

Mediator's Tip – State your Case, As Ordered

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You are probably like me. You hold few things more inviolate than Court Orders. The caselaw regarding sanctions for ignoring them floor you. How could attorneys thumb their noses at the judiciary and thereafter have the gall to appeal the consequences for doing so. It's the stuff that gives lawyers a bad name, the chicanery that happens only in South Florida, and the disrespect would never be shown by you.

Who violates Court Orders? Surprisingly, in my experience, almost half of the attorneys that participate in my Mediation Conferences. Perhaps its because there is no known penalty. Perhaps there is an unstated mutual apathy toward that directive. Whatever the reason, I rarely receive Mediation Statements, timely or belated. It's ordered by the court before every Mediation conference, yet hardly ever done.

Apart from the obvious, let me suggest three other reasons why you should diligently comply with that provision of the Order Appointing Mediator.

First, compiling a Mediation Statement helps counsel to master case facts. Often discovery has provided additional evidence not present presuit. Taking the time to generate a Mediation Statement, instead of relying on a presuit demand package, brings your knowledge of the case up to date. You can answer the Mediator's questions more rapidly and locate documents more quickly, to the delight of your client who sees your able representation.

Second, preparing a Mediation Statement demonstrates trial readiness. A litigant should never reveal their fear of trial, as such is one of the surest ways to lose all negotiation posture. Those who are most persuasive at Mediation are those who exude the ability and willingness to take the matter to trial. The Mediation Statement and the time spent preparing it serve as trial preparation – which is often obvious and can enable you to get a satisfactory result without the risk of trial.

Third, a Mediation Statement gives your opponent advance notice of your current negotiation position. Few parties are able to productively respond to a dramatic change in settlement demand or offer. Few things more greatly impede the Mediator's task than a surprise opening settlement position. If your case evaluation has changed due to newly discovered evidence (or a lack thereof), tell your opponent in a timely Mediation Statement. This will enable their people of authority to assess this new position and formulate a productive response.

Ultimately, a timely Mediation Statement improves the bottom line – by increasing your chances of success and decreasing the length and cost of the Mediation conference. Too much of my time as a Mediator is spent waiting for counsel to find relevant documents within their file, trying to convey a party's sincerity of position when their lack of preparation demonstrates otherwise, or working damage control for an unexpected opening position.

So, the next time you get an Order Appointing Mediator, calendar to prepare the Mediation Statement. The task will be time well spent and money well saved. And, let's not forget that it is, after all, a Court Order, which is supposed to mean something to our profession.

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.