

Musing About Mediation Fees: Using the Mediator's Fee to Resolve Cases©

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The Florida Civil Procedure Rules include Rule 1.720(k), which provides that mediation fees shall be assessed on a pro rata basis between the parties to the dispute. Typically, in a dispute involving two opposing sides, the fee is split 50-50 between the participants. Where there is a single party on one side of the dispute and multiple parties on the other side of the dispute, the parties may decide to split the fee by the total number of participants, or occasionally, the split remains 50-50 with the multiple party side then dividing the 50 % fee into its respective equal parts on a pro rata basis. Flexibility in the Rule permits the parties to stipulate to a different approach on how to compensate the mediator, should they wish to do so.

Stipulating to other methods or approaches to pay for the mediation costs may provide the participants with more options or leverage when resolving a case.

Raising the issue of who is paying what portion of a mediation fee provides the parties with options. When that question is deployed can be useful to resolution. As a preliminary matter, for the mediator, going to tell a party that their case is settled so long as they agree to pay more than their pro rata share of the fee, is never news that is well-received, regardless of how gracious counsel typically are when they hear it. However, that approach – adding the cost of the entire mediation fee to one side's ledger – is a common technique. The rationale behind the technique could be that in cases where insurance is involved, the mediation fee is a cost of defense, and thus, outside of the indemnity dollars available for a case's resolution (unless the policy places defense costs inside the limit). By seeking the mediation fee as a "last" move, the theory goes, the party accepting the offer has maximized the amount of indemnity dollars available for settlement and the added extra cost of the mediation is like the cherry on top of an ice cream sundae – just the extra enticement that enables the deal to close without causing the insurance representative to seek greater indemnity dollar authority.

Viewed from the side of the party extending the offer, the same circumstances add up to an ability to close a case when the insurance representative has exhausted the indemnity dollars available for settlement but needs to reach just a bit more to get the offer over whatever obstacle has been presented by the opposing side. "We can only pay \$X on the settlement, but we will cover the mediation fees" is a statement that has settled many a case.

Mediation fees are sometimes offered as an inducement into a conference. The party seeking the mediation states up front that if the opposing party will attend in good faith to attempt settlement, the fees will be covered by the initiating party. An offer to cover the mediator's minimum may have the same effect. "Come to mediation. We are paying for the first (2, 3 or 4) hours, then we will pro rate with you on a 50-50 basis."

In my experience, asking for the mediation fee as the first demand tends not to be well-received or very successful. While the party on the receiving end of that demand may indeed agree to pay the fee, a time constraint has now been placed on their willingness to participate. The party carrying the full freight of the mediation fee may be much more conscious of how quickly the parties are getting down to brass tacks to reach a resolution. With a certain figure in mind for what a mediation should cost, the

process can suffer if it is truncated due to the additional burden of the extra fees . Alternatively, the party conceding the fee may simply reduce the amount of available funds for settlement to ensure that the ultimate settlement comes within the planned-for range. Neither of these responses appears to achieve any strategic goal for the demanding party. A paid-for mediation that does not yield a resolution may become an exercise in futility. Another way to respond to the demand to pay the fees as a first demand in the negotiation process is to agree – with conditions. If the matter settles, the fee will be paid. If not, then the participants are each responsible for their share of the pro rata costs. Because this approach is not a rejection of taking care of the fee, the party who is on the receiving end of this message after making the early demand for payment may have a hard time rejecting this approach without seeming unreasonable.