AN OPEN LETTER TO THE MEDIATION COMMUNITY

I have been asked to comment on Judge Donahoe's order sanctioning the parties for settling a case after it has been set for trial. Although I was once a judge, I am now a lawyer, and a lawyer who publicly comments about a judge's ruling is probably the same guy who purchased a ticket on the Titanic - after learning the owner would not be making the trip.

In any event, I figure, what the heck, I'm old, and I hope Judge Donahoe accepts my comments in the spirit in which they are being offered - which is for public debate of these important issues.

Besides, this give me the opportunity to comment on a trend which has increasingly disturbed me over the years, as mediation has become more popular and hence more institutionalized - the development of rules which do nothing but thwart and bastardize the process.

Let's start with the Judge's order. It is apparently a standard order in which the Court requires the parties to make their "best offer and demand at the settlement conference." The Court notes that its calendar is set based on the idea that a case which has not settled at the conference will not settle, thereby displacing other cases which might otherwise be set. Any case which settled after it is set for trial will result in a sanction of 10% of the settlement amount against the party "causing the delay or engaging in gamesmanship."

Like so many other ideas which adversely impact mediation, the order in my opinion is well-meaning but wrong. I applaud the integrity of a judge who is bothered by delay - indeed I know more than one judge who welcomed the downtime caused by a last-minute settlement as an opportunity to get in a quick nine - but it fails to account for several things:

1) The civil justice systems is, ultimately, paid for by the litigants, who have the right to use it as they see fit within the appropriate rules.

2) The order fails to consider the real-life things which impact a parties' willingness to settle - things such as the appearance of the heretofore - mythical jury whose looks the parties may or may not like, the impact of late rulings on legal matters, or the simple human

effect of looking across the courtroom at an adversary who, by merely showing up, has demonstrated their preparation to do battle. A rule which punishes a party to do that which everything else in the law encourages - the settlement of the dispute - is wrong-headed. What should the parties do - proceed to try a lawsuit they no longer wish to have anything to do with?

3) Enforcement of the order is extremely problematic. Many settlements are confidential, meaning that imposition of a 10% sanction would require the parties to breach that confidentiality. Who is at fault for the delay? To the extent the Court seeks the testimony of the mediator on these points, such testimony is impermissible. A.R.S. §12-2238; Foxgate HOA v. Bramalea California, Inc., 25 P.3rd 1117 (Cal. 2001).

The order, in my view, should be discarded, along with a number of other rules and positions taken by courts and ruling-making bodies which likewise retard the dispute resolution process.

The reason mediation is so popular lies, in large part, in the fact that it developed so quickly that institutions couldn't direct it by the formulation of rules. By its very nature mediation is not subject to a formulistic rule-making structure. As a result, we have seen the creative flowering of innovative ADR techniques, from Danny Nastro's selection of appropriate music for the day to Michelle Langan's "two moves and you're out" procedures.

Now, however, the wolves are gathering at the door. People are making money, lots of it, from mediation, and hence the institutions require their due. Judges and rule-making bodies who insist on imposing traditional rules of ethical and courtroom behavior upon the hurly-burly world of mediation do great harm to the process. They remind me of the spoiled rich kid who shows up at the baseball field with a shiny new baseball. He tells the other kids that they can use his ball, but only if they play by his rules.

The kids look at the old, beat-up ball they have been using, and decide to capitulate to the spoiled kid's demands, as aggravating and unhappy as those demands may be.

Imposition of rules and behavior which work well in traditional litigation simply have no place in a system which is, in its starkest terms, not much different from the haggling of a buyer and seller in the marketplace. Judge Nastro always said that a good settlement judge is a judge who does windows. By that

he meant that anyone who engaged in the settlement of a lawsuit needed to cast off the robe, roll up his sleeves, and get into the pit with the litigants in the rough and tumble of argument, negotiation and compromise.

If you're a judge who doesn't feel comfortable in such a world, don't play the game. If you're a judge who can't abide the idea of a lawyer insisting that his client won't pay more than $150,000 when you and he both know the guy is sitting on $250,000, stay out of the fray. Don't bring your rules to bear in a world which does not function well with such restrictions.

This is not, by the way, an invitation to bad faith or unethical conduct by those who participate in mediation. I don't need a bunch of committees telling me how to deal with bad faith conduct. Any experienced mediator has in his or her bag of tricks an entire array of weapons which neutralize such behavior. Going back to my example of the rich kid with the shiny new baseball, it is obvious that the first time the kid gets to bat the pitcher will take that shiny new ball and do his level best to place it squarely inside the kid's ear. Once the spoiled brat rises from the ground, dusting off himself and his uniform, he will well understand that the traditional rules of the game have been firmly and soundly re-established.

The popular trend towards rule-making not only conjures up even more ways for lawyers to get into trouble; it always thwarts and retards a beautiful and wonderful process which brings peace to all concerned.

I'm certainly no hero in all of this, but there are heroes. They are the neighborhood and divorce mediators, who toil, often with little or no compensation, bringing peace to a place where before there was none.

Indeed, it is the last bit which I think we should all remember. Mediators do the most important work left for a human being, which is the resolution of disputes. In my mind, there is only one rule, and it should be writ large in the heart and soul of every mediator, whether they be handling a multi-million dollar complex tort case or a barking dog, and it is this:

Be that which separates us from The Beast.

Very truly yours,

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