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SmithAmundsen LLC, Milwaukee, Wisconsin****Introduction**

It is not uncommon for a plaintiff to ask for permission to bring a non-party friend or family member to participate in the mediation for "moral support." In most cases, the presence of the non-party during the mediation causes no problem at all. However, lawyers and mediators have seen situations where the participation of such friend or family member is less than helpful during the mediation.

Some such non-party participants will interject themselves into the process, such as by offering unsolicited and unrealistic opinions on case value. The non-party may tell the plaintiff to disregard the lawyer's advice when it comes to negotiation strategies. The non-party may even openly question the motives or neutrality of the mediator during a contentious mediation. Plaintiff's counsel and mediators are therefore often resistant to a request that a non-party participate along with the plaintiff in the mediation.

Sometimes, however, the opposite response by counsel and the mediator is required. In some cases, there are aspects of the plaintiff's background, attitudes, personality or life experience which create special barriers to settlement, and only the intervention of a non-party will overcome the problem. In such instances, counsel and the mediator should affirmatively seek out and encourage the participation and assistance of such non-parties.

Recognizing the Need for Non-Party Participation

There are a number of reasons why it may be hard for a plaintiff to accept what is by all accounts a reasonable settlement offer at mediation. For example, the plaintiff may have very limited education or sophistication and may therefore be very suspicious of the mediation process. There may be cultural or language barriers which make it less likely that the plaintiff will feel comfortable and confident enough to accept recommendations of the mediator or plaintiff's own counsel. The plaintiff may simply have the type of personality which makes it very hard to make any decisions on matters of importance without the guidance, affirmation or encouragement from others

on whom the plaintiff has relied in the past. In yet other cases, the plaintiff's anger at the defense may be such that neither the plaintiff's lawyer nor an experienced mediator can impart enough calming influence that the plaintiff will decide to set aside the anger and reach a settlement.

In some of these cases where the plaintiff's background or personality may create barriers to a reasonable settlement, plaintiff's counsel may identify well in advance of a mediation a friend or family member who should participate in the mediation process. The plaintiff may have mentioned to the lawyer that the plaintiff routinely discusses important life decisions with the non-party. In some cases, the plaintiff may simply declare in an unambiguous way that the input of that non-party at the mediation is essential if the plaintiff is going to be called upon to make any decision about settlement.

Working with the Non-Party at Mediation

In such cases where the need to bring a non-party to participate at the mediation is known in advance, the plaintiff's lawyer should definitely so advise the mediator before the parties arrive at the mediation. A forewarned mediator can and will make sure that the non-party who accompanies the plaintiff will be welcomed warmly to the mediation and encouraged to participate. The mediator will take care to avoid any misunderstanding or perceived insult that might occur if the mediator does not know in advance how important the non-party will be to the mediation process. Experience teaches that an unenthusiastic or grudging welcome from the mediator may create the type of hard feelings or even an antagonism on the part of the non-party which will doom the mediation before it begins. A mediator will instead want to win the confidence and good will and cooperation of the non-party at the earliest stages of the mediation process.

In other cases, the need for input from the non-party does not become clear until the mediation process is underway, and until a point is reached where it is clear the plaintiff simply cannot make a decision to resolve the case even under terms which the plaintiff's lawyer knows should be seriously considered. The problem presented isn't just that the plaintiff disagrees with the lawyer as to what to do – it is, after all, the plaintiff's decision to make. Rather, the situation is one where, whether because of the plaintiff's timidity, fear of later second-guessing, or suspicion of lawyers and the legal process, the plaintiff is emotionally frozen in a state where he or she cannot make a decision at all. Where such a point is reached, action is needed. Rather than simply letting the mediation fail, experienced counsel and an experienced mediator may conclude that bringing someone new into the mediation process to reassure, guide and advise the plaintiff is appropriate.

In some cases, it may be as simple as bringing the person who drove the plaintiff to the mediation – and who was initially asked to stay in the waiting area – into the mediation room for consultation with the plaintiff, counsel and mediator. In other cases, a call to the family member or friend (or perhaps a spiritual or financial advisor) in whom the plaintiff has expressed great confidence can be made by the plaintiff's lawyer, with the mediator on the line. If this non-party is a person of good will

who wants the best for the plaintiff and who likely is already aware of the emotional and financial toll the lawsuit is taking on the plaintiff, this person may be willing to join the mediation, either in person or telephonically. If a settlement offer is truly reasonable and appropriate and has the blessing of the plaintiff's lawyer, all that may be needed for the plaintiff to make a decision to settle is the sincere and gentle reassurance of the non-party. If the plaintiff is convinced that the trusted non-party will support the plaintiff's decision to end the litigation, the plaintiff may in fact make the decision to settle.

In other cases, the non-party whose participation is essential may not be reachable during the mediation. In those cases, it may be necessary to make sure the defense offer stays "on the table" until the plaintiff and the lawyer and even the mediator can talk to or meet with the non-party for advice and guidance. In most cases where the non-party has the best interests of the plaintiff at heart, and where the settlement proposal is truly reasonable, the non-party will counsel the plaintiff to make a decision to resolve the matter and so lift the burden of litigation from the plaintiff's shoulders.

Conclusion

In most cases, plaintiffs come to a mediation seeking an end to the controversy, and will agree to a settlement if they can be persuaded that they are being treated fairly. Sometimes, the effective use of a non-party will be the difference between a successful mediation and an unsuccessful one.

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