



Rich Smukler Mediation

433 Plaza Real, Suite 275
Boca Raton, FL 33432
www.richsmuklermediation.com
561-988-8999

September, 2010

Searching For The Heart of the Case

Why spend so much time in mediation? The opposition is unreasonable. The offer is an insult. We are wasting our time and money! Perhaps so, but not so fast. *A valuable opportunity may pass you by.*

Henrik Gibson's Peer Gynt tells us in part the story of the search for the heart of The Gyntian Onion, slowly peeling away one layer after another, only to find that the heart of the onion is empty.

May I suggest that the process of unpeeling the outer layers of your case only to find an empty center is not nearly as devoid of value as it may sound. *Here is why:*

We all hear about the need to present oneself at mediation "*in good faith*". What does that actually mean for the parties? And further, what does that mean for the Mediator?

At a recent Court ordered Mediation I was faced with a challenging set of circumstances. The parties had failed to exchange documents and discovery in a meaningful way. It was clear from the onset that this mediation would result in an Impasse. Why proceed any further? It was also clear that there was some bad blood between the parties and an early decision was made by me to break into separate caucuses to diffuse some of this animosity.

After private discussions with the parties, it was revealed to me that each had separate axes to grind. Plaintiff was furious with opposing counsel's delaying and obfuscating tactics, while the Defendant was upset with the failure of the Plaintiff to communicate in a meaningful way and thereby eventuating in litigation.

I was able to persuade Plaintiff and Plaintiff's counsel to allow Defendant to set forth some of these complaints (and asked Plaintiff to be patient and try not to respond in a defensive manner). While this was occurring, gains were being made by both sides.

Defendant got some of his anger off his chest, and perhaps by so doing might be more amenable in the future to a reasoned approach to resolve this case.

Plaintiff and Plaintiff's counsel, on the other hand, were able to hear what Defendant had to say, assess some of the pros and cons of his argument, and perhaps more valuably, *got to assess the Defendant's demeanor in a more open forum, far less structured and restrictive than a deposition or trial situation.*

Was this a violation by the parties of the "in good faith" requirement under mediation? The answer is clearly no. In fact, the concept of "good faith" is clearly a misnomer and will be more fully discussed in my upcoming newsletter.

By the end of the mediation the parties had at least agreed to exchange discovery on a specific time-line. The Mediation resolved in an Impasse, as earlier predicted, but gains were materially achieved by both sides.

Pursuant to rule 10.420(b)(3), a mediator should adjourn or terminate a mediation if "any party is... unwilling to participate meaningfully in the process."

The Committee notes that there is no requirement in the statutes, rules or common law governing court-ordered mediation which requires a party to "negotiate in good faith." As stated in MQAP 95-009, a mediator may report to the court a party's lack of appearance at mediation [rule 1.720(b), Florida Rules of Civil Procedure; rule 8.290(l)]...

Professional Affiliations

Special Assistant Attorney General (PA) (past)
Private Practice (PA and FL -1972 - current)
Florida Bar Association
Pennsylvania Bar Association
Florida Certified Circuit Civil Mediator
Qualified Florida Arbitrator
FINRA Certified Arbitrator
Palm Beach, Broward and Dade County Bar Associations
ASFMA (Assoc. of South Florida Mediators and Arbitrators)
FAPM (The Florida Academy of Professional Mediators)
Collins Center for Public Policy
Certified in Residential Foreclosure Mediation
(compliant with the Supreme Court Administrative Order AOSC09-54)
Broward County Bar Association ADR Committee
Palm Beach County Bar Association ADR Committee
American Arbitration Association Neutral
Florida Bar Association ADR Section
South Palm Beach Bar Association
Florida Bar Trial Lawyers Section

Locations

Locations available in Palm Beach, Broward and Miami-Dade Counties:

Boca Raton

433 Plaza Real, Suite 275, FL 33432

West Palm Beach (Phillips Point)

777 W. Flagler Drive, West Tower, Suite 800, FL 33401

Ft. Lauderdale (Cypress Creek)

1451 West Cypress Creek Rd., Suite 300, FL 33309

Ft. Lauderdale (Downtown)

110 E. Broward Blvd., Suite 1700, FL 33301

Miami (Brickell Bayview)

80 SW 8th St., Suite 2000, FL 33130