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The grease that oils the machine of mediation

By Jeffrey M. Bases

In a time when we see our savings accounts diminish, widespread unemployment, volatile world markets, political unrest, mass protests, and general unpredictability about the future, we should all strive to resolve conflicts.

Mediation affords parties and practitioners a uniquely confidential setting to communicate to the opposing side. In court and in business, everything said is potential fodder for attack. There are transcripts in court; there are minutes kept in business.

Mediation, however, is ideally designed to be a safe-zone for communication. The communications made are not recorded and used later. If somebody hypes their case, overstates or understates damages, argues facts based on hearsay, so be it. The other party's lawyer and the mediator are there to check facts and law.

Good mediators are cognizant of the facts and law, and thoroughly question the attorneys on each side. Typically, chaff falls by the way side. Mediators are not judges, but are conductors of mediation. They control tempo and tone, which are key to establishing the safe-zone environment.

Good lawyers counsel and admonish their clients about speaking openly. But if a mediator can instill trust in the participants, then he can be very effective in acquiring and transmitting substantive information critical to opening the door to settlement. It is this give and take - mixed with negotiation and argument - that is the grease that oils the machine of mediation. Sometimes a party is secretly willing to take some responsibility, but has been too afraid to say anything because of potential or unknown liability.

Litigation is so much about the zero-sum game of win or lose that communication between parties conducive to resolution is often all but nonexistent, except for within a mediation context. Parties that want closure and are willing to accept some responsibility may find a dignified path to resolution in mediating.

Mediations typically involve negotiations about money, but hopefully, something else takes place as well: the resolution of a conflict. When mediations are successful, parties go on with their lives. Regardless of the case, hopefully, the parties obtain a sense of closure. That is a big deal.

As a mediator that has conducted countless mediations, I understand the priority-stand the state Supreme Court made in *Cassel v. Superior Court (Wasserman, Comden, Casselman & Pearson LLP)* (2011) 51 Cal. 4th 113, 244. Making a "judicial exception" to

allow attorney statements in mediation into evidence might beg the question of what context the statements were made. In answering that question, the Court would likely be faced with whether further "judicial exceptions" to allow the attorney his defense are necessary, e.g., statements by parties, other attorneys, or the mediator. Private facts revealed may be in jeopardy of disclosure. The obvious risk is a chilling effect on communications in mediation.

Recourse for lawyer malpractice is a concern, but cannot be the overriding concern. Typically, lawyers bring a sense of rational thinking to mediations and assist their clients with the difficult decision-making process and analysis involved in making a settlement. Lawyers commonly work jointly with the mediator in providing the tough, hard facts and advice sometimes necessary to convince a client to settle. Lawyers do this fundamentally because it is in the best interests of their clients.

Further, good lawyers prepare their clients prior to the mediation. Parties should be aware of the value of the case, the costs and risks involved in going forward, and the practicalities at hand. Contrary to the bad press lawyers often get, most lawyers take their role as legal counsel seriously and conduct themselves ethically and professionally. Granted, some are better advocates than others, some are sharper on the law, and some are clearly inexperienced and less professional, but these issues are really not central in *Cassel*.

The *Cassel* decision presumes that the lawyers are doing their job, i.e., keeping their clients informed, providing competent legal advice and advocating their client's position. Mediations are neither depositions nor discovery expeditions. There should not be any settlement entered into without informed participants making intelligent decisions. If a party needs more facts before he can intelligently decide on a settlement, then he should not enter into a settlement. If a lawyer needs to do more legal research before he can give competent advice to settle, then he should continue the mediation to a time when he will be prepared. Mediations can and often are continued until after certain depositions are conducted or other discovery is obtained.

The *Cassel* ruling does nothing to suggest that a lawyer's duty is in any way relaxed. Rather, it fosters a more respectful, free flow of open communication from a lawyer to her client and vice versa that is sometimes necessary and appropriate in advising a client with his decision to settle. It also allows the mediator more freedom to be creative, without concern of a breach in the confidential process.

Modern legal ethics dictate that lawyers *sufficiently* inform their clients about mediation confidentiality, i.e., that communications made in connection with the mediation are confidential and protected from disclosure by the mediation confidentiality statutes, including those between the client and his or her own counsel. The mediator should likewise explain the nature of the mediation confidentiality laws to all parties at the outset of the mediation to set the tone of fairness, as well as to conduct the process in a balanced, informed and safe manner for all involved.

We all know that litigation is fraught with peril and is unpredictable. A good lawyer

discusses these aspects of litigation as well as the merits, challenges, costs, risks, and practicalities of the case with his client. Mediation allows the client to be directly involved in the process of resolution, but it requires the client to take responsibility for his or her decisions regarding settlement. Of course, there are some that experience a certain "buyer's remorse" phenomenon, but most parties get over that after the dust has settled and they have thought it through.

Life is short, and closure is a valuable thing - even to the party that might otherwise have wanted to sue his lawyer for recommending that he settle for a "lower" sum than what he thought the case was worth.