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PERSPECTIVE

Rules of disengagement: Does the mediation ever end?

By Jan Frankel Schau

Yogi Berra, the late, great New York Yankees' catcher, famously said: "It ain't over till it's over." That seems to be the applicable rule for mediation of civil disputes as well. Although California Evidence Code Section 1125 (a) and (b) address the termination of the mediation process for "the purpose of confidentiality," it is common practice for parties to continue negotiations through the mediator well beyond the "10-day lapse in communication" contemplated in that statute.

Now that mediation has been broadly accepted and practiced for more than 25 years, there are present trends that may be cause for concern. This year, almost one-third of the cases I mediated resulted in a settlement only after the hearing session itself through follow up negotiations. I include these cases in my almost 90% settlement rate, but the hurdles to them were much higher for both the litigants and the mediator, when you consider the investment of time and further discovery while both negotiation and litigation efforts continued.

When the mediation session nears its end it's common for repeat litigators to expect a mediator's proposal to break what would appear to be an artificial impasse.

In a recent case, the plaintiff's lawyer began the day by telling the mediator that the case would need a mediator's proposal (and a range of what that proposal needed to be) and then proceeded to negotiate at a multiple of his ultimate number, always keeping the mid-point in view for that eventuality. The challenge in those types of negotiations is: How much gets shared with the defendant about the plaintiff's plain strategy? And how much is the mediator swayed as the bargaining continues, knowing that at 5:00 p.m. she will be asked to break the impasse with a proposal of her own?

The benefits of this approach, of course, is that the plaintiff's lawyer can save face with his client and his mediator by ultimately achieving a reasonable settlement without compromising his "position" during negotiations. The hard part is having an honest conversation with the defense about this apparent strategy without revealing the range before they too are at a supposed impasse.

In a recent demonstration by a very well-known and respected mediator, he was careful to confirm that the parties had absolutely reached an impasse before he dug in and got to work proposing a solution that was way beyond the "impasse" number for both sides!

Another challenge comes when the client has different and perhaps unrealistic expectations of the settlement value in an early mediation. Those cases may reach an even earlier impasse than fairly evaluated ones. In one such case, the mediation was adjourned with a gap of almost $1 million. One year later, after a motion for summary judgment was filed, the parties attempted to mediate again. This time, the plaintiff was represented by new counsel who had conducted substantial discovery at considerable expense. At 5:00 p.m. and still hundreds of thousands of dollars apart, the parties agreed to adjourn and continue the negotiation with a view towards securing a mediator's proposal in a range that both sides might find acceptable. This a more formidable task based on the progression of the case and cooling off after the in-person mediation sessions.

When a mediator's proposal is going to be made after the in-person mediation session, the mediator loses all opportunity to discuss or justify the terms of the settlement with the principals. The lawyers alone control the message to their clients. The real fears and real passions that may have been frightfully present during the mediation session will have faded, and it becomes all too easy in a phone call or email to simply reject the pending offer, even when it comes from a trusted mediator. The "promise of mediation," which was suggested by Robert A. Baruch Bush and Joseph Folger back in 2004, will be all but destroyed.

Another type of challenge is presented where the lawyer is driving the negotiation so that he can earn the attorney fees he expects on a particular piece of business. In an early mediation, the lawyer will rarely earn as much as he might as he gets closer to trial, assuming the facts come out in his client's favor. Again, it is easy for a lawyer, who has a decent caseload, to turn down a reasonable settlement and draw a line in the sand on behalf of his client. However, it is much harder for the mediator to persuade the client that this is in his best interest once the session is adjourned and the only communications that follow that are funneled through the lawyer in further negotiations. These communications are also often abbreviated in ways that are not the case in a mediation session typically. They are often sent via email or even left as voice mail or text messages, rather than with a longer, more full-throated explanation and a brainstorming on possible responses which occurs very often in a face to face negotiation.

Sometimes it's true that both sides need some "litigation therapy," which requires time, thought and money before they are willing to commit to a reasonable compromise. In employment and other cases where there are fee shifting provisions, this also raises the settlement value. But at what cost? By then the defendants will also have spent so much in defense costs that additional money towards a settlement may no longer be available. At the same time, when the defense is forced to more fully prepare for a trial, or a dispository motion, they very often also formulate a stronger conviction that their defenses are valid, leading them to be more stringent about their willingness to settle a case that they have vetted thoroughly and no longer view the matter as one that bears significant exposure or risk.

Increasingly, there is a legitimate intent by both sides to harness the power of a third-party neutral who is committed to stay with the case throughout the discovery and pre-trial phases.

The "rules of engagement" is a term which refers to orders issued by a competent military authority that delineate when, where, how and against whom military force may be used. But what are the rules of disengagement? In mediation, there are none other than those found in Evidence Code Section 1125(a) which states:

"For purposes of confidentiality, a mediation is deemed to end when any of the following occur:

(1) A written agreement is executed by all parties that "fully resolves the dispute."

(2) An oral agreement by all parties that fully resolves the issues and comports with the requirements of Evidence code Section 1118 (oral presentation of the mediation agreement in open court);

(3) A mediator's executed written notification to all parties that the mediation has ended, "or words to that effect", with notification to a court that comports with Evidence Code Section 1121 (report to court).

(4) A party provides a writing to all parties and mediator that the mediation has ended between all or some of the parties, or "words to that effect" in compliance with Evidence. Code Section 1121. Parties who desire to continue with the mediation process may do so until terminated in accordance with Evidence Code Section 1125; or

(5) There has been no communication regarding the dispute for "10 calendar days" between the mediator and the parties, or for a shorter period agreed to by the parties.

Taking a critical view of Evidence Code Section 1125 — it has virtually no applicability in today's litigated case. In almost 20 years of practicing mediation, I have never seen a written notification that a mediation has ended authored by the mediator and also sent to the court unless it is accompanied by a written settlement agreement. The default, if the case is court appointed (as those from the U.S. district court), is an indication that "negotiations are continuing." Mediators are trained never to give up or accept that the mediation has ended simply because the parties have not reached agreement during the mediation hearing day.

Similarly, I have never seen a writing by a party indicating that a mediation has ended. And I'm not sure how such a writing would affect the confidentiality of the session regardless. The rules protecting the confidentiality of communications in mediation are pretty strong. See Evidence Code Section 1123, et. seq. So, what reason would a party have to formally "end the mediation"?

Finally, we all know that communication regarding disputes which do not result in settlement can extend well beyond 10 calendar days.

The mediation process is ever-evolving and fluid. However, it seems that it is an appropriate time to take a hard look at the rules of "disengagement." If one in three cases ends in a "false" impasse which requires further intervention, up to and beyond a mediator's proposal, have we undermined the beauty and the magic of a face to face one day expedited route to a fair, albeit imperfect resolution to litigated cases?

Perhaps the language of negotiation needs to be changed, like the lexicon in social settings. Perhaps a "last, best and final" offer should be re-named a "best offer for today." Perhaps a "no, never will I accept anything below a certain level" should be re-stated as, "as I know the facts today, I would not recommend that my client settle below $X based upon my current analysis and the costs and fees incurred to date." Perhaps the "absolutely no further authority" should be re-stated as either: "my client wants me to try this case" or "call me next week after I've had a chance to detail out the negotiations today in a letter to my client."

Communication is indisputably a key to successful negotiation. In mediation, where one or both sides believe they will never accept the other side's last offer of the day, why not begin discussing a mediator's proposal early in the session? In a case where the client's own evaluation is the obstacle to settlement, why not insist on including him in every discussion of every offer and counter-offer, rather than ever surrender it to a mediator to make a proposal that will inevitably be rejected? And finally, where mediation is conducted in the early stages of litigation, but the lawyer has an eye towards "earning" the maximal fee even before that fee has actually been earned, why not either table the mediation until later in litigation or communicate that fact to both mediator and opposing counsel early on for their consideration?

In short, the rules of engagement in mediation follow a predictable path. The parties decide to mediate, choose a mediator, a date, exchange briefs, pay a fee and attend with all relevant decision-makers present. But the rules for disengagement remain elusive. They are still guided by the rules of baseball, "It ain't over till it's over." ■

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