REDEFINING BAD FAITH NEGOTIATION AFTER THE DEMISE OF COURT-CONNECTED ADR IN L.A. COUNTY

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By Jan Frankel Schau

There is a new world order in civil litigation in Los Angeles County Superior Court now that the court has eliminated the ADR Program and all “court-connected” mediation that went along with it. In other words, no judge is going to order you to mediate your dispute or check to see if you showed up with the requisite decision-makers and settlement authority at any time before trial. Of course, mediation was always theoretically voluntary, not subject to court order.

Now that Los Angeles County Superior Court — the largest county court in the world — has eliminated all court-connected mediation (with the exception of certain child custody or visitation issues in family court), the Local Rules regarding ADR (Rules 3.252-3.274) have been repealed. Apart from Rule 3.245, which revives the old “mandatory settlement conferences” before a “settlement judge,” using ADR in civil cases filed in superior court is finally completely voluntary.

An unintended consequence is that the conduct leading up to, during and following the mediation is entirely unregulated. The elimination of the program also leaves the unfortunate opportunity for gamesmanship in participating in mediation, or holding out for the opportune moment. In mediation, this type of conduct may lead to an outpouring of cries of “bad faith.”

Efforts at Defining Bad Faith in Negotiation

Many states have statutes requiring good faith participation in mediation. California is not among them, choosing instead to exalt the strict confidentiality rules of mediation over the potential for abuse during the process. Until recently, Los Angeles had local rules governing the conduct of mediators, but those rules have been eliminated as of May 17.

Academics Nationwide have proposed a broad good faith requirement. Kimberlee Kovach, a professor at South Texas College of Law, has proposed that litigants be required to engage in direct communication, participate in meaningful discussions, and remain at the mediation until excused by the mediator. Although 22 states and many federal courts do require good faith participation in mediation, California has never adopted such a requirement.

Professor Maureen Weston of Pepperdine University School of Law has proposed an even broader definition of good faith which would be defined by the “totality of circumstances” and subject violators to sanctions. In California it is virtually impossible

to get any testimony into evidence to establish that a participant violated the principles of good faith. The stringent confidentiality requirements under Evidence Code Section 1119 have repeatedly been interpreted as absolute by our Supreme Court, even where the client is claiming malpractice by his own attorney.

A Proposal for a New Definition

Woody Allen famously said, “80 percent of success is showing up.” Most parties to litigation and experienced mediators would agree. Getting the parties to the negotiating table is at least ¾ of the battle. Once both parties reach an agreement about engaging a particular mediator, scheduling a target date, and even how the fees get paid, the settlement conversation has already begun in good faith.

The act of showing up is a demonstration of an earnest attempt to begin to negotiate a resolution. Whether the parties ultimately reach an agreement on that date or another bears little relevance to the bad faith intent of the negotiators: By showing up, they have demonstrated their good faith.

Advantages to Early, Voluntary Mediation

As more and more contracts and statutes require pre-litigation mediation, litigators are engaging mediators earlier and earlier in the dispute. There are valuable benefits to convening an early mediation.

For example, in a pre-litigation sexual harassment mediation the plaintiff was asking for several million dollars in damages. By the time of the hearing, the plaintiff’s counsel had not been able to discover the policy limits, and earnestly was evaluating the resources and time to put into the case depending on coverage limits. On the other hand, the plaintiff’s counsel had not shared any medical information, making it all but impossible for the defendant’s counsel to make a meaningful offer. Only by coming together at this early mediation could the lawyers drop their posturing for the sake of exploring whether the two sides could settle the matter without formal discovery.

Mediation also can be a useful tool to define the boundaries of the zone of possible agreement. The mediator can assist the parties and their lawyers in making a reasoned decision as to whether to move forward or push back, and what force will be required. Engaging the parties in hypothetical bargaining helps shine a light on the true parameters of negotiation.

Occasionally, a lawyer and his client evaluate the chances for success or failure at trial differently from one another. A third-party neutral can help objectively assess the chances of recovery. For example, consider an aggrieved employee who remains on the job, but claims to have endured discrimination throughout his long career. The damages may appear to be worth millions. To his lawyer it may be a case that bears a settlement of six figures. The lawyer can have a real challenge in delivering his evaluation to his client without appearing to be weak or less than fully committed to zealous representation.

The follow up that most mediators offer can proves to be invaluable in those cases which are mediated at a time that is just too early to settle. Someone who reaches out to each side with some regularity to nudge them along can be the perfect "silent partner" in a difficult case.

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It is an exercise in futility to attempt to prove that someone acted in bad faith in a mediation. First, the conduct or communications during a mediation are strictly privileged. Second, there is no clear definition of what constitutes "bad faith" in this context.

In any event, there are clearly many ways in which mediation, even if it doesn't result in a settlement, can be very useful. Next time your opponent shows up to a mediation without any significant settlement authority, or makes an offer that you find insulting, instead making accusations of bad faith, try this: demand a face-to-face meeting and listen to his or her perspective of why that offer has been made. Find something you can agree upon, like reconvening after a critical motion is heard, or reconsidering your position and communicating an offer through the mediator after certain depositions are taken or informal evidence exchanged. At the very least, you will learn about the personalities of the lawyers and their clients and can be better armed to inform your client about the mountain they are about to climb.

As Martin Luther King, Jr. said: "Faith is taking the first step even when you don't see the whole staircase." In these uncertain days of budget cuts and court closures, taking that first step may prove to be an invaluable strategy. At least it will demonstrate your own good faith in every case and may even engender reciprocity by inspiring good faith by your adversaries.

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