

Mediation – It's not just for litigation anymore...

By Blane G. McCarthy

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Does this sound familiar? Plaintiff's counsel demands \$25,000. Carrier offers \$2,500. Counsel counterdemands \$19,500, to which Carrier counteroffers \$4,500. A second counterdemand of \$16,000 is met with a counteroffer of \$6,001. Both sides scream "No More!" A lawsuit is filed, which Carrier sends to its counsel. The attorneys fully litigate the case, consuming much time, resources, and funds in the process. The Court orders mediation, at which a settlement is reached – ten months after the lawsuit was filed and for an amount between the parties' last negotiation positions.

While the details may vary, statistics from the Jacksonville division of the Fourth Judicial Circuit confirm the frequency of such a scenario. In the years 1999, 2000 and 2001, there were 7,680, 8,450, and 8,845 Circuit Civil (general) lawsuits filed. During those same respective years, there were only 69, 68, and 82 jury trials held for Circuit Civil (general) cases. The vast majority of those lawsuits settled at mediation or shortly thereafter because of progress made or information learned. It's no wonder that mediation is lauded and ordered by our local judiciary.

Indeed, there are many valid reasons to litigate, such as accessing subpoena power and other discovery tools. Often, this tactical litigation results in one party conceding its position and resolving the matter toward the other party's favor.

More often, however, litigation is pursued simply because it is seen as the next step when presuit negotiations stall. At mediation, the litigants discover the benefit of having a neutral third party to gather all of the decision-makers in a collaborative (rather than competitive) setting to work toward a mutually agreeable result. Yet, they also discover that accumulated litigation expenses and attorneys fees impede their ability to reach that mutually agreeable result.

Litigants generally prefer to resolve their own disputes when faced with the alternative of trusting the task to six strangers. Yet, their litigation often frustrates that objective.

More and more, savvy disputants and their counsel are turning to mediation *before* litigation.

There are many potential benefits to the Plaintiff's attorney. Advanced costs and the risk of not being reimbursed are minimized. Attorney fees generated from presuit mediations are often more profitable per case-hour than fees generated from Court-Ordered mediations, despite the slightly higher contingency fee percentage. Litigation efforts and resources are focused on the cases that warrant such. Time is freed to handle more cases, leading to more potential referrals from those additional clients, perpetuating and growing the firm's revenues, stability and status.

Likewise, there are many potential benefits to the Defense attorney. Counsel is able to generate more business and revenue by offering assistance in presuit mediations at an hourly or flat rate. The client's legal costs and fees are minimized as litigation is averted. Corporate representatives and adjusters can document proficiency and cost-efficiency in claims handling,

prompting them to see counsel as a proactive advocate who, in this era of cost-cutting and shifting allegiances, is a less expendable asset deserving of loyalty.

Most important are the potential benefits to the disputants themselves. Less time is consumed in the legal and negotiation process. Disputants are educated as to the strengths and weaknesses of their cases. Costs and attorney fees are minimized. Disputants get their “day in court”, while maintaining control over the outcome. They feel their counsel truly and cost-effectively worked toward their best interests and frequently share this praise with others in need.

So, the next time your presuit negotiations stall, think twice about pulling the lawsuit trigger and consider trying presuit mediation. There is little to no downside. An impasse does not negatively change your client’s status, and you can file a Rule 1.700(b)(1) Motion to Dispense with Court-Ordered Mediation to avoid duplicating the time and money previously expended.

While it may not be for every case, mediation is certainly not just for litigation anymore.

This article is one in a series of periodic articles concerning mediation topics such as use, legal developments, and negotiation tactics. Blane G. McCarthy is a Jacksonville civil trial lawyer and certified circuit civil mediator. For questions, comments, or suggestions on future articles, please call (904) 391-0091 or email at bgmccarthy@sprintmail.com.