MEDIATING THE CIVIL CASE: Great Expectations or Reality Check

"There are an infinite number of generalizations that are consistent with any set of observations, and no strictly logical basis for choosing among them." -- Anonymous Scientist

My model for mediation, the person who inspired my decision to become a full-time professional mediator is Judge Charlie Field. In my experience with him, Judge Field always made thought-provoking comments during mediation that seemed to keep the process moving. A paraphrase of the one I best remember--and use--is that it seems most people want "justice" through the system of litigation and, it seems, most people's view of justice is, "I win."

The majority of mediations that I have conducted in which at least one party is represented by counsel, at least one of the attorneys (or sometimes the party) wants to convince the "bonehead" on the other side just how wrong she is. Another significant number involved attorneys who want a neutral to help convince the parties to settle. I have been much more successful in the latter situations. My observations and experiences during mediation create within me a desire to communicate to the advocates and parties those things that I believe will help them to be successful in mediation.

It is my experience that though no cost court sponsored mediation programs seem to be extremely successful within the guidelines currently in effect, those parties who select private mediation, as opposed to a no-cost program, have a greater incentive to settle. First, they have elected to mediate which suggests a desire to settle, but they need to have an experienced neutral help them get to an agreement. Also, people want value for money so those who have a private mediator seem to be more motivated since it is

costing them for the service. I have also seen that there are a fair number who trigger and invest in private mediation just to get the process started and to evaluate the opposition's resolve. The feedback I have received from mediation clients has been that the latter is an effective use of time and money as it better helps the parties to prepare for further mediation, private settlement, or trial and it certainly gives both sides the opportunity to see how the opposition has evaluated the case.

The trend toward court sponsored mediation programs is a very good development. I have found that many times counsel or the parties in litigation aren't aware that settlement is an option in their case. Perhaps it is a lack of communication or benign neglect, but when a settlement option is presented to an unsuspecting litigant (or counsel); it is a pleasure to see the lights come on.

The dark side of court programs is that all too often cases are either not ready for mediation or are simply not right for mediation. I believe, based upon my experience, that most cases are amenable to a mediated settlement when the time is right. But the court sponsored programs should not be clogged with cases that are either not ready or those in which counsel are reasonably certain that a mediated settlement is unlikely. I suggest that the best approach for bench officers in these programs would be for cases not to be referred to mediation until all of the relevant boxes are checked on the CMC statements that all litigants are required to file in which they declare that they have met and conferred and have discussed ADR with the clients (see, *California Rules of Court* 3.221, 3.720-3.730 and particularly 3.724). All this means is that counsel need to be honest with the judge at the time of the case management conference. It is more difficult and expensive for everyone if the parties engage in mediation without being

properly prepared which, in my view, includes at least some dialogue beforehand regarding settlement.

Professional negligence cases, most particularly the generic group of cases known as "medical malpractice" create a special problem for mediators. Many times in these cases the insured has the right to prevent his insurance carrier from offering money to settle a case. Though I see nothing wrong with this prerequisite, if there is a "consent" issue, counsel representing the insured must tell the court so the judge can evaluate whether or not mediation is appropriate. I believe that this should also be information included in the CMC statement. I also believe that the court should ask, for example, "if the [insured] consents, and knowing the range of the plaintiff's demand, will there be authority that you reasonably believe will be sufficient to settle this case?" If there is authority but no consent, the case may be appropriate for court mediation but the insured must be ordered to be physically present along with, I propose, the person who actually has settlement authority. If the defense reports at the CMC, "no authority, no consent," perhaps a referral to private mediation would be appropriate but my experience suggests that with the limited time and financial resources available to the court, the court mediation program may not be appropriate.

Most of the time an experienced mediator can handle a blustering party since mediators can appeal to the self interests or, as Abraham Lincoln used to say, the "better angels" of a party's nature. However, there are some instances in which there are too many layers between the mediator and the parties. The major examples will be briefly discussed.

THE SUCCESSFUL LAWYER Too many times mediators hear something like, "I can do much better at trial," or "I know we will win on (choose one) issue at trial." Of course, the attorney may be right, but all too frequently that position places neither the client's desires nor best interests at the center of the comment. On the other hand, it may be true that the lawyer will do better at trial because the opposition's position is unreasonable. Mediation is a process that requires thoughtful concentration and patience by all parties and the mediator. In those cases where settlement is possible but impeded by ego, the experienced mediator will respectfully elbow past the lawyers to find out what the parties want without the fog generated by counsel.

THE RECALCITRANT OR INSECURE CLAIMS REPRESENTATIVE

Another predominant issue involves cases in which an insurance carrier is in control of one side. The problem also arises in those cases in which the plaintiff's evaluation and demand is more a reflection of plaintiff's hope rather than reality. It is also a problem when the defense (carrier) evaluates the case based solely upon cold data and, consequently, fails to bring the human side to the mediation table. In cases such as a personal injury case, it is fair for both sides to evaluate the case based upon the facts. Most of the time an experienced mediator will be able to overcome, or at least deal with, the former problem. But the latter is many times insurmountable. I have personally had some difficult exchanges (mostly by phone) with claims supervisors over, quite literally, a few hundred dollars. In cases in which an insurance carrier who controls the "purse strings" is involved (it is usually identified in the CMC statement) the court should require both sides to serve good faith's demands and offers (pursuant to *Cal Evidence Code* §1152 et. seq.) upon each other not less than two weeks before

mediation. Those demands and offers should take into consideration all relevant factors, including the opposition's evaluation of the case, so that the mediation has a viable starting point and the parties can prepare to support their position and/or dispute the opposition's before the mediation begins. Then, for court programs, the court should order[1] the individual who has the actual ability to make the decision to settle in an amount sufficient for the opposition's offer or demand (even though the case might not be worthy of that demand), to be physically present. Perhaps making a high-level plaintiff or a higher-than-local-level claims person travel in from distant locations will cause the parties to take the mediation and the opposition's position more seriously.

In all cases the party should be prepared to mediate appropriate to the level the case has been developed. Sometimes when the parties have a clear realization early on that liability exists and the case should be settled quickly, early mediation can save the litigants significant money. However, in most cases, both sides should be prepared to present supporting documents and evidence (per *California Evidence Code* §§ 1115-1128 and 703.5) at mediation and to have all discovery completed that either party feels is necessary (depositions, IMEs, etc.) before the mediation. If the parties have expert reports, etc., they should also be available. In most cases it is a waste of time for everyone to show up only to hear that one side or both still needs something. For the parties this can be an inconvenience and more expensive (chances are that subsequent sessions will be at the parties' expense) than being ready the first time around. It is my understanding that most judges will listen and give the parties extra time to get ready, if

[1] Mediation is and must be a voluntary process. However, once the parties have stipulated to submit to mediation, the Court should be free to see to it that at least the basic mechanics are in place to give the mediation the best chance for success.

asked, since the bench officers did not want the parties "spinning their wheels" and wasting court resources.

CLIENT PREPARATION Mediation will be far more productive if counsel prepare their clients with a "reality check" so the "great expectations" of the client can be brought into control. This is frequently a very difficult task. If the client is made to believe that she has a $1 million case if she wins at trial, but no one explains the risks of an adverse judgment, higher expenses, etc. it will be more difficult bringing the client into a zone of potential agreement. I recall early in my career as an attorney when I would give a client my evaluation of the case as being somewhere between $10 and $10,000, the client invariably heard the $10,000 and ignored the $10. It is a good idea to refresh your evaluation shortly before your mediation. Insurance defense counsel should do likewise, clearly expressing the risks of under valuing the case to the carrier.

Mediation, both private and court sponsored can be and is very effective in resolving cases where the parties are motivated and prepared. Those cases in which the expectations and preparation of the parties reflect the actual facts and a reality check is provided before mediation are far more successful.

NEW DEVELOPMENT Recently, the holding upon which many of us relied in *Wimsatt vs Superior Court*, (2007) 152 Cal.App.4th 137, 61 Cal.Rptr.3d 200, discussing *Cal.Evid.Code* § 1115 et seq., was modified in a substantial manner. The 2nd DCA, in *Cassel v. Superior Court*, (November 12, 2009) 179 Cal.App.4th 152, 101 Cal.Rptr.3d 501, tightened up the “dome of confidentiality” provided by mediation. In simple terms, the Court held that in post mediation disputes between client and attorney, only

discussions held IN mediation, before the mediator, were protected by confidentiality. Discussions between client and counsel outside the presence of the mediator, even during the mediation proceedings, may be admissible in a dispute between client and attorney.

*Donald Cripe is a former Trial Lawyer and currently a Professional Mediator who operates "**JUST RESULTS MEDIATION SERVICES**" mediating civil and family law cases in Southern California*