A MEDIATOR'S DILEMMA –COMPETING INTERESTS IN THE SAME ROOM

By Malcolm Sher

It's one thing, when despite being prepared, reading everything that is submitted, listening attentively, exhibiting patience, engendering trust and coming up with a smorgasbord of options, a mediator's efforts are unsuccessful in bringing about a settlement. It's quite another where the case won't settle and the impasse is not caused by the parties, themselves, who are only too keen to settle and put the whole unfortunate experience behind them.

So, you might ask, who or what got in the way? The answer is, one "who" and two "whats." In many types of cases, the "who" is the plaintiff's lawyer and the two "whats" are the attorney's fees and a fee-shifting statute or contract that provides for recovery of fees. These barriers to resolution can arise in cases involving civil rights, consumer protection, employment, landlord-tenant disputes, and breach of contract, to name a few.

Take for example the plaintiff who had purchased a used "muscle car" from a dealership. The "Car-Fax" allegedly stated that the vehicle had never been involved in an accident. When damage was found, plaintiff sued under the Consumer Legal Remedies Act, Civil Code Section 1750 *et seq*. and the Consumer Warranty Protection Act, Civil Code Section 1790 *et seq*. Both of these acts include fee-shifting provisions, where, among other remedies, a prevailing plaintiff "shall" recover reasonable attorney fees.

The mediation seemed to be progressing nicely. As part of a mediated resolution, the dealership agreed to take back the car, re-purchase the plaintiff's loan, and pay something towards his attorney's fees and costs. The plaintiff and dealership were ready to close the deal! Indeed, the plaintiff was particularly motivated, having driven several hundred miles to attend the mediation, and incurring travel, hotel, and food expenses. Plaintiff recognized that these costs would multiply significantly if the case went to trial in a couple of months. Further, he was facing the costs of expensive expert depositions that remained to be taken.

So, what could be the problem? The plaintiff's attorney sought over one hundred thousand dollars in legal fees and over seven thousand dollars in deposition costs and expert fees prosecuting the case and wasn't about to give up any of it!

In our example, when his attorney went to make a phone call, plaintiff started crying. He could not afford to continue with the case, much less take it to trial. The plaintiff badly wanted, indeed *needed*, to settle on the terms offered at mediation. The litigation stress and expenses were jeopardizing both his job and his marriage. Referring to his attorney as a "greedy SOB who thinks it's her case," the plaintiff begged the mediator to "make" the attorney accept the offer, even though there would be little paid towards the attorney's fees. As in most contingency fee agreements, the plaintiff was responsible for costs, but not for fees, if he did not recover at trial.

What an ethical dilemma for a mediator! The mediator is not able to give legal advice, nor should a mediator cause a rift between an attorney and her client. Does Rule 2-100 of the California Rules of Professional Conduct, governing communication with a represented party, apply? Probably not, as the mediator is not acting as an attorney representing another client. Rule 2-100 would certainly not bar the communication if the mediator were not an attorney. The Model Standards of Conduct for Mediators provide some guidance, as they require mediations to be conducted based on the principle of party self-determination. In this case, the plaintiff desperately wanted resolution. ABA Model Rule of Professional Conduct 1.2, although not applicable in California, also provides good guidance in requiring an attorney to "abide by a client's decisions concerning objectives of representation."

With this guidance in mind, the mediator may ask to speak privately with plaintiff's counsel, with the plaintiff's knowledge and consent. The conversation should be tactful, and may include an explanation to counsel that the client is desperate to settle the case and may believe that the lawyer does not fully understand the client's concerns. The mediator may discuss whether there is a conflict between the lawyer and her client. Or are there external pressures that will result in the client making a poor witness at trial? In this setting, it may be useful to convey information provided by the defendant or defense counsel about the plaintiff – information not revealed directly to the plaintiff, to avoid emotional reactions – but which the attorney may find useful. Asking the attorney to assess the necessary future investment of the attorney's time and money, the risks associated with going to trial, and the risks associated with making a fee application. In our example, the mediator could compare the $25,000 paid for the muscle car with the attorney's fees. Defense counsel would almost certainly oppose a request for fees and costs totaling more than 5 times the amount at issue on the grounds that it is not "reasonable." In most cases, attorneys on a contingency fee will recognize that proceeding to trial carries risks, even when a client is eager to try the case, but perhaps more so when the client is reluctant to try the case.

Sometimes the divergent interests between a plaintiff and counsel cause the plaintiff to reject a settlement offered at mediation that, at least objectively, appears to be in the plaintiff's best interests. Especially in contingency fee cases, where the plaintiff has no real "skin in the game," a plaintiff will sometimes attempt to force her attorney to trial, even where the offer is fair, the likelihood of prevailing is uncertain, and it may even be too late for counsel to withdraw, because to do so would arguably "prejudice" the plaintiff's case and counsel would lose the ability to recover a contingency fee. In these circumstances, the most a mediator might be able to do is reiterate the risks of going to trial and emphasize the "bird in the hand" argument. Or demonstrate that, unless the plaintiff wins, recovering an amount, which, after deducting contingency fees and costs, is way above the amount, offered at mediation, the plaintiff might never be fully compensated. Then, mention the time-value of money now, plaintiff's time in court, away from work and family, the emotional costs, or other non-quantifiable items.

Divisions between client and counsel can ruin the prospect of reaching a reasonable resolution. Mediators who are sensitive to the internal relationships, and use a variety of

tools to address the situation, can overcome the hurdles and allow the parties and counsel to reach an acceptable, and amicable, resolution.

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