
Kluwer Mediation Blog

The Elephant In The Room

Jeffrey Krivis (First Mediation Corporation) · Sunday, October 16th, 2011

The Situation:

Your client has brought a spouse or a significant other to the mediation who is having a problematic influence on your client's decision-making abilities. This is preventing you from getting your client prepared for a fair settlement.

The Solution:

Enroll the spouse in the settlement process early, as opposed to ignoring them. This means listening to their concerns and even asking them to give you their belief of what a fair settlement might look. This way they will feel part of the decision-making process and have a sense of contribution to the settlement. Make sure you ask them to help you understand the criteria they are using for their evaluation so you can provide them with your expertise at the appropriate time.

Clients often do not have an understanding of how our civil justice system works, let alone how to quantify a fair outcome. They see anecdotal evidence on television and on the internet, yet when it comes down to their case, they are looking for some direction. That direction usually comes from trial counsel. Sometimes trial counsel, for whatever reason, has been preoccupied with other matters or has not been able to get the client on board with their recommendations. The client will naturally gravitate to another source of leadership, which tends to be a spouse or significant other. The problem is that the spouse often has an extreme view of substantive fairness, i.e., what amount their spouse should receive that adequately compensates them for the harm purportedly caused by the defendant. As a result, they tell their spouse that they deserve significantly more monies than the case is worth, and clearly more than might be available at the mediation, which makes your job virtually impossible.

In a recent wrongful termination case, the plaintiff was leaning heavily on their spouse for advice during the negotiation and was turning on the trial lawyer. Clearly the settlement efforts were deteriorating fast as it was obvious that the trial lawyer had no prior contact or relationship with the spouse, except to tell him to stay quiet during the mediation. The mediator took the opportunity to ask the trial lawyer if he could speak privately with the plaintiff and spouse and see if the process could be revitalized. Thankfully, the trial lawyer agreed and a meeting took place. During the meeting it was clear that the spouse was the source of the problem and wouldn't let his wife settle unless his two cents were thrown into the ring. Once that occurred, and the spouse felt the mediator recognized his contribution to the case, the negotiation went forward in a positive manner.

Since the spouse or significant other is critical to your client's decision-making process, it is absolutely vital that you allow that party an opportunity to be heard and to contribute to the process. When talking about being heard, I am primarily referring to the beginning phase of a negotiation. After all, a negotiation is simply a communication process to put deals together or resolve conflict. Failing to recognize the "communication" element, particularly when a spouse is involved, will create an emotional impediment that will prevent you from putting the deal together when the opportunity presents itself.

Generally speaking, your client and their supporters want to paint the canvas of damages with broad strokes. Spend quality time letting them know that you fully understand and appreciate their viewpoint, and that you would not have taken the client's case without being sensitive to these issues. Make sure they understand that for mediation purposes, the case is being condensed into a short period of time. As a result, you might appear to give short shrift to some of their concerns, but let them know you are hearing them. Once you are convinced that the spouse and the client recognize your supportive role in the process, move to the next phase of the negotiation, which is reevaluating the potential range of settlement. At this point, the spouse and the client should be made aware of the fact that you may not be able to help them achieve all of their goals, but that you feel that, based on your experience, a fair outcome can be achieved if they let you lead the negotiation. The reason they will let you take the lead at this point is you have now built up their confidence in you, and the goodwill associated with your trust will open the door to a reassessment of their goals.

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