

Mediator madness: When the “hypothetical” becomes a real-life mediator’s dilemma



By Michael Young

I walked into the mediation blind. No briefs had been submitted, no pre-mediation conference calls, nothing. And so I had no forewarning on that early November morning as I offered Coffee and Tension-Easing Donuts to the disputing parties that I



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would soon come face-to-face with something I thought was purely mythical: A Mediator Ethical Dilemma. Now I had been warned about these pesky creatures in Mediator School; but to be honest with you, I really believed them to

be nothing more than pedagogical exercises, hypotheticals designed to stimulate discussion but having no answers and certainly no “real life” application. I was wrong. Before the mediation was over, I was forced to face the difficult question of what my role as mediator really is.

Here’s what happened. I walked into my firm’s Mediation Suite (which sounds much more impressive than its regular name, the Claustrophobic Conference Room By The Elevator Banks) and went through the standard opening statement. Sensitive to the fact that there are some lawyers out there (like all of them) who are for whatever reason just a tad uncomfortable with having their clients spill their guts to the opposing party and counsel, I allow the attorneys to summarize the dispute if they prefer. Here is what I learned: Plaintiff’s counsel: “Plaintiff was rear-ended by defendant and suffered personal injuries and lost wages. She is willing to settle for repayment of her medical expenses of \$3,500 and general damages of \$8,500, for a total of \$12,000.” Thanks. Very enlightening. And the defense? “It was the plaintiff’s fault. The damages are inflated, and the plaintiff’s doctor is, respectfully speaking, a quack. We have offered \$1,500 as nuisance value and are not willing to budge.”

In private caucus, I learned that the plaintiff’s attorney (whom the plaintiff actually hired due to his personal injury expertise, as proven by his bus stop

advertisement) had done nothing to prepare the case, which was set to go to trial in a few weeks: No witnesses, no experts, no doctor, no exhibits, no nothing. The plaintiff, a young Hispanic single mother of two working as a housekeeper with very limited funds, had no appreciation for these facts, and simply relied on her lawyers statement that he was ready.

On the other hand, the defendant, a successful small businessman, had retained his regular attorney. In response to some Mediator Probing during our private session, the defendant disclosed that he was drunk (again) at the time of the accident, and had no reason to seriously question the plaintiff’s medical bills. But, the defense counsel knew from prior experience how bad the plaintiff’s counsel was and was certain he would accept an incredibly low settlement to avoid trial and recover his 1/3 contingency. So, he authorized me to relay a \$3,000 “final offer.” He also reminded me that everything he had just disclosed was confidential and I was not to repeat any of it to the plaintiff. What a surprise.

Enter the Pesky Dilemma. Duty bound, I relayed the offer to the plaintiff and her counsel in a private caucus, certain it would be rejected for the insult that it was, and began planning my Secret Mediator’s Strategy to bring the parties together. Instead, to my surprise, the plaintiff’s attorney jumped on the offer and began counseling his client to accept it! Now, the plaintiff was young, not well educated, and without any legal sophistication, but she was not stupid. She could count. She could also calculate two-thirds of \$3,000. A net of \$2,000 did not seem right to her. But her attorney was relentless, bombarding her about the difficulty of the case, the lack of witnesses, the risk of a defense verdict. The plaintiff looked confused. Her resolve was weakening. But still, I thought she would stick to her guns.

Apparently so did her attorney, because at this point he pulled out his secret weapon. Knowing his client had no money to speak of, he told her if they were to go to trial, she would have to front a few thousand dollars for jury fees, court reporter fees, and the costs of some exhibits and a doctor. He

also said that if she did not trust him, she could fire him and hire another attorney. She buckled. She turned to me and asked, with a look of confused and helpless desperation in her eyes: “What do you think? Should I take it?”

Dang! Now what? Of course she shouldn’t accept that offer. It’s not a ‘fair’ settlement offer no matter how you analyze it, right? This is not an unsympathetic plaintiff, and \$3,000 doesn’t even cover her medical bills. And the only reason it was being considered by the plaintiff at this point was because she was being sold down the river by the type of legal practitioner who gives lawyer jokes that sickening sense of realism. And the defendant knew it. The defendant had leverage over the negotiations that comes not from the merits of the dispute but from greater information, greater sophistication, better preparation, and a better legal representative.

What do I do? It depends, does it not, on what my job is. For those who think a mediator’s only job is to close the deal and put another notch in the ole’ Mediator’s Briefcase, the answer is easy: Tell her to accept, get the deal in writing, send the ex-disputants on their way with another Tension-Easing Krispy Kreme, prepare the bill, recalculate your ‘settlement ratio’ (surely you’ve seen them: “I have a 96% success ratio.” Give me a break.) and wait for your next case. After all, isn’t that why you hire a mediator? To get the case settled?

And who am I to second guess the parties? I’ve only known them for a few hours at best. I don’t really know what’s going on in their lives. Maybe the plaintiff is so desperate for cash that it is in her best interest to take a few thousand dollars today rather than risk recovering nothing, or even going in the hole, at trial. Maybe the defendant is about to go bankrupt and this is the plaintiff’s only shot at true cash. Maybe the plaintiff knows it really was her fault, or maybe her damages were inflated. Maybe she wasn’t hurt at all. Maybe.

On the other hand, there are some mediators who feel they have a responsibility beyond just closing out the deal

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before them. Attorney and judicial mediators, after all, are still officers of the court, even if they are operating out of their own spacious conference rooms by the elevator banks. And with that duty comes, does it not, an obligation to at least pursue justice? Or, at a minimum, to refrain from participating in an injustice? Indeed, court officer or not, many mediators will simply refuse to participate in an agreement that strikes them as unjust. After all, even we mediators need to sleep at night. Additionally, many mediators are hired not only for our Secret Bag O' Settlement Tricks, but because we bring to the process some neutral substantive legal expertise. And doesn't that necessarily imply that you want us to use that substantive knowledge to help craft a settlement that is based on the dispute's merits and risk, i.e., one that is 'fair,' based on the law and facts? Besides, don't the parties expect and deserve from mediation a process that strives for lasting agreements – which, practically speaking, equates to agreements that at least approach some sense of fairness? It does not take too many years in the deal-making and dispute-resolving businesses to learn first hand that the first agreements to be broken are those that are severely one-sided, or are based on non-substantive leverage (approaching duress) rather than on the true needs and interests of the parties. Doesn't all of this compel the mediator to answer the poor plaintiff: "DON'T DO IT?"

But if I were to advise the plaintiff not to accept the offer, which frankly was my inclination, haven't I just crossed over the line from Neutral to Counselor? Surely the defendant, who is paying half my fee, would not be too pleased with my obstructing a settlement that is so closely within his grasp. Nor would the plaintiff's attorney, who would (properly, I might add) interpret my response as a disparagement of his own advice to his client, appreciate the interference. Indeed, given the state of the record, am I even doing the plaintiff, herself, a favor if, as a result of my intervention, she declines the offer, goes to trial and loses? On the

other hand, how could I advise her to accept an offer that I know (I think) to be grossly unfair and premised on the leverage created by the apparent malpractice of the plaintiff's chosen representative?

Back at the Hogwarth School of Mediation, the hypothetical Pesky Ethical Dilemma is drafted to explore how a mediator might respond to a gross disparity in negotiating power: What might you do when one party comes unrepresented while the other arrives with a high-priced and worthy attorney in tow, resulting in a substantively unfair agreement being proposed and accepted. There was no answer, of course; but what seemed to make me feel better back then was to ensure that the process was fair; that the weaker party had the opportunity to obtain legal or other assistance and voluntarily accepted to proceed solo; that she appreciated the risk of proceeding *pro per* against a more sophisticated party; and that no one was looking to me to make the 'fairness' judgement – they were each on their own to evaluate whether the settlement made sense to them given their own personal circumstances.

But out here in real life, where the weaker party was, at least in name, "represented," this "solution" did not seem to sit as well. The process was procedurally fair; the plaintiff not only had the opportunity to obtain legal assistance of her choice, she took advantage of it (and it's neither my fault nor the defendant's that her chosen method of attorney selection – memorizing "1-800-BUS STOP LAW" – failed to distinguish the subtle differences between 'good' and 'hood'). Someone, not me, who was retained to assist her evaluate the appropriateness of any settlement was there purportedly assisting her. Who was I to get in the way? And yet, it still did not seem right to me.

Dare I tell you what I did? Taking a cue from my other jobs as an adjunct professor and a father of two young boys when faced with a difficult question, I deftly 'reflected' the question back: "Well, what do you think?" She responded, "I really need the money. But, \$3,000 just

doesn't seem right. Do you think he'll go higher?" In an effort to invest her attorney in the process, I asked the lawyer whether he thought a counter-offer might be a way to find out. Eventually, with a little prodding, an appropriate counter-offer was proposed; standard positional bargaining ensued; and a settlement was reached that was still extremely favorable to the defendant (as evidenced by the voracity of his final handshake) while marginally equitable (in my mind, at least) to the plaintiff. The parties went home happy; the plaintiff's attorney (for better or worse) could afford to rent the bus stop bench for another 6 months; and I was able to sleep that night (just as soon as the Krispy Kreme sugar high wore off about ten hours later).

But I still wonder whether what I did was right. Had the two attorneys chosen to do this on their own, the case would have settled for \$3,000, so my involvement as a neutral cost the defendant many thousands of dollars over and above my reasonable fee. On the other hand, the plaintiff still ended up accepting an amount well below what she could have (and in my mind, should have) received. Did I overstep my bounds? Or not step far enough? Who knows? I only know I had to do something, and I did what I thought was right. And ultimately, if either party did not believe the final deal to be in his or her best interest, he (or she) was free to reject it.

And as for me, give me a complicated civil dispute bursting at the seams with highly paid attorneys any day. Those lawyers may talk a lot, even as they eat all the donuts, but at least they keep those pesky mediator dilemmas at bay. Don't they?

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