Fairfield UNIVERSITY

North East Journal of Legal Studies

Volume 4 *Spring 1996* Article 1

Spring 1996

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THE ROLE OF MEDIATION IN OVERCOMING BARRIERS TO THE SETTLEMENT OF LEGAL DISPUTES: A CASE BASED APPROACH

By William D. LeMoult*

This paper was inspired by observations resulting from the mediation of more than 100 civil legal disputes in five states (Connecticut, New Jersey, New York, Massachusetts and Rhode Island) involving personal injury, wrongful death, property, landlord/tenant, workers' compensation, medical malpractice, attorney malpractice, contract, attorney's fee, employment, civil assault and battery, collective bargaining, and real estate. All negotiating parties involved in the mediations were attorneys and/or claims personnel employed by insurance carriers, and the parties they represented.[1]

Original inquiry involved the attempt to discern factors which kept litigants from settling their disputes, and distinguishing them in terms of case type. But the barriers to settlement were indistinguishable from case to case. In addition, there were often several barriers present in a given case, each presenting its own set of problems and requiring the employment of varying mediation skills.

A syllogism of sorts developed in the process of relating mediation to the problems experienced by litigants attempting to resolve their conflicts. Namely, that if settlement of a litigable matter was to be achieved at all, the notion that mediation could contribute presupposed that there were obstacles to timely settlement through direct negotiation which could be overcome by the intervention of a third party. Put another way, mediation appeared unnecessary unless there were barriers which inhibited direct negotiation and settlement in a timely fashion.[2] One exception to this notion involved those cases where representatives of the parties were willing to settle, but for a variety of reasons wanted a forum to achieve this objective. Reasons included client distrust, a lack of client control, and efforts at keeping clients fully involved and informed.

This paper discusses the barriers to direct settlement (which are sometimes also barriers to effective mediation) and recommends the role of mediation in helping to overcome those barriers. Hopefully it will contribute in some small way to the timely settlement of conflict and an improved image of attorneys in pursuit of their clients' best interests.

This Article received the Hoehlein Award for Distinguished paper at the 1995 Annual Conference of the North East Academy of Legal Studies in Business in Kiamesha Lake, New York.

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Finally, this paper does not distinguish matters that are not suitable for mediation. The point of view that seems most valid on this issue is that all matters may be properly mediated save those in which either party can achieve satisfaction only through a binding declaration.[3]

I. Barriers

The barriers to settlement of legal disputes discussed herein are:

1. Delays in litigation;
2. Differences regarding valuation/remedy;
3. Posturing;
4. Individuals with ultimate authority who do not participate directly in negotiations, referred to as "Phantom Negotiators";
5. Limits on authority to settle;
6. Egos;
7. Attorney's personal economic interest;
8. Failure of parties to properly prepare cases;
9. Phenomena regarding multi-party cases.

The presence or absence of these barriers is not a signal that an attorney or party has done something "wrong" or "right"; they are simply part of the fabric of litigation. Representatives of parties who pursue their clients' best interests, and who thoughtfully analyze the environments which affect those interests, should examine barriers to settlement as well, and consider the question of whether mediation would constitute an effective vehicle for overcoming the obstacles which inhibit a satisfactory and mutually agreeable solution. It is the failure to identify and acknowledge these barriers that is largely responsible for protracted negotiations and resistance to facilitated settlement.[4]

A. Delay in Litigation

A threshold issue revolves around the notion of delay. It is well known that approximately 95% of all litigated matters are never pursued to judgment.[5] If the number of claims and conflicts settled by parties before the commencement of litigation was documented, the percentage of untried litigable matters would be greater. Since all litigable matters not tried or discharged under the law are settled, it is reasonable to ask what motivation exists to seek mediation if the parties can reasonably expect that the controversy will ultimately be resolved without mediation. The answer depends on what is meant by "ultimately," what the nature of the other barriers to settlement are, and how they affect the client's interest in the case.

The extent of societal damage being created by delay in the litigatory process is unclear.[6] Factors contributing to delay include court congestion caused by the enormous volume of cases in the court system[7] and the panoply of mechanisms available to litigants in the adversarial process.[8]

It is not necessary to analyze the myriad justifications for delay or the use of legal mechanisms which contribute to delay since attorneys can always evaluate their conduct against a single ethical standard: Is the conduct in the best interest of the client?[9] Permitting or contributing to excessive delay with regard to matters that will, in all likelihood, settle privately seems not to comply with the standard.

A possible measure, then, of whether delay is excessive might be the extent to which it serves the interest of the client. An individual injured in an auto accident may have sustained latent damages not readily identifiable. Here, resolution cannot be achieved until the nature and extent of damages is known or reasonably foreseeable. Consider, however, a multi-party property damage case in which one of five defendants has taken a no-pay position. The parties wrangle bilaterally for years over damages alleged to be $20,000. Each party is, or should be, acutely aware of the likelihood of settlement, the improbability of a trial, and the disservice to clients resulting from the failure to seriously attempt multilateral settlement efforts. Yet the case drags on with no party undertaking a serious settlement initiative. The case assumes a life of its own independent of the interests of the parties. There are adverse economic consequences to defendants and plaintiffs for whom the concept of the present value of money is forever lost. Between these extremes there is, of course, a plethora of possible scenarios; but all are measurable against the client interest standard.

Mediation provides an escape from the spiral of excessive delay and serves to crystallize issues, focus on client interest, and achieve closure. Mediation brings parties together, relieves tension, focuses on issues which separate the parties, and seeks win-win phenomena. It has as its primary focus the interests of all clients and the most satisfactory solution possible in light of competing interests. Most importantly, results can be achieved in a timely fashion.

Excessive delay, however, is not a **cause** of failure to settle, it is a **result**. While there are forces inherent in the litigation process which contribute to delay, parties are still free at anytime to discuss and settle differences. Why, then, does it take so long? Why is the route to settlement often such a tortuous one?

There are other barriers which can be effectively overcome by the use of mediation, and which contribute to excessive delay.

B. Valuation and Remedy

It seems reasonable to assume that differences regarding the settlement value or outcome of a particular claim or lawsuit contribute more than any other single factor to the failure to settle. Absent this element there is no reason for litigants to continue, and the pursuit of litigation without legitimate differences regarding the outcome seems again to violate the client interest test.

Yet it is true that mediation efforts take place regarding litigation that has been in process for years without settlement demands or offers ever having been exchanged.[10] The reasons for a failure to negotiate are sometimes legitimate and in the client's best interest. But very often they

are not, and ethical advocates should universally examine the issue of client interest as it applies to settlement initiatives, particularly in light of the statistical data regarding the likelihood of trial.

Since the process of settlement necessarily involves negotiations, and attorneys are nurtured on notions of strategy, there is an ever present danger that the objective of achieving a realistic outcome in the best interest of the client may become subordinate to achieving what is believed to be a strategic advantage. Making the first settlement overture, for example, may be perceived as indicating a weak position. The results of this attitude on both sides is, of course, inertia.

If reasonable settlement is an option in the best interest of the client, it cannot be achieved without an initiative from one side and response from the other. However, once expressed or pursued it may be that a negotiating strategy or posture is forever damaged. (Lawyers and claims personnel are haunted by the prospect of offering more than is minimally acceptable to the other side, even though such a condition should be idyllic from the perspective of the parties). Or it may be that a demand or offer will later operate to haunt the negotiating parties to their detriment at a pre-trial conference.[11] Mediation obviates most problems inherent in valuation issues. Skillful mediators will not lead parties into positions which will be detrimental to future negotiations or processes, and a skillful use of the confidential nature of the proceedings will leave all sides in a condition of parity. One complex personal injury mediation involving six defendants was conducted over a period of eight hours without a single demand or offer being exchanged among the parties. Barriers to settlement involved perceptions of value as well as comparative contribution of the defendants. Although settlement was not achieved, issues were crystallized, and information obtained in the mediation was the foundation upon which the eventual settlement was built.

It is most often true that valuation of a case is a highly subjective matter, and that no party to the action can forecast the likely outcome with clarity. Speculation regarding probabilities and possibilities of recovery is fueled by the interplay between issues of liability and damages, and the vagaries of jury behavior and venue.

Holmes circumscribes the dilemma of case evaluation when he defines the law: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[12]

Addressing his concept of the relationship between law and logic, Holmes is plain:

> You can give any conclusion a logical form. You always can imply a condition in a contract. Buy why do you imply it? Is it because of some belief as to the practice of the community or a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conelusions. Such matters really are

> battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon slight change in the habit of the public mind. No concrete proposition is self evident, no matter how ready we may be to accept it .[13]

Mediation acknowledges the wisdom of Holmes. It provides a forum for the honest repose of uncertainty and the quiet impartial evaluation of prophecy. Competent mediators will maximize the benefits to be derived from the judicious use of confidentiality,[14] drawing the parties closer and closer based on the exercise of their own reason as well as the mediators.[15] Mediation is also an excellent forum for discussing matters that are relevant yet outside the actual merits of the case, such as the likelihood of an adverse judgment in a jurisdiction known for bias in favor of plaintiffs or defendants.

C. The Perils of Posturing

If we can accept a dictionary definition of "posturing" as acting "in an affected or artificial manner, as to create a certain impression,"[16] then it is probably safe to say that every negotiator of a legal dispute is posturing to some degree up to that point beyond which further concessions will not be made and positions will not change; it is at that point that final impasse is reached. Since each party to a negotiation legitimately seeks to get as much as possible while conceding as little as possible,[17] it is necessary during the negotiation to communicate in a manner which represents something short of the negotiator's final impasse position.[18] The ethics and proficiency of the negotiation process have been explored by scholars and it is plain that not all negotiators perceive the ethics of negotiation in the same light, or are equally competent in that process.[19] The danger for negotiators lies not so much in the perception of their own attributes in these matters, as in the perception of their adversaries'.

The very notion of disequilibrium between and among negotiators constitutes a barrier that Mnookin might refer to as "cognitive."[20] Thus, as negotiators wend their way through the mine fields of adversarial discourse, creating images as they go which represent something other than their ultimate concerns, opportunities for error and miscalculation are created. When these are combined with the difficulties inherent in principal/agent relationships[21] there arises a permutation of barriers to timely and effective negotiation and settlement that sometimes become so insurmountable a trial is unavoidable.[22]

In one case involving recovery of an attorney's fee and a counterclaim of attorney malpractice, the parties had become so hostile during their bilateral settlement efforts that civil discussion was impossible. This continued through the joint session of the mediation, and into the caucus pbase, degenerating eventually into a notion of killing the messenger. Mediation in the early stages of this relationship, before the parties had become encrusted in a reverence of their

own posturings, would have stood an excellent chance of success, and would have preserved a friendship between former business associates.

Barriers to effective negotiations and settlement, whether among those specifically discussed herein or those formulating part of the accouterment of the communication process, have a universal quality about them in that they operate to damage relationships between adversaries to some degree, if not irreparably.

Professor Fuller describes the "central quality of mediation" as:

> ... its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and disposition toward one another.[23]

This "new and shared perception" is largely a product of structuring the posturings of the parties, and of providing a parity in negotiating techniques and competencies, thereby intercepting potential barriers in such a way as to appeal to the negotiators' most productive and rational inclinations.[24]

This view is reinforced by generally accepted notions of the mediator's functions. Stulberg relates them as being that of educator, translator, expander of resources, bearer of bad news, agent of reality and scapegoat.[25]

D. Phantom Negotiators

Another obstacle to negotiated settlement, that sometimes also inhibits mediation, is the specter of phantom negotiators, i.e., individuals who are in control of the outcome of a negotiation but do not participate directly in it. In these scenarios, negotiations are conducted by individuals with or without any given authority, and it is left to the negotiating party either to achieve preordained objectives or persuade the phantom of the rationale for movement to other or broader objectives. These structures are often logistically necessary, but a barrier nonetheless.

The notion of compromise implies that the compromiser is equipped with all available influences which permit a reasoned judgment and the ability to achieve closure. In the settlement of legal disputes every discussion or communication contains its own environment as well as reasoning, and the evaluation of positions is best done by those who are in a position to assess both.

One mediation where a good faith effort by both sides over several hours proved successful was summarily undone by a 10-second telephone call from the plaintiff to a relative with an obviously preconceived notion of value.

Mediators provide a sounding board to those with authority who are not actively involved. In addition, the representations of mediators are more thoughtfully and thoroughly considered by phantom negotiators than are the representations of the adversary, or sometimes even their own representatives.[26]

Also, mediators can often talk directly with phantom negotiators, which generally is not an option available in direct negotiations due to considerations involving the undermining of authority. One two-party personal injury mediation occurred at the office of the defendant insurance carrier. The claims representative was unusually intransigent and matters were proceeding badly. This mediator went to the kitchen for a cup of coffee and, by chance, met the claims representative's supervisor who was familiar with the case. The three of us met thereafter and in five minutes ironed out a more reasonable and realistic approach. It seemed the claims person had authority for more than he had revealed, and had apparently been through a tough negotiation with plaintiff's counsel.

E. Limits on Authority

Plaintiffs and defendants generally will not reveal to each other limits on authority. Most often they negotiate as if there were none, although each side is strictly bound and must, at some juncture, or through prior experience, wrestle with the prospect of the other side's natural boundaries.

Mediation is a method of ferreting out those secret logistical barriers in an environment of strict confidentiality, evaluating their validity in light of the corpus of the argument, and using the information in the best interests of settlement rather than strategy. Effective mediators test the validity of negotiators' constraints and may pose to those with ultimate authority the bases for modification or abandonment of disputed positions.

In one two-party medical malpractice mediation, the parties negotiated in good faith, finally becoming positioned at numbers which virtually demanded a compromise to which both seemed to be pointing. At this juncture both parties had to stop negotiating to seek authority from their principals. The principals eventually consented to this obvious compromise, but it was four years after the injury had occurred.

The matter of limits on authority applies to plaintiffs as well as defendants. With regard to plaintiffs, it is often true that lay persons have envisioned some dollar value that seems a reasonable settlement to them, and which bears no relationship to reality. In an action involving liability under a life insurance policy a beneficiary had become entrenched in a demand which corresponded to his needs for an annual income. The number bore no relationship to the prospect of what the case was worth in light of the facts and law. After five years of litigation the matter was settled in one mediation session after the beneficiary's personal representative, a relative, acquired an in depth understanding of the issues.

With regard to defendants, limits on authority are often rational boundaries thoughtfully conceived, but sometimes they are arbitrarily derived and refer more to the negotiator that the case value. For example, a claims person might have a limit on authority based on some arbitrary standard such as tenure with the insurance company.

Limits on authority, even those with a foundation in precedent, should be kept flexible for negotiators because of the uniqueness of every case. In the world of negotiation, parties focus on the multitude of variables extant and consider most acutely those which have any prospect of affecting their internal prophecies. It is the strength or attractiveness of these variables which command the need for flexibility.

F. Egos[27]

In a perfect world, notions of egotism of the negotiator would never enter upon the field of a bona fide negotiation. In the world of law it is often true that concerns of self worth, or reputation, or image, play a part in considerations of success. Negotiations often reverberate with contempt for the other side, or their position, based not upon a realistic prognosis of the outcome, but rather on such matters as the opposing negotiator's stature, apparent skill, level of education, erudition, experience, personality, or communications technique. The focus in negotiations is often on "winning" or "losing" all or any part of the contest, confusing sometimes the lawyers' and clients' interests. If winning and not losing is the overriding consideration, the most legitimate forum for resolution is a trial or other binding process; but this is antithetical to the reality that 95% of all litigation never goes to trial. The negotiation, therefore, sometimes becomes the field of combat upon which adversaries test each others' mettle for no truly productive purpose, knowing all the while that the likelihood of a trial is remote.

Attorneys sometimes want to project an image to their clients of infallibility or invincibility. The use of mediation interferes with such pretensions. In one mediation involving a very serious injury, the plaintiff's credibility was the focus of the defendant's resistance to settlement. Although there was evidence on both sides regarding the facts, it was clear that if a jury believed the plaintiff's version of events (which was distinctly possible) the defendant was exposed to serious liability. In the course of the mediation the defendant insurance claims person and his attorney made a nuisance-value offer which the plaintiff responded to with a modified demand. The defendant thereafter refused to move based on the credibility issue. This left the plaintiff in almost exactly the same position she had been in prior to the mediation. When the plaintiff refused to "bid against herself" the defendant's counsel terminated the mediation, saying to her claims person "I told you mediation wouldn't work." The insurance carrier later admitted that the case was not suitable for mediation in light of counsel's feelings.

Sometimes the barrier to settlement is found in one party's interest in a remedy which not only compensates for client damages, but which also seeks to embarrass the other party, or as often, the other party's representative. Arbitrator Joseph Pastore tells of a recent conflict which, although within reach of settlement, raged for over two years because the plaintiff sought, in the

mind of the defendant, a reasonable solution but with an added twist designed to "rub the settlement in the face" of defendant's counsel. When the case reached arbitration and my colleague as arbitrator suggested that an *ad hominem* remedy was not only unlikely but unprofessional, the parties settled the case in minutes.

Mediation defuses most, and sometimes all, of these barriers because mediation eliminates the battlefield. There is nothing from which the ego can seek reflection. Focus is away from psychic obstructions and toward substantive issues upon which agreement is sought. "Winning" and "losing" surrender to "agreeing." In mediation there is usually a "joint session," where parties present their overall arguments, followed by "caucuses" with the parties individually. There's no benefit to be derived from extraneous behaviors by advocates in caucuses. While acting-out occasionally occurs in mediation, it almost invariably subsides with regard to those who are involved in good faith efforts at settlement.

G. Attorney's Economic Interest

It is part of the process of the law that lawyers are necessarily compensated for their skill in conditions of both success and failure. Indeed, the rewards for failure often exceed those for success, and failure and unnecessary delay are often the allies of enhanced attorney compensation. Since dilatory lawyering is older by centuries than any code of ethics, it seems fair that this article will not cause in any measure the reform of those who abuse their trust by failing to resolve resolvable matters or advise clients of ways to end litigation when such tactics appear warranted.[28]

Notwithstanding attorney duties and obligations, lawyers need to cast their vision to other horizons. ADR offers an opportunity to improve service to clients, and in an industry which offers that product alone there is a broad opportunity for change in focus to achieve improved market share through offering clients better ways to meet their needs. Ultimately, the satisfaction of client needs (to the extent possible) is the mission and purpose of every representation, and in rapidly changing client and social environments, those who can adapt will be the survivors in this increasingly competitive profession.[29] It seems axiomatic that the notion of improved service implies reduced costs and the requirement that firms will seek vehicles for maintaining profitability without diminished service.

H. Failure to Prepare Properly

The failure of attorneys and claims representatives to prepare a case properly is often based on the very knowledge of the plodding nature of legal processes. As time passes, and files thicken, substance and strategy sometimes become disconnected. Words and communications circumvent the gravamen of cases, and parties tend to lose track of just what, exactly, the case is all about, often to the detriment of those represented. This is particularly true for parties handling large numbers of cases and cases with small economic values.

In a mediation involving six insurance carriers, one of the claims representatives made opening remarks that had nothing to do with the case at bar. When corrected by others present, the representative deferred to them to set out the case. A thirty-minute break was suggested in order to give the first claims representative time to refamiliarize herself with the issues. During two subsequent caucuses with this claims person, she kept confusing the instant case with others she was handling. She subsequently advised this mediator that she was handling 350 cases and expected tbe load to possibly increase due to a reorganization at her office.

In another case a multi-party mediation was conducted and continued so that a party could seek additional authority. In the interim, the case file changed hands and subsequent discussion with the new representative focused on issues of liability. The representative was adamant about the minimal exposure of his client. Further discussion revealed that although he knew details of the case he was mistaken about which party he represented. Undaunted (and now in the throes of the Ego barrier) he continued the same argument although it was obviously inapplicable.

Mediation helps to refocus on cases in a timely fashion, giving them the importance to which clients are entitled. Because the process is informal, parties re-explore the vital issues in a noncombative environment. Timely mediations also circumvent most problems inherent in the practice of reassigning files among attorneys and insurance claims representatives. Mediations tend to be most fruitful when the parties are represented by advocates with an ongoing, thorough familiarity with the facts and issues, unless settlement negotiations have been chronically unproductive, in which case new faces and voices may be appropriate. In a memorable case, this mediator was seated in the lobby of a large law firm waiting for the parties to arrive, and a woman entered and sat down. We made small talk, and were soon joined by an attorney who identified himself as a party to the mediation. The woman introduced herself as the plaintiff and complained bitterly that the case had heen in litigation for more than four years. She then asked the attorney who his client was. "You" was the reply. The case settled in 55 minutes.

The preparation required of mediation is simply that of knowledge. The burdens of trial preparation are completely absent. Eloquence and strategy give way to reasoning and dialogue, as the parties strive to discover whether the prophecies described by Holmes are within their mutual contemplation.

I. Phenomena Regarding Multi-Party Cases

All of the barriers to effective settlement heretofore discussed compound and beeome more forbidding as parties are added to a lawsuit. There are, in addition, certain barriers that are unique to these cases and are created simply by virtue of the numbers of parties in interest.

1. Complexity of Communications

Communications among parties in multi-party cases become a logistical challenge, often avoided by litigants in favor of time spent creating further support for entrenchment.

Consider, for example, a personal injury in a leased portion of a building undergoing renovation. Parties to the action may include the General Contractor, all relevant subcontractors, the architect(s), landlord(s), tenant(s), manufacturers of objects connected with the injury, municipalities, and others brought in directly or by impleader. Each adopts an initial position which, ipso facto, has relevance to the position of the others both in law and in fact. Bilateral discussions are virtually impossible because of the multilateral, interdependent nature of the controversy. Within this population there seems invariably to be one or more parties who resist collective efforts to resolve the dispute. Unstructured multilateral negotiations without a neutral are fraught with difficulties.[30]

There is an unheralded skill extant possessed exclusively by the Case Administrators of good ADR providers whose job it is to bring together in one forum the warring interests in multi-party litigation. Their efforts, which are often threshold mediations in and of themselves, combine many of the skills of effective mediators, with an emphasis on patience, tenacity, perception, and knowledge of the subject matter.

Mediation serves, therefore, not only as a forum for settlement, but also as a vehicle for bridging complex relationships, bringing adversaries to the table for discussion where they might otherwise have been unwilling, and moving along those advocates who, by virtue of the complexity of communications, are inclined to delay the inevitable, to the detriment of their clients.

2. Theories of Relativity

A significant barrier to settlement in multi party negotiations is the perception that defendants bear a certain proportionate liability relative to each other. This view, which is dependent on, and as imperfect as, estimates of overall case value, sometimes maintain irrespective of the amount of dollars a defendant has to spend. For example, it is not uncommon, even in mediation, that parties will state their dollar contribution to an overall settlement, only to recant upon learning of the contribution of other defendants who they believe bear a greater share of the burden. The dilemma is complicated when those who seem to contribute a comparatively low amount are constrained by limits on their authority imposed, sometimes, by phantom negotiators. In these cases the dispute is not with the plaintiff and may have no immediate bearing on settlement value.

In one personal injury matter involving five defendants and one plaintiff, the parties were asked to write a confidential note stating their view regarding the value of the case, their individual percent of liability, and the relative liability of the remaining defendants. There was no consensus regarding the case value, and little accord on comparative liability. The parties were then asked privately how their estimates of their own liability stacked up against specific settlement values. Every party was prepared to pay their own estimate of their own liability relative to their estimated case value, which collectively constituted an appropriate settlement value for the case. The parties then all agreed to reveal their confidential evaluations. When some

parties realized that their estimated case values were greater than the values of others, thereby giving them a proportionately greater share, those parties balked. A mutually satisfactory compromise was subsequently reached which focused more on the parties attitudes regarding value to **them** rather than the perceptions of others. This is not to say that perceptions of relative liability do not have quantitative dimensions and are not valid considerations in case settlement. The point is that there are other dimensions of liability in multi-party cases that need to be focused on and addressed.

There are effective techniques in mediation to bring defendants to a point of agreement regarding relative contribution within the context of a total settlement. Plainly these are fluid in nature, and change and move within the framework of the entire mediation and shifting attitudes in response to the plaintiff's demands. But there is a group dynamic[31] that occurs involving group pressure, values and attitudes[32] which, if understood and effectively managed by the mediator, will tend to bring tbe parties to agreed upon norms,[33] a central logic, and recognition of the desirability of facing square-on their mutual BATNAs (Best Alternatives To a Negotiated Agreement).[34]

Conclusion

To effectively represent a client, or an employer, attorneys and insurance claims personnel should examine the barriers to settlement and consider the prospect of mediation as a legitimate vehicle for overcoming the barriers, particularly in light of settlement statistics. Strategies of delay, until the pressure of trial serves as an enforcer, often fail to inure to the benefit of principals, and must be questioned against tbe standard of the best interest of the client.

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*Some of the concepts discussed were first presented at a seminar sponsored by the Connecticut Bar Association, Continuing Education Series, regarding "Settling Insurance Claims and Lawsuits," May 20, 1993.

The author expresses appreciation to his Pace University colleague, Joseph M. Pastore, Jr., himself an arbitrator/mediator for over 20 years, for his invaluable comments.

All cases discussed in this paper are actual. However non-essential facts have been disguised to preserve confidentiality and the identity of circumstances and parties.

[1] The burden of research was lightened by John P. McCrory's compilation: "Dispute Resolution: Alternatives To Litigation: Selected Readings", Vermont Law School, 1992-1993,unpublished manuscript in hans of author and Leonard L Riskin and James E. Westbrook, DISPUTE RESOLUTION AND LAWYERS (1987, 1993 Supplement).

[2] Barriers can exist at any stage of litigation from inception to trial. *See* William H. Champlin, III, "When Settlement is Appropriate", Settling Insurance Claims and Lawsuits, Connecticut Bar Association, Continuing Legal Education series, May 20, 1993. *See* also Robert H. Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict", FORUM, National Institute For Dispute Resolution, Summer/Fall, 1993.

In Getting to Yes, Fisher and Ury explore ways that people can deal with their differences. In doing so the authors indirectly identify a spectrum of barriers to settling legal conflict, and recommend ways to overcome them. ROGER FISHER, WILLIAM URY AND BRUCE PATTON, GETTING TO YES (1981).

[3] *See* Nonna Skumanich and Denise Lach, When Mediation Won't Work, 47 WASH. STATE BAR NEWS (April, 1993). This topic is also dealt with in "The Role of Mediation in Public Interest Disputes." Barbara A. Phillips and Anthony C. Piazza, 34 HASTINGS LAW JOURNAL, 1231, 1236. The authors cite an unpublished paper by Mark Galanter, University of Wisconsin Law School, October 1982, in which Galanter summarizes cases requiring judicial declaration including those (a) where a disputant needs to secure a declaration of "good law," (b) where an employee doesn't want to take responsibility for a settlement (c) fear of weakening future bargaining credibility, (d) vindication of fundamental values. The authors point out, however, Galanter's view that parties to civil litigation frequently change perceptions of what is and is not negotiable.

[4] *See* Leonard L. Riskin, "Mediation and Lawyers", 43 OHIO STATE L.J. 29,43 (1982) (hereinafter Riskin). Riskin discusses thereason for lawyers' reluctance to use mediation.

[5] George L. Priest and Benjamin Klein, The Selection of Disputes for Litigation, RAND INSTITUTE FOR CIVIL JUSTICE, (1984), citing H. Laurence Ross, Settlement Out of Court, The Social Process of Insurance Claims Adjustment (1970). Hon. Beverly J. Hodgson and Robert A. Fuller, "Summary Jury Trials in Connecticut Courts", 67 CONN. B.J. 181 (1993).

[6] For example, it is unclear how much legitimate legal activity is not instituted, or bad decisions not appealed, because of the ponderous, dilatory, and costly nature of the process, and the economic and emotional strain it inflicts on the parties. Nor is it clear how much civil injustice is being committed with the understanding that it will not be remedied within a reasonable time.

The quality of justice seems also adversely affected in, for example, pre-trial proceedings where judges, frustrated by delay, dispatch justice summarily. *See* Jan Hoffman, "A Judge says Now", The N.Y. Times, Metro Section, April 24, 1994, at 35.

[7] In 1988, of the approximately 30 million **new** cases filed in state courts; 16.9 million were civil cases. This figure does not include 68.2 million traffic or other ordinance violation cases. *See* State Court Caseload Statistics: Annual Report 1988, A Joint Effort of the Conference of State Court Administrators and the National Center for State Courts, February, 1990.

[8] *See* Stephen Landsman, "Readings On Adversarial Justice: The American Approach to Adjudication" (1988), at 25. Consider the findings in a Rand Institute study which concluded that from the clients' point of view delay in matters **tried** did not appear to play a "substantial" role in determining whether tort procedures were seen as fair and whether litigants were "satisfied." They did, however, find a modest but statistically significant correlation between these concepts. E. Allan Lind, et al., "The Perception of Justice: Tort Litigants' Views of Trial, Court Annexed Arbitration, and Judicial Settlement Conferences," Rand - The Institute for Civil Justice, R-3708-ICJ (1989). Study is warranted on the perceptions of litigants whose cases are settled after various durations and before trial. *See* an unpublished paper by U.S. District Judge Robert C. Zampano, "Court Annexed ADR: A View From The Bench" at p. 3 (undated), (Copy in possession of author) where it is stated that "in many cases the objective served by discovery is not a search for truth; rather it has become a vehicle of attrition designed to harass, demoralize, and pummel the opponent with time consuming, lengthy and expensive proceedings.

[9] Roger J. Patterson, Dispute Resolution In a World of Alternatives, 37 CATH. UNIV. L. REV. 591, 601, 604 (1987). Patterson provides guidelines in considering alternatives to litigation involving a balancing of clients' interests.

[10] One extreme case began as a personal injury, developed into medical malpractice, continued with attorney malpractice, and 15 years from the date of the injury was settled in a 6 hour mediation where, for the very first time, demands and offers were exchanged. In a property damage case where five defendant companies were scattered all over the country, a three hour mediation settled the six year old dispute in which no party present had ever discussed settlement with the other.

[11] The disregard of the need for confidentiality in pre-settlement negotiations by some judges is deserving of more concern by the judiciary. Requests by judges for revelation of bargaining history very often operate to the serious detriment of good faith settlement negotiations and subsequent effective mediation. Too often parties will reveal to a judge their last demands and offers, or limits on settlement authority, only to be confronted with an off-the-cuff compromise number from an overworked judge. This number then becomes the reference point for all future discussions between the parties, whether or not the number is rooted in reality. The judge's number is often not the result of a thorough mediated negotiation, and the parties are virtually stripped of their ability to pursue further rational discussion based on the ubiety of a judicially sanctioned conclusion. Ethics opinion 93-370 of the ABA Standing Committee on Ethics and Professional Responsibility covers the issue of the responsibilities of attorneys regarding disclosure of limits on settlement authority and recommendations to clients of a judge's recommended figure. But these structures do not always prevail in the pretrial world of settlement (see Champlin, *supra*, note 2, at 75).

At the same time, and in a more positive sense, judicial intervention often prompts a settlement which is both timely and satisfactory to the parties. This is particularly true of well managed court annexed systems.

[12] Oliver W. Holmes, The Common Law and Other Writings The Legal Classics Library (1983), at 173.

[13] *Id.* at 181.

[14] *See* RISKIN, *supra* note 1, at 247.

[15] In capturing some of the ethos of mediation Fuller quotes Edmund Burke: "The world is governed by go-betweens. These go-betweens influence the persons with whom they carry on the intercourse by stating their own sense to each of them as the sense of the other; and thus they reciprocally master both sides." Lon N. Fuller, "Mediation: Its Form and Functions", 44 S. CAL. L. REV. 305, 324 (1971), citing Burke's "An Appeal from the New to the Old Whigs," (1791), in THE WORKS OF EDMUND BURKE (1904), 189-190.

[16] RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged, 1967, def. 9.

[17] The minimal return that must be achieved before breaking off negotiations is discussed in HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982), 126 et. seq. Also see Fuller, supra note 15 at 315.

[18] Fuller, discusses the "obvious but mistaken expedient" of having "both parties at the once disclose ... their internal evaluations.", *supra*, note 15, at 371. Fisher and Ury distinguish "less than full disclosure" from "deception". *supra* note 2, at 140

[19] With respect to ethics, Geoffrey Hazard suggests that there is a lack of consensus regarding the standard of openness that should govern lawyers' dealings with others; that lawyers' standards of fairness necessarily derive from society as a whole; and that the legal regulation of trustworthiness cannot go much further than proscribing frauds. Geoffrey C. Hazard, "The Lawyers Obligation to be Trustworthy When Dealing With Opposing Parties", 33 S. CAROLINA LAW REVIEW 181, 193 (1981). Hazard cites White, Machavelli and The Bar: Ethical Limitations on Lying in Negotiation, AM.B. FOUNDATION RESEARCH J. 926, 927 (1980).
A rebuttal of Hazard's position appears in Gary Tobias Lowenthal, 2 GEORGETOWN JOURNAL OF LEGAL ETHICS 411,988-89. Lowenthal decries the failure of the ABA's Rules of Professional Conduct to address certain matters of attorney conduct in negotiations, thereby permitting unacceptable behavior, such as lying.

With regard to proficiency in negotiations, in LEGAL NEGOTIATION AND SETTLEMENT (1983), author Gerald R. Williams presents his research on negotiating styles.

Felstiner, Abel and Sarate discuss transformations between stages of disputes, ascribing to lawyers a central role in that process. William Felstiner, Richard Abel and Austin Sarate, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming", 15 LAW & SOCIETY REVIEW, at 642 (1980-81).

Redmont suggests rhat different personality characteristics are required for litigation than for negotiation and conciliation. Robert S. Redmount, "Attorney Personalities and Some Psychological Aspects of Legal Consultation", 109 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 972. (1961)

See also DAVID A. LAX AND JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986), discussing negotiators who are valuecreators (win/win) and value claimers (win/lose).

See KENNETH W. TERHUNE, The Effects of Personality in Cooperation and Conflict, SOCIAL PSYCHOLOGY: A SERIES OF MONOGRAPHS, TREATIES, AND TEXTS (1970) concluding that personality is considered one of two main influences on cooperation - conflict behavior.

[20] Mnookin, *supra*, note 2, at 26.

[21] *Id.* at 25.

[22] Hazard states that "the event of a trial shows that the less costly alternative (of negotiation) has failed in a particular case". *supra*, note 19 at 187.

[23] Fuller, *supra*, note 15, at 325.

[24] *Id.* at 318.Consider the view that a problem-solving orientation to negotiation has the prospect of leading to improved solutions and a process whicb is more creative and enjoyable than destructive and antagonistic. "Toward Another View of Legal Negotiation: The Structure of Problem Solving," 31 UCLA L. REV. 754 (1984)

[25] Joseph B. Stulberg, The Theory And Practice of Mediation: A Reply To Professor Susskind, 6 VERMONT LAW REVIEW 85 (1981). *See* Leonard Riskin's list of mediators' activities in The Special Place of Mediation In Alternative Dispute Processing, 37 UNIVERSITY OF FLORIDA LAW REVIEW, 19-27. and Jeffrey Rubin, "Negotiation: An Introduction To Some Issues and Themes", 27 AMERICAN BEHAVIORAL SCIENTIST 149 (1983) for a discussion of the role of a third party in "saving face" for negotiators, at pp 138-139, citing R. J. Meeker and G. H. Shure, Pacifist Bargaining Tactics: Some Outside Influences, JOURNAL OF CONFLICT RESOLUTION, 13:487-493 (1969), and J. E. Podell and W. M. Knapp, The Effect of Mediation On The Perceived Fairness of The Opponent. JOURNAL OF CONFLICT RESOLUTION 13:511-520 (1969).

See Frank E. Sander and Jeffrey Rubin, "The Janus Quality of Negotiation: Dealmaking and Dispute Settlement", NEGOTIATION JOURNAL 109-113 (1988) 109-113 (the authors characterize these two different types of negotiation).

[26] Mnookin discusses "Reactive Devaluation" citing the work of his Stanford colleague Professor Lee Ross whose research demonstrated that a given compromise proposal is rated less positively when proposed by an adversary than when proposed by a neutral or ally. (Robert H. Mnookin, *supra*, note 2, at 28).

[27] In his study on negotiating styles, Gerald R. Williams points to only one characteristic shared by all categories of ineffective negotiators: "Egotist." GERALD R. WILLIAMS, LEGAL NEGOTIATIONS AND SETTLEMENT (1983) 39.

[28] There would appear to be both ethical and legal support for the proposition that lawyers need to be knowledgeable about Alternative Dispute Resolution (ADR), and must inform clients of this option, at least when it is offered, and may be required to represent clients in ADR proceedings. Consider the Connecticut Bar Association Informal Ethics Opinion 87-13, January 13, 1988, that counsel for an insured defendant has a professional duty to represent the client at a non-binding ADR proceeding if counsel believes "the proceeding represents a significant opportunity to advance the client's cause" or if the insured's interests are at risk.The "Comment" on Rule 1.2 of the Connecticut Rules of Professional Conduct, 1993, states that "Both lawyer and client have authority and responsibility in the objectives and means of representation." The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives." This suggests, at a minimum, that an attorney has a duty to consult with a client regarding an offer to pursue ADR.

Sander and Prigoff argue that there is a duty to discuss ADR with clients., (Sander citing Rule 1.4 (b) of the Model Rules of Prof. Conduct of the ABA) but Prigoff argues that the duty should not be a basis for professional discipline or malpractice liability. See Frank E.A. Sander, "Yes, an to Clients," 76 A.B.A.J. Nov. 1990 at 50 and Michael L. Prigoff, "No, An Unreasonable Burden, " 76 A.B.A.J. Nov. 1990 at 51.

In a Connecticut case, *Laura Klingeman Admin. v. Joseph Sakal et al.* 8 CSCR 928, CU 293949 (1993), the court held that plaintiff pleaded a legally sufficient CUTPA (Conn. Unfair Trade Practices Act) claim against her attorneys, alleging they did not fully inform her of anoffer of settlement. Since ADR is now part of the Connecticut's judicial framework (CONN. PRAC. BOOK §546T) the "Cigarette rule" recited in *Daddona v. Liberty Mobile Homes Sales, Inc.*, 209 Conn. 243 (1988) could be expanded to embrace an attorney's duty to discuss the ADR option. See Riskin, *supra* note 4, citing as a reason for lawyer reluctance to use mediation "The economics and structure of contemporary law practice."

[29] New York's LeBoeuf, Lamb, Leiby & Mac Rae is illustrative of changes in the basic economic approach of many law firms. They have entered an agreement to handle all of Alcoa's litigation for a period of more than three years for a fixed fee of between $6 and $7 million.

Corporate Legal Times, October 1993, at 1. Making money under these circumstances will require a policy of expense reduction.

See Steven Brill, "The New Leverage," The American Lawyer, July/August 1993, regarding innovative billing practices based on value to clients and results. There is a strong movement afoot to limit the amount of attorney compensation in contingency fee cases by linking fees to the degree of risk actually borne by personal injury lawyers. The contingency portion of the fee would kick in only after trial and would be based on that portion of the award which exceeds the defendant's original offer. Peter Passell, *Windfall Fees in Injury Cases Under Assault*, New York Times, February 11, 1994, Section A, Page 1. If this or similar approaches achieve success in bar associations, ethics ruling, or in the judiciary, lawyers should lean more and more to neutral forums where clients can be seen and heard in a timely fashion, barriers to settlement can be effectively eliminated by neutrals, and value judgments can he truth-tested at an early stage in the BATNA (Best Alternative To a Negotiated Agreement) evaluation process. (Fisher and Ury, supra note 2, at 101.) Attorneys who doubt the changing attitude of corporate America regarding obtaining value and results for legal expenditures should consult *Corporate Legal Times*, Chicago, Illinois, a national monthly on managing in-house corporate legal departments.

See also Dahlgren, Jennifer, *Consulting the Future*, ABA Journal, April 1994, regarding prepaid legal services.

[30] In this connection *see* HOWARD RAIFFA, *supra*, note 17, especially part IV "Many Parties, Many Issues," at 251.

[31] KEITH DAVIS AND JOHN W. NEWSTROM, HUMAN BEHAVIOR AT WORK: ORGANIZATIONAL BEHAVIOR, (7th ed. 1985), at 217 et. seq.
See ARNOLD BIRENBAUM AND EDWARD SAGARIN, NORMS AND HUMAN BEHAVIOR (1976), especially Chapter 4, "Explaining Behaviors." and Hubert Bonner, GROUP DYNAMICS (1959), at 45. In describing "togetherness" of a group as a dynamic structure he refers to a "circular reaction" in which there is a high degree of self intensification in each member of his own 'excitement' as he finds it reflected in others. In this process shared feelings and tension, which in each member separately had no adequate outlet, are freely expressed. When a person's responses to others is shared by them when these experiences become reciprocal or interactive, there exists the basic condition of group behavior."

[32] J. JAY BRAUN AND DARWYN E. LINDER, PSYCHOLOGY TODAY: AN INTRODUCTION, (4th ed. 1975), at 619 et. seq.

[33] Davis and Newstrom, *supra,* Fuller *supra* note 15, at 308, suggests that the mediation is directed not to conforming to norms, but rather to creating the relevant norms. Note 31, at 312.

[34] FISHER AND URY, *supra*, note 2, at 101.

PROTECTING THE CONSUMER: BUYER AGENCY IN RESIDENTIAL REAL ESTATE TRANSACTIONS

by

Robert D. King*

I. Introduction

The single most important investment for most Americans is the purchase of a home. The decision to buy a home requires substantial financial consideration. Similarly, one who sells a home must consider the financial consequences. It is inappropriate, therefore, that such an important financial transaction is in many instances conducted in a manner which is inconsistent with prevailing notions of agency theory and which does not accurately reflect the understanding of the buyer, the seller, and the real estate professional.

The typical residential real estate transaction promotes this inconsistency through the use of "listing brokers" and "cooperating or selling brokers," the latter of whom are deemed to be "sub-agents" of the listing broker.[1] In this transaction, the seller designates a broker to act as his or her exclusive agent in marketing the property. A listing agreement setting forth the obligations of the parties is executed.[2] This broker is referred to as the "listing broker," and is legally recognized as the agent of the seller in the sale of the property.[3] The listing agreement typically requires the listing broker to place the listing in the local Multiple Listing Service ("MLS"). Through the MLS, selling brokers learn that the property is for sale and are advised of the conditions and terms of the offer to sell. The selling brokers who market the property to prospective buyers are deemed sub-agents of the listing broker and, consequently, sub-agents of the seller, to whom they owe a fiduciary obligation.[4]

The typical real estate sale involves the prospective buyer contacting the sub-agent and requesting that the sub-agent assist the buyer in locating suitable property that is for sale. The sub-agent reviews properties listed for sale in the MLS and presents them to the buyer for consideration. If the buyer decides to bid on a property, the sub-agent then prepares the buyer's offer to purchase, often after having counselled the buyer on the purchase bid as compared with similar properties in the area. As negotiations with the seller over the terms of the proposed sale continue, the sub-agent often negotiates on behalf of the buyer.[5]

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