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Getting in the Middle

When lawyers come to blows with their clients, it's mediation time

By RICHARD A. ZITRIN

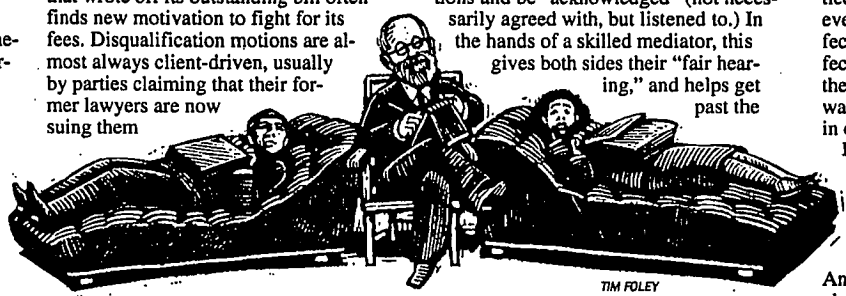
Palookaville? That's where boxing "bums" wind up after too many fights. It's also where lawyers and their former clients could wind up after duking it out for too many rounds in litigation, especially when there's a better way to fight.

The Bay Area is a mediation hotbed. But while lawyers increasingly opt for mediation for their clients, less than five percent ever get to mediation when they themselves are parties to a lawsuit, according to sources on the American Bar Association's professional liability committee. That percentage is not much higher even in mediation-savvy Northern California. But if there is a type of case more perfectly suited to mediation than a fight between a lawyer and a former client, I have yet to see it.

So the question is not whether legal malpractice and attorneys fees claims are good candidates for mediation. Rather, the puzzle is why the parties in these cases don't choose the mediation process more often.

MANY LAWYERS, MANY DISPUTES

There are many kinds of lawyer-client disputes, but three types are most commonly litigated: legal malpractice cases, claims for attorneys fees, and motions to disqualify counsel. The first two often appear in the same case as a complaint and cross-complaint. It's a common occurrence that when a law firm sues for fees, the client sues for malpractice. And when a client sues for malpractice, a law firm that wrote off its outstanding bill often finds new motivation to fight for its fees. Disqualification motions are almost always client-driven, usually by parties claiming that their former lawyers are now suing them in a related case.



TIM FOLEY

Virtually all of these cases have common threads — the kinds of issues that ordinarily make them ideal for mediation:

First, there's emotion. Almost every lawyer-client case features emotions that run high, often on both sides. The relationship between lawyer and client usually starts out upbeat and optimistic. When it disintegrates, it can often look a lot like a divorce case, complete with name-calling, promises of revenge, and — most significantly — strongly held beliefs on all sides of having been wronged. Added to that emotion is the fact that most liability policies, unlike auto and business insurance, can only be settled with the lawyer's consent, as well as the carrier's.

Good lawyers know that the last thing they want is a client ruled by emotion. One of mediation's greatest strengths is in working through the reality of emotion by allowing the parties to vent their frustrations and be "acknowledged" (not necessarily agreed with, but listened to.) In the hands of a skilled mediator, this gives both sides their "fair hearing," and helps get past the negative energy caused by the lawsuit to work on resolving the case so that the litigants move on to the next positive thing in their lives.

Second, declining or "wasting" policies are the norm in professional liability coverage. Simply put, the policy limits are reduced by all defense expenses — attorneys fees and costs incurred. Here, the benefits of mediation — and acting at the earliest possible time once enough facts are known — are obvious. When a policy is wasting and the client's claims may have substantial merit, both law firm and client are ill-served by allowing the policy limits to decline. This does nothing except deplete the funds available for settlement. The last thing the lawyer needs is even the possibility of a jury verdict in excess of depleted policy limits. And when it comes to collecting a judgment, it's about the last thing the client needs, too.

Third, lawyers rarely want a malpractice claim against them aired in public, even if they feel their conduct was perfectly appropriate. To many, the case's effect on their reputation is as important as the effect on their pocketbook. They don't want the case prosecuted, much less tried in open court.

Early dispute resolution not only avoids this, but also allows the client's concerns to be heard. It allows the lawyer and law firm to stop devoting countless nonbillable hours — and ever-rising blood pressure — to an old case. An insurance carrier may also be able to close a file promptly and with a minimum of expense. Those who have mediated cases involving a lawyer's professional conduct find that these cases almost always settle — because it's in the interests of all the parties involved.

TURNING PROBLEMS INTO SOLUTIONS

There's a fourth good reason to mediate lawyer-client disputes. These cases are filled with specialized insurance, coverage, and representation issues. When these problems are dealt with by experienced mediators knowledgeable about the duties of lawyers and those who defend them, they can stop being obstacles to settle-

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ment, and start being part of the settlement solution.

Most of these problems relate to insurance. Many lawyers don't have malpractice insurance, while some large firms are self-insured. Many firms that have insurance face other issues that can seem daunting, including large deductibles, coverage disputes focused on which causes of action and types of damages are covered, and representation questions. For example, when there are both malpractice and attorneys fees claims, most policies require that lawyers find separate counsel to seek fees, and many law firms wind up representing themselves. But some policies tie recovery of fees to the settlement of the malpractice claim, limiting whether a law firm can get money from a client while its insurer is paying out money to the client. All these issues create dicey problems of loyalty for insurance defense counsel, and important questions of money for everyone.

If a case does have potential merit, the earlier the case's exposure is evaluated and resolved, the less grief, attorneys fees and costs, and unbilled time wasted.

When complete settlement is the goal, the niceties of exactly where counsel's representation stops and self-representation begins becomes a collateral issue. Both coverage and fee issues are, ultimately, a question of dollars and cents — ideally dealt with in a mediation where the end result is "global peace."

This is even more true of the specialized area of motions to disqualify counsel. There are ethics rules and opinions and abundant case law on the issues of loyalty presented in such motions. Too often, though, going to court for an all-or-nothing decision before a judge not fully conversant with the specialized law misses the opportunity for a negotiated resolution that is certain, fair to everyone, and, of course, not subject to after-the-fact appellate review.

Given the obvious advantages, why, then, isn't mediation used more often in cases involving a lawyer's professional conduct? Ironically, the same common factors that make mediation so desirable sometimes convince the parties — mistakenly — not to mediate.

Lawyers litigating someone else's case know they don't want emotional clients, but when they're being sued themselves, many lawyers find it hard to remain detached. Like doctors who are the last to see their own physician, we lawyers are often in denial, the last ones to see how our own emotions interfere with reason — and the time and expense of fighting a lose-lose war. Since the lawyer's consent is required for settlement, lawyers are in danger of becoming the client we all want to avoid — the one who stands forever on principle.

TURBULENT RELATIONS

But lawyers don't have a monopoly on either emotion or denial. Many clients find it equally hard to look at their case objectively. It is not without reason that many liken the emotions of an attorney-client dispute to a domestic relations case.

Coverage and representation issues can also get in the way of understanding the benefits offered by mediation. Many of us who litigate for a living like all our procedural issues neatly resolved before coming to the negotiating table. Unfortunately, some attorney-client disputes will never achieve that level of clarity, even at trial. Coverage, representation, and fee set-off issues may not be resolved until after-the-fact declaratory relief. And the statute of limitations, the subject of many recent appellate court opinions, is hardly a rock of clarity, even after the Supreme Court's recent decision in *Jordache Enterprises v. Brobeck, Phleger & Harrison*, 98 C.D.O.S. 5893.

Rather than interfere with settlement, these issues should encourage the parties, their lawyers, and insurers, to do a serious and early assessment of the risks of various outcomes. With the help of a mediator experienced in these issues, the focus can shift to saving time, money, and a great deal of grief, instead of worrying about the vagaries of protracted litigation.

When wasting policies result in early case resolution, defense counsel, of course, will bill less time on that particular file, and make less money. But insurers increasingly expect their lawyers to give them early assessments, and with them, early settlement opportunities. There will, after all, always be another new filing to defend.

Just as in a simple accident case, agreeing to mediation doesn't mean agreeing to pay money or agreeing to wrongdoing. It simply means that both sides are willing to hear what the other has to say, factually and legally, and that they are willing to share this information with an eye toward putting an end, then and there, to the painful differences between them. If a case has no merit, then there is no compulsion to pay anything. If a case does have potential merit, the earlier the case's exposure is evaluated and resolved, the less grief, attorneys fees and costs, and unbilled time wasted.

All this makes mediation a win-win, no-risk proposition — a much cleaner way to fight. Either party can get up and leave at any time. But experience shows that once the parties in an attorney-client dispute sit down at the mediation table, almost inevitably they remain in the room and resolve their differences by walking away with a binding agreement that puts an end to the fighting for everyone. ■