Judge Settlements Versus Mediated Settlements

By Stephen G. Crane

The jury was in the box. The plaintiff was the older brother of the defendant, a lawyer. The family was divided in its seating in the courtroom—like at a wedding. The plaintiff was a carpenter by trade, and the family had grown in wealth from the parents of these litigants who created a pot into which went the profits from trading in real estate. The older brother was suing his sibling for a larger share in the profits of the sale of a condominium in New Jersey. The defendant-lawyer-brother claimed that there were no more profits to yield up and that the plaintiff had received the lion's share of the transaction.

I thought, "What a destructive lawsuit this is for one brother to accuse the other of fraud and bring the rest of the family into the fray." It was not the merits of the claim or defense that impelled me to call the parties into the robing room for a settlement conference but, rather, the polarization of the entire family that the case had created. After securing permission to deal with the lawyers and clients ex parte, I conferred first with the plaintiff and his lawyer. Sensing that there was more to this lawsuit than the legal issues and the pleadings, I asked the plaintiff why he was driven to sue his younger brother, a lawyer. His answer revealed what actually was going on and gave me the key to settlement.

"I was the older brother and the defendant was the favored child," the plaintiff told me. "I recognized that my parents wanted the best education for him but could not afford to give both of us a college education. So, after high school, I went to work and contributed to the family's support, including my younger brother's college and law school education. Do you think he ever thanked me or told me he loved me for what I did for him? Nothing. Ever. So, why should I care if he is a lawyer and my case charges him with fraud?"

Then I switched litigants and sat alone with the defendant and his lawyer. The younger brother swore that he had done nothing wrong, that he had favored the plaintiff with more than his share of the proceeds of sale of the condo, and that he, the defendant, was tapped out of funds with which to settle this case. (The plaintiff was willing to settle for $65,000, and the defendant could raise no more than $15,000.) I asked the defendant about the facts of his education, and he corroborated all that the plaintiff had revealed to me. Then, I sprang the crucial question: "How have you shown your appreciation for the sacrifices your brother made for you?"

At this point in the negotiations, I suggested that the brothers and their lawyers go out for lunch and discuss

settlement. The postprandial settlement was modest in amount but came with the lawyer-brother saying how much he loved and appreciated his older brother for putting him through college and law school. The plaintiff—to the consternation of my court officer—then threw his arms around me and bestowed a big hug.

You can see that I learned something basic from the experience. Settlements come in all sizes and forms and depend not just on the technical legal issues the case presents. I use the human relations technique that I first learned in my experience as a judge quite considerably in my mediation practice.

Some judges, I heard, achieved settlements by coercion and bullying or by denigrating the case in the separate caucus just to soften a party. I never, ever resorted to this technique. If I were the fact-finder in a nonjury case, I would not even conference the case for settlement but would send it to another judge in whom I had confidence. If the case were going before a jury, I felt an ethical obligation not to comment on the issues or the merits. It would offend the New York Rules Governing Judicial Conduct and the ABA Model Code of Judicial Conduct to comment on a pending case and would lend an appearance of impropriety. However, this stance would not prevent me from asking, in a diplomatic way, how, for example, the plaintiff was going to combat a statute of frauds or statute of limitations defense or how a defendant intended to demonstrate that her signature was forged.

Since I left the judiciary and became a mediator, I was slow to understand that parties selected me because of my experience on the bench in trying cases and participating in panels that adjudicated appeals. They really did expect me to give an opinion on the merits of their claim or defense. This dawned on me after a good year in my new role of nonjudge neutral. I traveled to Dallas from New York to conduct an all-day mediation in a case pending in the commercial division of the New York State Supreme Court, a court of which I was a graduate. The judge presiding in the case was a friend of mine for 30 years, and I knew how he thinks. The defendant had made a crucial motion that was pending while we were mediating. I was in the unique position of being able to assess the viability of the motion with an edge that the lawyers could not have possessed.

On the plane, I had plenty of time to read and digest the motion papers and transcript of the oral arguments. After the joint session when we recessed to separate caucuses, I told the party who had made the motion that I thought its attorney's papers were extremely persuasive, "But you are going to lose." They were taken aback; yet, when their attorney took me aside in the hallway he said, "Bless, you, judge for saying that to my clients. I've been telling them the same thing for weeks, but they believed what I wrote in the motion." So, another lesson learned. And, I think it enhances the ratio at which my cases settle in mediation, because I do express my opinions on the merits and value of the cases.

When I was a trial judge in the Commercial Division of the New York State Supreme Court and simultaneously served as the administrative judge in New York County, I was devoted to the court-annexed mediation protocol that we had developed. A Commercial Division judge was given the right to direct the parties to appear, in good faith, before a pro bono mediator drawn from a list of volunteers. Although the overall settlement rate from this protocol in 1996 started modestly in the 40 percent range, it improved steadily. Involved as I was with the business cases that were subject to this procedure, I felt an obligation to understand the techniques of the mediator. Two of the members of our pro bono panel had vast mediation experience. They volunteered to conduct a three-day CLE in basic mediation skills. I enrolled. It was enlightening and useful and, of course, gave me the rudiments I built on in the more advanced courses I experienced when I came to JAMS. One of my Commercial Division colleagues, still presiding there, later followed suit and took training in mediation. I understand that he uses those techniques in his own settlement conferences. Yet, we both understand completely the difference between judge-induced settlements and mediator-produced agreements.

When I became the administrative judge, I decided to expand court-annexed mediation beyond the Commercial Division, which had been a testing ground for this and a number of other innovations. Michael McAllister, then a law-trained clerk in the court, was responsible for the most remarkably successful of these expansions. He had approached me with an idea to screen personal injury cases as they became ready for trial. He was to be invested with the authority to send a case to pick a jury immediately if any party were not negotiating in good faith.

In carrying out this plan, Michael conducted his own negotiations. He quickly built his skills and experience as mediator and could easily identify which parties were not participating before him in good faith, for example, when a party stonewalled by refusing to negotiate meaningfully, leading him to believe that settlement was impossible. The secret is to tell the parties, "Pick a jury," and that gets them to be more realistic about settlement. His program was so successful that it contributed, along with the hard-working trial judges, to a drop in the inventory from 55,000 cases in 1996 to 35,000 cases by the time I left for the appellate division in March 2001.

Michael McAllister is a success story. He started in the court system as a court officer. He went to law school at night and became a member of the bar. He continued to serve the court as a clerk to Hon. Edward Lehner, a

Hon. Stephen G. Crane (Ret.) *was the senior associate justice of the Appellate Division, Second Department. He presided as one of the New York County justices in the Commercial Division from 1995 to 2001. He can be reached at scrane@jamsadr.com.*

Supreme Court Justice in New York County, whose cases he conferenced for settlement. He enjoyed that role and was so successful at it that he wanted to do it full time. His program grew when another clerk-lawyer joined the team, and the chief administrative judge wanted to copy the program in other counties. Michael became such a legend that the inevitable occurred: he was offered a position as a neutral at JAMS, where he served until, to the lamentation of us all, he died unexpectedly at age 59 on January 27, 2011.

Our court also tried to expand the program that Michael started into other areas, such as cases against the City of New York, an intractable inventory, and medical malpractice cases. These court-annexed programs, I submit, were influential in making the New York legal culture much more accepting of alternate dispute resolution and mediation than it had been. This cultural shift over the last decade and a half is certainly palpable at JAMS, where I now serve.

As a kind of summary, let us consider a few pros and cons for participants in judicially hosted settlement conferences compared to mediations conducted by private neutrals. I perceive that the environment is inherently coercive in a settlement conference conducted by a judge, at least if the judge would have some power over the case if it continued to trial. In such a setting, the following concerns might run through the mind of counsel or client: "I want my day in court before a jury and don't want to feel betrayed by the system or required to sacrifice even a little in avoiding trial. After all, my legal position is unassailable. Yet, will the judge be displeased if I refuse to compromise? Will the judge take it out on me during trial?" These are legitimate concerns and have fueled a long-running debate among judges themselves, many of whom have expressed that it is the judge's role to preside and decide cases, not to try to settle them. This may be an outmoded view, especially with the volume of cases in our courts, most of which cannot possibly be tried. But a judge who does not think of his role as a helpmate in settling cases is not likely to be a good settlement judge in any event. And woe to the parties and their attorneys who confront one of those abusive settlement judges, who, not content with implicit coercion, resort to a "technique" that amounts to little more than outright bludgeoning.

Compounding the problems of judicially conducted settlement conferences is the need, in an ideal world, for the presence in the judge's chambers of decision makers on both sides with the authority to settle. The lawyers are accustomed to appearing before judges and biding time until their cases are called. Not so the clients. Will they be cowed or awestricken? Will they have the time to waste before their case is called?

On the other hand, some parties might feel they are actually being heard if the person listening to them is a real judge and if this listening occurs in a courthouse. Some litigants might be ready much faster to make the emotional transition to being open to settlement if they have been able to speak their peace, directly or through their lawyer, to a real judge. This becomes their "day in court."

In addition, a judicially required conference takes the "sign of weakness" syndrome out of the negotiation calculus. There is folk wisdom that the party who first suggests settlement or mediation is exhibiting anxiety and may be perceived by the adversary to have a weakness or defect in this party's case. By the judge requiring a conference or sending the case to a court-appointed mediator, this syndrome is avoided.

A judge who does not think of his role as a helpmate in settling cases is not likely to be a good settlement judge in any event.

With private mediation, the parties may be reluctant to participate because of the expense, even though litigating often turns out to be much more costly. The fear of appearing weak may be an inhibitor, but it can be managed by a skilled advocate. Parties and lawyers who really want a clearly articulated second opinion on the merits can secure it from a private mediator; yet, clients might ascribe less weight to this opinion when it comes from a private mediator rather than a sitting judge. On the other hand, a sitting judge may be violating the ethical rule prohibiting comment on any pending case by delivering such a second opinion.

The process of mediation, where the parties engage in meaningful negotiations, entails risks. Among the chief of these is the risk that the party will sacrifice too much. But a private mediator may be better positioned or more inclined than a sitting judge to help allay anxiety over this kind of risk by engaging in a more detailed analysis of the often far greater risks of litigating. A mediator also might emphasize more than a sitting judge that the parties themselves control the outcome in mediation, whereas outsiders control it in litigation. Then there is the beauty of any negotiated settlement—finality. A private mediator might feel freer to be blunt about the limitations of the adjudicative process and inclined to focus on the possibility that, without settlement, a trial may only be the beginning of a long path of appellate combat and possible retrial.

In the end, however, whether the host of their negotiations is a sitting judge or a private mediator, it is the parties' responsibility and privilege to reach settlement. ◆