. Personal attendance by the parties or carriers is not always required.

8. The mediators are not certified. Few states have the level of infrastructure found in Florida, including mediation rules, certified mediators, rules governing certified mediators, attendance rules, ethics opinions and court-ordered mediations in virtually every state and federal action. If you leave Florida, expect to find mediation is held in lesser regard and that the lawyers may be arguing more law than finding a deal.

9. Low expectations. While settlement rates by most reports in Florida hover around 60-75%, settlement expectations in other parts of the country and the statistics themselves are likely to be lower. Folks in other places do not believe mediation is as beneficial as statistics here in Florida demonstrate, and that, in part, becomes a self-fulfilling prophesy.

10. The parties use the process to intimidate and engage in sabre-rattling that is not conducive to deal making. This conduct explains the point made above.

Florida's mediation culture is, by comparison to others, more mature, robust, polished, and sophisticated. If you travel outside the state of Florida, spend some time investigating what mediation looks like in other jurisdictions.

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