

Voluntary Mediation – Give your agreements teeth...

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As I advocated in my first article last summer, Mediations are not just for litigation anymore. Parties are more frequently turning to this ADR option when presuit negotiations stall. This is not always successful or appropriate, as the lack of formal discovery or other factors may prevent early settlement. Often, however, presuit negotiations fail due to posturing, miscommunication, poor negotiation skills, or a failure to appreciate the other side's position – all of which can be overcome with the help of a Mediator.

Florida Statutes Chapter 44 and Florida Rules of Civil Procedure 1.700 – 1.730 control court-ordered Mediations, providing:

- Confidentiality for all communications during Mediation conferences, Sec. 44.102(3),
- Fee and cost sanctions for a party's failure to appear, Rule 1.720(b), and
- Fee and cost recovery for enforcing a mediated settlement agreement, Rule 1.730(c).

These matters are critical to a successful Mediation in that they create a productive environment, ensure meaningful attendance at the conference, and enable a party to enforce any settlement agreements reached therein.

Are these protections and remedies forfeited in voluntary Mediations? Not necessarily.

In Lazy Flamingo USA, Inc. v. Greenfield and Island Endeavors, Inc., 834 So. 2d 413 (Fla. 2d DCA 2003), the appellant sought to enforce a mediated settlement agreement. While the trial court enforced the agreement, it denied the motion for costs and fees because it had not written an Order referring the matter to Mediation. The Second District Court of Appeals held that the remedies of Rule 1.730 were not dependent on a written court Order. Finding that the judge's comments during a prior hearing were the equivalent of an Order, the court reversed and remanded that portion of the final judgment.

The analysis in Lazy Flamingo can be extended to voluntary Mediations. Formal orders are not required to invoke the protections and remedies listed above. As with any other contract or transaction, parties can agree to practically anything regarding their Mediation conference – limitations, conversion to arbitration, or control by statute and rule. Trial courts are not likely to negate the parties' lawful, mutual agreement. The judicial favor toward Mediation stems from its positive effect in controlling trial dockets and preventing needless litigation. Voluntary Mediations further those objectives and should be provided with the attributes of court-ordered Mediations when the parties so agree.

Thus, make sure that your voluntary Mediation is subject to these statutes and rules. Your Mediator should accomplish this end within the Notice or other document. If not, take the initiative yourself to craft a stipulation that the parties execute, confirming that the Mediation will be conducted and controlled as though it were court-ordered. Without invoking these provisions, your voluntary Mediation conferences may prove less meaningful and any settlement

agreements reached therein may have same number of enforcement “teeth” as does my five-month-old son, Jonah.

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.