CIVIL HARASSMENT MEDIATION: A SETTLEMENT-FRIENDLY ENVIRONMENT

Abstract: Civil harassment mediation, from an outsider's perspective, seems to be a daunting environment in which to achieve a settlement. Parties have an emotional dispute, are not likely to cooperate with each other, and mediation time is limited. Nevertheless, settlements are achieved by applying well known concepts from basic mediator training.

Proving the proverbial "you can't judge a book by its cover" axiom true, my mediations in the Los Angeles Superior Court (LASC) civil harassment program during the last several months have almost universally resulted in settlement agreements. No one is more surprised than I am by this revelation, as I approached this assignment cautiously hoping that my developed skills might work an occasional "win-win" outcome that we all seek as mediators. Parties to these disputes are highly charged with emotion, have a strong desire not to cooperate with each other, and mediators generally have less than one hour to try to resolve the dispute before the court hearing. With hindsight, and peering through the lens of our mediator training, comes recognition that the posture of the cases and the situations in which the litigants find themselves (by the time they get to court) make this a very settlement-friendly environment.

Why settlement-friendly? Let's take a close look at the typical situation. Under current LASC program protocol, litigants appear at the courthouse to argue the merits of their case as to whether an injunction should be granted to keep respondent away from the petitioner for a period of up to three years. Many of the petitioners have been previously granted (without a hearing) a 15-22 day temporary restraining order (TRO) vs. the respondent(s) that is due to expire shortly. Usually in this program, the litigants appear pro per and are naturally very apprehensive about what might transpire during the upcoming hearing. The court may assign a specific case to the mediators, or alternatively, mediators may be allowed to solicit volunteers for mediation from the litigants waiting for the courtroom to start the day's calendar. If the parties do not settle at mediation, they proceed almost immediately to their court hearing on the matter. The mediations in these matters are generally very short; 30 minutes to an hour may be all the time you have to mediate before the court calls the case.

SETTLEMENT-FRIENDLY: ALIGNMENT OF INTERESTS

One of the most important skills mediators develop is the ability to get "under the hood" of a litigant's position to discern the interests. Our training tells us that once you do that, there may be interests in common between the parties for which we can ultimately derive a different position (which is then reflected in the settlement agreement).

Civil harassment mediators find this often "gift wrapped" for them. Not surprisingly, petitioner's main interest at the courthouse is to have nothing to do with the respondent. However, the revelation is that in almost all cases, the respondent wants nothing to do with the petitioner. Without evaluating the veracity of the petitioner's claims, (which may suggest that the respondent

is fixated on the petitioner), by the time they get to the courthouse the respondent wants to be done with it. Maybe whatever they wanted previously from petitioner has not been worth the trouble created by the TRO or the current court hearing. Or maybe petitioner has overstated respondent's actions. In any event, during mediation, respondents often state that their interest is to be left alone and they do not want further interaction with the petitioner. This aligns petitioner's and respondent's interests.

SETTLEMENT-FRIENDLY: UNATTRACTIVE BATNAS

Another important skill mediators develop is the ability to help the litigants evaluate their Best Alternative to a Negotiated Agreement (BATNA). Those of us who mediate litigated cases routinely incorporate this "evaluative" approach into the vast majority, if not all, of our mediations. Civil harassment cases, housed under the statutory authority of CCP §527.6, lend themselves to this approach. Both petitioners and respondents invariably find that given their common interests of keeping away from each other, their respective BATNAs are not that attractive.

Petitioner's BATNA is often very unattractive. CCP §527.6 requires, amongst other things, that the petitioner prove by "clear and convincing" evidence that respondent has engaged in a course of conduct over a period of time that would justify turning the TRO into an injunction of up to 3 years. Mediators with legal backgrounds, or those who have mediated litigated cases, know that "clear and convincing" is a standard that is much stricter than the general "preponderance of the evidence" standard required of most other civil cases. Additionally, petitioners in mediation often have difficulty asserting a series of acts that might constitute a course of conduct; instead, they are often relying on one egregious act or a series of ill defined actions within an unclear time framework that may not satisfy their burden under the statute to establish evidence that is "clear and convincing." This means that a mediated agreement is, in many cases, the only real option petitioners have to come away that day with a document that will keep the respondent away from them.

Respondent's BATNA presents troublesome issues as well. If they allow the case to go to hearing and lose, then they will have court findings against them that put them at fault. A settlement agreement is often more attractive, because they can reduce the risk of a court mandate regulating their behavior and, at the same time, serve what they state are their interests now – staying away from the petitioner and having the petitioner stay away from them. Note that even if they were to prevail in a court hearing, the ruling would not serve their interest in keeping the petitioner away from them.

SETTLEMENT-FRIENDLY: IMPASSE AVOIDABLE

Mediators can avoid impasse in these mediations by establishing interests very quickly. We use a caucus-only format throughout the mediation, even in the party initial statements, because of the nature of the allegations in the civil harassment case. That provides the opportunity to use our reframing and reflecting skills extensively during the party initial statements to get to the interests

of the parties. This invariably results in mutuality around the concept of staying away from each other. Agenda setting for discussion mostly includes the various forms in which the "no contact" with each other will manifest itself, e.g. personal contact, telephone, email, etc., and what happens should they come across each other in a public setting. Thus, in following this format, many of the reasons that often cause impasse are eliminated. Civil harassment mediators recognize that if impasse occurs it most likely marks the end of the mediation; the reality is that the court will want the case called in shortly if it doesn't appear likely to settle.

Settlement-friendly: Settlement Agreement Practically Writes Itself

Mediators have the training and wherewithal to help the parties construct their agreement. The parties have already agreed to no contact in various forms as we progress through the agenda. Mediators with their reflective and reframing skills have effectively helped the parties transfer their dislike for each other into a "no need to contact each other" mode. The settlement agreement, therefore, becomes a reiteration of what the parties have already stated as their interests. The agreement requires mediator skill in ensuring that fault concepts remain, for the most part, out of the document. Any agreement that sounds like blame to the respondent could lead to impasse, since one of the main attractions of the mediation for them was to avoid the culpability that court findings against them would necessarily entail.

At the end of the day, it is the true "win, win" scenario that we relish as mediators. Petitioners walk away with an agreement that is permanent without having to go through various and possibly daunting proof obstacles. Respondents avoid court findings against them and can get some mutuality in a "stay away" settlement agreement that serves their interests. So, although from the outside it might seem impossible to settle a highly emotional dispute in an hour in which the parties hold each other in high disregard, the reality is that we do it all the time based upon the part of our mediator training that suggests, at least in part, not to "judge a book by its cover."