Settlements That Don't Work . . . Or Do They?

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In mediation, there is pressure to get the deal done. This pressure comes from all sides - the mediator, the attorneys, and the parties. A prerequisite is that everyone who needs to approve the settlement must be there and, if someone else becomes necessary during the day, they must be reached and brought in, at least by phone. In addition, the mediator tries to keep momentum moving, dragging sessions late into the day, and usually drafting the agreement then and there so the deal cannot fall apart before it's in writing and signed.

The result of this great push to settle right away, not surprisingly, is a high settlement rate among good mediators but not enough attention has been paid to what happens to those settlements afterwards. In two recent cases in which I was personally involved, both considered by the parties as "impossible" to settlement, a settlement was, in fact reached, drafted, and signed but by the next day, it was clear that one of the parties could not or would not perform under the settlement agreement, opening a new can of worms.

In the first, the parties could not agree to a cash payment that would satisfy both sides. The session moved on to non-cash alternatives, which in this case took the form of an ongoing business relationship in which the plaintiff would receive distributorship rights, allowing him to make a profit that would replace the money he believed he should get in the settlement. The defendant' s representative, the CEO of the company, was aware there was already a distributorship in place but was unable to contact the member of management who had access to the terms of the contract. So, the parties agreed that the plaintiff could get the rights after a year by when CEO believed all such contracts would have expired.

The next day, the CEO learned that in fact, this particular territory was tied up for several years. From a contract standpoint, the result is predictable - the contract can be rescinded based on a mistake. From a settlement standpoint, the problem is more severe. Rescission would reopen litigation. Reforming the contract would not give plaintiff the benefit of the bargain. The parties and the mediator are stuck with a bad settlement.

The second case illustrates a more common scenario. In the heat of the moment, to avoid the expense of trial, the defendant agreed to payments and a stipulated judgment only to wake up with buyers' remorse and the realization that there was no way to make the payments. The stipulated judgment will be difficult for plaintiff to collect. Secured creditors hold most of the collateral. While plaintiff was pleased with how much it "got," it ended up with a bad settlement. A lower amount would have resulted in money in plaintiff's pocket, not an uncollectable stipulated judgment.

Mediators often tout settlement rates but there is rarely follow-up to determine how many settlements work, resulting in a contract that is fulfilled by both sides. A settlement that does not work tosses the parties into a whole new dispute.

All is not lost in a bad settlement. The new dispute is often narrower than the previous dispute and usually comes down to one clause whether it is the amount of money exchanging hands or something more intangible such as in the first example when distributorship rights would begin. Parties have moved out of the litigation arena into the dispute resolution arena and are often willing to continue negotiations rather than return to litigation.

Mediators can and should assist parties through this secondary stage of settlement. At the very least, the joint session at the end of mediation, in which everyone shakes hands and comes to closure, should include a speech by the mediator that encourages the parties to return in the event of any

unforeseen problems. In addition, the mediator can include similar precautions in his opening remarks, when expectations of problems are more on the mind of the participants. A sample opening speech:

"Mediation is a process. Sometimes, while we try to accomplish settlement today, today' s session can be the first step in that process. If after you achieve an agreement, there are any problems in execution, they should be brought back here so we can hammer them out."

The parties can also include a provision in the agreement that any disputes will be brought back to the mediator before litigated or enforced. Specific procedures can be helpful - for example, the parties will set up a conference call with the mediator in the event of default.

Regardless of what is discussed during the mediation, the mediator should call and follow-up with the participants. Many do so the next day or the next week in order to get the parties' feedback. The mediator should also be aware of the important dates in the settlement and consider placing a follow-up call around that time. If the mediator does not do so, the parties jointly or individually should feel free to contact the mediator.

With a little effort, a bad settlement can be turned into a good settlement. Mediators can achieve this result and parties should ask for that assistance from the mediator. Mediation is not always the one-shot solution it purports to be.