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Why are Attorneys Afraid of Conflict in Mediation?

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The mediation process has evolved significantly over the past few decades. Mediation was initially viewed skeptically by trial attorneys who envisioned themselves as warriors ordained to try cases rather than settle them.

As courts were increasingly overburdened, mediation became a popular forum to resolve disputes. Many courts throughout the country (including state and federal courts in Florida) require cases to be mediated before the case can go to trial. Consequently, attorneys have been forced to participate in mediation. Because trial attorneys were not accustomed to the mediation process, the process initially looked somewhat like a court hearing or a trial. For example, in the early days of mediation opening statements in mediation looked and sounded very much like an opening statement at trial. Trial lawyers in the early days of mediation, and some trial lawyers still today, had a difficult time finding the balance between advocating their clients' position while proceeding in a conciliatory manner consistent with the goal of settlement.

Largely due to attorneys' discomfort finding that balance, it became commonplace in many parts of the country for attorneys not to make opening statements in mediation. This trend has even gained popularity in Florida. The decision by an attorney not to make an opening statement in mediation is often a wasted opportunity because this is typically the only opportunity during the course of a litigation for an attorney to speak directly to his or her opposing party. A well prepared and delivered opening statement goes a long way towards achieving a favorable settlement for one's client.

The trend of skipping opening statements has now sometimes led to not even having a joint session. Except in the rare situation where there is the potential for violence, this is a mistake. The parties and their counsel should at least be willing to sit in the same room with one another for some period of time while the mediator explains the process and lays the groundwork for a productive day.

In addition, many people want their voices heard not just by the mediator, but by the party with whom they are litigating. This is particularly true in situations where the parties had a preexisting relationship, such as partners in a business, former employees or competitors. Many attorneys feel uncomfortable with the conflict that sometimes arises from these direct communications. Hopefully, the next time an attorney reading this article gets that uneasy feeling when the mediator suggests that the parties speak directly to each other, he or she will give it a try rather than viscerally reject the idea.

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To learn more about mediation at JAMS, please see The JAMS Mediation Process.

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