

“Effective Mediation Summaries,” Palm Beach County Bar Association

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We have all been to mediations where hours are spent identifying issues, back and forth with factual inquiries, and assisting the mediator to determine terms that need to be negotiated. This may just be part of the mediation process. However, an effective mediation summary can help make the process more efficient. Supplying the pleadings and a description of the case status is helpful, however, I would suggest giving some thought to providing background and insights that will make the process as efficient as possible.

The following are some tips for preparation of an effective mediation summary. First, provide the operative pleadings and a copy of any pending dispositive motions. Next, if there have been any rulings that impact the scope of trial or available remedies you should expound on that. Beyond the pleadings, pending motions and rulings, provide an explanation of what discovery has occurred and what is left to be done. Importantly, this is an opportunity to explain what facts or points have been established in discovery vs. facts and matters that are left to be discovered. The facts yet to be discovered oftentimes manifest as an impediment to settlement. For example, in a construction case even if the parties agree that a defective condition(s) exists, does the defense know how much it will cost to repair? If the cost of repair is something left to be determined or discovered, that should be explained in the summary.

Additionally, how much has been incurred in costs and fees and how much is yet to be incurred? Is there a basis for the recovery of attorney's fees? Have the parties served Offers of Judgment/Proposals for Settlement? The mediator needs to understand the substance of the case, but it is also important to understand the economics which also drive motivations. We all know that the cost of litigation is usually a practical reality for the parties, and the mediator needs to understand how economics play into the dispute.

Further, are there matters of concern or practical terms that may not be subject of the claims or available relief, but could serve as incentives to settle the case. This is part of the beauty of mediation. The parties are not bound by the four corners of the pleadings and relief that may be awarded by a court or arbitrator. By way of another example in a construction scenario, maybe a contractor disputes the extent of damages. Would the contractor be willing to provide or extend a warranty to help compensate the property owner? Clearly, there are terms that you can seek in mediation that are not available as legal or even equitable remedies that may bridge the gap of the typical monetary negotiation. Brainstorming the what ifs and laying some of that out in a mediation summary will help you prepare for mediation and aid the process.

Thus, the bottom line is that mediation is a process and will usually require some time before the parties can “get down to business”. However, you can facilitate a more efficient process and reduce some of the frustration that participants have with the amount of time and sitting in caucus sessions by providing an effective mediation summary.

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