Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2016 Issue

Jan Frankel Schau

The tail that wags the dog

Strategies for overcoming barriers to settlement, especially attorneys' fees when they become an issue

"Lawyers are always confident before the verdict. It's only after that they share their doubts." Julian Fellowes, *Downton Abbey, Season 2, Episode 9, 2010.*

In an environment where over 95 percent of employment cases are resolved before trial, common barriers to settlement of FEHA and other employment cases persist. If we accept that the vast majority of employment disputes are settled, rather than tried, why do some employment cases become impossible to settle through mediation?

Here are some common barriers to settlement, and thoughts on how to overcome them.

Barrier #1: Overconfidence

In a study conducted by the University of California-Irvine and published in the May, 2010 edition of *Psychology, Public Policy and Law*, a journal of the American Psychological Association, 44 percent of the 481 lawyers interviewed achieved outcomes less successful than they predicted. Thirty-two percent matched their goals and only 24 percent exceeded them. Interestingly, men who displayed high confidence in a successful outcome failed to meet their goals more than highly confident women. Consequently, when two opposing counsel approach a mediation with a great deal of confidence in their chance of winning, not only does it make settlement a greater challenge, but statistically, both of them are likely to be over-confident and wrong.

In accepting this statistical analysis, trial lawyers should be careful not to "oversell" their chances of success to their clients or their mediator. Doing so can make it much harder to bring back some humility when the negotiation gets further along.

Barrier #2: Poor management of expectations

Although trial counsel is expected to begin any negotiation at an "aspirational" high, a candid conversation with the client, so that he/she understands that this is merely the way the rules of negotiation work is worthwhile. Occasionally, if a client hears an initial demand of $1million, it makes it really hard to settle for $125,000 at the end of the day unless he or she is fully prepared for the give and take that occurs in modern commercial mediation.

Before you arrive at the mediation, you may also want to manage your adversaries' expectations by either agreeing to begin at the last demand you articulated, or by explaining that you will be looking for something greater in advance. Very often, a plaintiff will make a pre-litigation, or pre-summary judgment, or pre-critical deposition demand which will no longer be applicable by the time of the mediation. Whenever that is the case, it is imperative that you communicate that to the defense counsel so that he/she has a chance to discuss the history of settlement negotiations with his/her client before the hearing. If your demand has gone up without explanation or warning at the mediation, it will be difficult for defense counsel to justify making a higher offer than your previous demand during the course of the day. Simply stated, the defendant representative or decision maker needs more time than that to evaluate the claim when your intent is to achieve a higher settlement than the earlier communicated demand.

Barrier #3: The endowment effect

Economists have long recognized the fact that people value their own goods more once their property right to it has been established. Essentially, this

See Schau, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2016 Issue

means that the defendants will generally assign a higher value on their own goods or services than the plaintiffs. Another way to look at this is as "loss aversion": defendants consider the payment of damages to be "real money," whereas, plaintiffs see it as merely a gain. (Thaler, *Towards a positive theory of consumer choice* (1980) Journal of Economic Behavior and Organization, 1, 39-60.)

This is a challenging, but common barrier to settling employment disputes. The key may be to appeal to the attorneys about the risks of greater losses if the matter is subject to a plaintiff verdict, where not only the damages are awarded, but attorneys' fees under FEHA (as well as defense costs), too.

Barrier #4: Too narrow a focus

Most negotiations within the employment context are what ADR professionals call "mixed motive" negotiations. Although the lawyers may see it as strictly principled or "problem-solving," the clients, on both sides of the aisle, more often really want something more. People often experience emotional reactions to an event or an outcome that extends in both intensity and duration beyond their lawyer's expectations. Researchers have expressed this phenomenon as "miswanting" in negotiation. (Guthrie & Sally, *The Impact of the Impact Bias on Negotiation* (2004) 87 Marq. L. Rev. 817.)

In order to overcome this "impact bias," lawyers are well-served to take a client-centered approach to managing negotiation of their client's disputes. This does not suggest that lawyers need to stand down and allow the client to negotiate on his own behalf. To the contrary, it suggests that the lawyer play a more active role in the client's decision-making, but by taking into account both monetary and non-monetary ways to meet the client's needs and interests.

Barrier #5: Setting the wrong pace

Clients (or their lawyers) are sometimes impatient with the arduous process of negotiation in mediation. They assume that both sides are adequately familiar with the facts and the law, and rush to "get to the bottom line." This is usually a mistake in that there are at least two different decision-makers, who may approach the negotiation differently. On the one side, you may be dealing with an individual who is cut-throat and will never agree to a number unless he has generated it as a proposal. On the other side, you may have someone who is willing to accept an amount that is below the highest and best for the sake of expediency.

It is a difficult balance between meeting your clients' needs and desires and maximizing your side's recovery, but it is one worth slowing the pace to achieve the best outcome in every negotiation.

Barrier #6: Attorneys' fees have driven up the value of the case

Employment lawyers know that the cases they bring under the Fair Employment and Housing statutes provide for a recovery of attorneys' fees to the prevailing plaintiff. (Gov. Code, § 12965, subd. (b).) Under section 1032, subdivision (b), of the California Code of Civil Procedure, "a prevailing party is entitled as a matter of right to recover costs in any action or proceeding" unless some statute expressly says otherwise. Last year, the California Supreme Court issued a decision in *Williams v. Chino Valley Indep. Fire Dist.* (2015) 61 Cal.4th 97, holding that the court has discretion on whether to award costs to a prevailing defendant under FEHA, meaning that California courts now apply the same standard to the recovery of costs that it previously only applied to attorneys' fees. For this and many other reasons, employers are motivated to either avoid lawsuits or avoid the costs of trial and attorney's fees through strategic negotiation.

Consider the hypothetical case in which plaintiff's lawyer makes a pre-litigation demand for $200,000 which is rejected without a counter-offer. One year later, the lawyer has associated in trial counsel, has taken the depositions of the person most knowledgeable as well as his client's supervisor and has successfully opposed a demurrer and motion to strike, amended the complaint and successfully defeated the defendant's motion for summary judgment.

The mediation briefs are not exchanged in advance of the mediation. Plaintiff and his lawyers discuss the likely outcome at trial (plaintiff now has no more than $50,000 in damages from lost earnings, because he has found another better paying job) and the lawyers have something between $50,000 and $80,000 to date in fees and costs. The opening demand is $1.2 million.

The negotiation may stall before it begins if the defense lawyer is viewing the case as one of questionable liability and remembers that before the discovery was undertaken and the outside counsel evaluated the liability, the case had a value of something less than $200,000, based upon his initial, pre-litigation demand at a time when future lost earnings were unknown. Their opening offer might be $10,000 to $20,000.

The solution to the obstacle of the unprepared defendant is to prepare them to include the value of legal services in advance of the mediation. This can be done by exchanging briefs that communicate an initial settlement demand and perhaps even break down the special damages, the element of emotional distress, attorneys' fees and factor for punitive damages, if applicable.

Alternatively, early on in the mediation process, the plaintiff's lawyer may want to provide a range of values for the attorneys' fees, which considers both the "to date" fees and costs and the likely fee award upon application after trial if plaintiff prevails and they are unable to settle on the day of the mediation. By having this conversation in advance of the initial negotiation, plaintiff's lawyers will appear to be more reasonable to their client and to the opposing counsel. In addition, the client may also begin to understand that his damages may not be growing in the same ratio as his attorneys' fees are. In cases where there is mitigation, and the client has found alternative sources of income, that is often the case.

The benefit of providing this early analysis to both client and opposing counsel is that you may be able to avoid the work that will be necessary to earn

See Schau, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2016 Issue

those future fees and may initiate what can otherwise be a sensitive negotiation between you and your client as the mediation concludes.

Barrier #7: Attorneys' fees have eclipsed the value of the case

Attorneys are generally entitled to a reasonable award of fees that reflects the number of hours reasonably expended on the litigation multiplied by their hourly rate. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48.) That number may be multiplied if the judge takes into consideration various relevant factors which militate in favor of augmenting the award, such as the novelty and difficulty of the questions involved, the extent to which the nature of the litigation precluded other employment by the attorneys, the time and labor required, and the experience, reputation and ability of the attorneys, among other factors. (The lodestar method as defined in *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 445] and *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 647.)

Consider the hypothetical case of Mr. Smith, a sole practitioner who represents a current employee at Big Co. on a disability discrimination action, contending that the company has failed to reasonably accommodate her disability, causing exacerbation of her injuries and violating FEHA. Consider the hypothetical instance in which Mr. Smith takes the requisite depositions and the court grants defendant's motion for summary judgment. Consider that one year later, the Court of Appeal grants Mr. Smith's appeal and awards costs to the prevailing party, remanding the matter to trial.

By the time of the trial in the case, plaintiff has been accommodated and continues to be employed, capping her damages at $25,000. On the other hand, the attorney has expended more than $100,000 in fees, just to get back to a trial date. In mediation, the opening demand may be $500,000 and the defense, not weighing the value of the attorneys' fees on what they still believe is a no liability case, may open the negotiation at $10,000 or even $5,000. After all, by then, defense has spent more than $80,000 in litigation fees on a case with a minimal value and a dire chance of plaintiff proving liability.

The solution here would be to carefully evaluate the actual attorneys' fees accrued to date and to prepare both the client and the opposing counsel that this needs to be considered in any negotiation. It can be a tricky negotiation between lawyer and client, but if those numbers are detailed out, most defendants, who are typically motivated to avoid the increased expense of trial as that date approaches, will consider enhancing their offers in order to meet the needs of the lawyer as well as the client. If this can be done within the confines of a mediation, there is an added benefit of a solid explanation to the client by a neutral third party of why this unusual arrangement may be in their best interest as well.

Barrier #8: Fees lead to a conflict of interest

In some cases, the defendant dislikes their former employee and for precedential or principled reasons is willing to pay the attorneys' fees, but no damages (or minimal damages) to the client, creating a conflict of interest between lawyer and client.

Curiously, lawyers engaged in the profession of litigating employment cases begin to develop certain dynamics between themselves. Some are classically competitive; they discredit the other side's valuation and refuse to reward them for bringing what they consider to be less than meritorious cases. Others are more cooperative; they hold one another in higher esteem, recognize that the opposing counsel is capable of bringing a case to trial and achieving a verdict in their favor, and understand that, although they may bring opposing views to the same set of facts, they come to mediation with a mutual goal to settle the lawsuit at the best possible outcome for their respective clients.

Occasionally, this cooperative attitude can create yet another sticky potential conflict of interest between plaintiff lawyers and their clients. Consider the case of Jennifer, defense lawyer at Big Law. After hearing the facts and weighing the chances of liability, she may conclude that plaintiff's case has a value of under $30,000, but because she knows that plaintiff's attorney, known as "The Queen of Big Verdicts," will not recommend that her client accept that amount unless she also gets her well-earned fees, may want to enter into a separate negotiation for fees and damages.

Although this may create an ethical dilemma, as the lawyer's fees may be greater than the client's damages, it is nevertheless a legitimate and frequent concern. One of the ways this can be addressed is to negotiate it separately. Work on the value of the client's portion first and once the client can be satisfied, then separately negotiate for fees. If this can't be achieved, the parties may decide to surrender the issue to the court to determine reasonable fees as of the time of the acceptance of the offer to the Plaintiff.

In my experience, this can be very risky, but usually is followed by a more earnest negotiation of the fees as a part of the total package. Usually, the very suggestion that the matter might be separated out (under facts similar to those I have suggested in this hypothetical) may result in the more cooperative counsel getting together to look more expansively towards a global resolution, which includes both damages and costs and fees.

Again, the potential conflict with your own client may best be avoided by reaching a global settlement, but you may need to consider all of the options before the other side will arrive at the conclusion that such a resolution is in their best interest, too.

The "net to client"

Mediation offers an opportunity for flexibility in your approach to negotiation and for a third-party intermediary to consider all options so that every participant achieves what they want. It is unfortunately not at all unusual that when that "last, best and final" award is ultimately made, there are difficult conversations between plaintiff's attorneys and their clients about how the fees and costs are paid out and what the "net to client" will be. Many times, these represent mini-negotiations between lawyer and client before the settlement

See Schau, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2016 Issue

documents can be signed and the deal finalized.

In order to manage the potential conflict that can be reasonably anticipated, plaintiff employment lawyers are reminded that preparing your opposing counsel in advance of the mediation as to the approximate value of attorneys' fees that have been earned to date and the reasonable expectation of post-verdict fees can be extremely useful. Where appropriate, you may also want to engage your mediator in negotiating the reasonable value of fees as against damages with your own client, so that the client will feel good about your services and not resentful if his net is less than he expected. Finally, you may want to consider offering to litigate the fee issue separately. This can be a substantial motivating factor in getting the defense to reconsider a reasonable and global demand.

Summary

Mediation is designed to be flexible and dynamic. It has the added benefit of being both voluntary and confidential. When you can trust your mediator, you can wiggle out of most impasses that are created by positional bargaining. Barriers to settlement don't need to be impenetrable obstacles.

Where these barriers are unavoidable, you may wish to seek out a mediator who is more evaluative than facilitative, helping both sides to see the range of fees that may be awarded if the matter goes to trial, as well as to manage some of the biases and other common barriers that inevitably arise during the course of a challenging negotiation.

I return to the analogy of the tail that wags the dog. If we continue to be mindful that it is the client's case, and that we are merely their spokesperson, advocating and expressing their claims and ultimately aiming towards meeting their interests, we will be able to successfully overcome most of these barriers and achieve our goal without the necessity of impaneling a jury and losing all control of the decision-making process at trial.

Jan Frankel Schau, ADR Services, Inc., *has been a mediator for over 15 years in Los Angeles. She learned her diplomacy skills at Pomona College in Claremont, where she majored in International Relations and her skills as a litigator at Loyola Law School. Practicing on both the Defense and Plaintiff sides of the aisle, she devoted herself to becoming a full-time neutral after 20 years of practicing law. Specializing in employment, tort and business disputes, Jan is also Adjunct Faculty at Pepperdine University's Straus Institute of Dispute Resolution, where she teaches "Mediation Skills and Theory."*