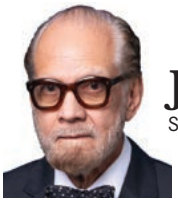

Judge Enrique Romero (Ret.)
SIGNATURE RESOLUTION

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Court proceedings after mediation

MEDIATION TIPS FROM "THE PROFESSOR" ON HOW TO BEST USE THE COURTS TO WRAP UP YOUR MEDIATION

The obvious interaction between the mediator and the court is with respect to the enforcement of a settlement agreement. There are two possible scenarios. One where the case has already been filed and assigned to a judge and the other when you have a pre-litigation mediation.

Settlement with case pending

If the case has been filed and assigned to a judge, the obvious enforcement mechanism is to file a motion to enforce pursuant to Code of Civil Procedure section 664.6. This is easy and all that is required is to have the material terms of the settlement in writing, signed by the parties, and then you file the motion to enforce it. You just have to be sure that the material terms are included and that the parties with full authority to settle signed the agreement. Make sure that when you give notice to the court of the settlement and make sure that the parties and counsel *ask the court to maintain jurisdiction of the case* in order to enforce it. Especially important if the agreement calls for installment payments over time. All you do is to attach a copy of the settlement agreement with declaration from counsel.

Settlement contingent on execution of settlement agreement

The hard part is when the settlement entered into is contingent on the execution of the "long form" settlement agreement that will be prepared by one of the parties, which is usually defense counsel. So, this is what I do and recommend that you do. Have the material terms in the "short form" agreement which will have the provision that the short form is contingent on the execution of long form. Then do the long form the same day that you settle the case with the short form.

I usually have a joint session to discuss what else should be in the long form and come to an agreement. In the short form, make sure that there is a provision that provides for the mediator to act as the arbitrator in a binding arbitration with no right to appeal to resolve any dispute in the language to include in the long form, and I put down that the parties waive all disclosures that need to be made by the mediator in order to have an expedited resolution of any dispute that arises. So, if a dispute arises, I immediately put my arbitrator hat on and make the ruling. Thus, the enforcement mechanism would be both a 664.6 motion and a motion to enter the arbitrator's award (you are not entering a monetary award, you are only deciding the terms that should be included in the long form).

I find it important that in the arbitration provision that reasonable attorney's fees and costs be awarded to the prevailing party. This will discourage a frivolous dispute because of the threat of fees and costs to be awarded if you are wrong. Of the hundreds of mediations that I have had, I cannot think of any one instance where there was an actual motion made to enter my award and can only remember a few isolated instances where I had to put on my arbitrator's hat.

Settlement with no case pending

The other situation is when you settle pre-litigation with no case pending. Code of Civil Procedure section 664.6 will not work because you have to have "pending litigation." To get around this requirement, I have tried putting in the settlement agreement that the parties stipulate, for example, that the DFEH complaint was filed, the "Demand Letter" sent, and that the mediation shall be deemed to be "pending litigation" to get it within the section 664.6 requirement. I frankly do not know whether this has actually worked with the court because I have never gotten any feedback. Instead, what I do is to turn the mediation once we have a settlement, into a binding arbitration, and the settlement agreement becomes the award issued by me, and the enforcement mechanism is to move to have confirmation of the award with the Court.

Settlement involving multiple parties

In a settlement involving multiple plaintiffs, including minors (although, the same procedure would be followed if no minor involved), and all represented by the same lawyer or law firm, my experience has been that in most of these cases, the defendant and/or insurance carrier involved don't care about the individual amount that each plaintiff is going to receive. They see it as a global number that will settle the case, and leave it up to the lawyer and plaintiffs to decide on the allocation. It often comes up when you have limited insurance coverage and the insured is insolvent.

So, the best way to ensure enforceability and avoid conflict of interest between the lawyers and clients, is to get them all to agree that I will act as the arbitrator in a binding arbitration with no right to appeal, and that I will hear from each plaintiff separately as to their injuries, damages and award an amount to

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each plaintiff after all have had their day in court. The same procedure is used when you have multiple plaintiffs represented by separate counsel, and you have the policy limits paid out and the only issue is the allocation of the settlement proceeds amongst the various competing interests. In many ways, the latter scenario is easier for the mediator/arbitrator because each plaintiff truly has independent counsel who will argue on behalf of the client as to what portion of the global settlement the client should get. This will make it easier to enforce any settlement challenged by any plaintiff.

Settlement contingent on court approval

A settlement entered into by the parties that is contingent on the approval of a Petition of a Minor's Compromise and you are concerned with court rejecting it is not a real problem if you have only the minor as the plaintiff, but a potential problem if you have an adult plaintiff or plaintiffs and limited settlement funds.

If there are no objections from any of the adult plaintiffs and their counsel, or from defendant and their counsel, which I always insist on having in writing, I will prepare and sign a declaration as to how the amounts were arrived at during the mediation for the court's consideration at the hearing on the petition. By the way, I have done the same where the minor is the only plaintiff. I cannot think of any instance where the court rejected the petition and can think of one instance where the court actually called me because the judge had some questions, which were answered to the judge's satisfaction.

Settlement contingent on entry of "good faith"

A settlement contingent on the entry of a "good faith" order by the court pursuant to Code of Civil Procedure section 877.6 is a potential problem because you have a non-settling defendant that will most certainly object to the issuance of a good-faith order. However, just to be sure, if you are the settling defendant, always ask the non-settling defendant if they will stipulate to the motion. If they do not object, you file a declaration setting forth the no objection.

In any multi-defendant mediation that I have, I always make it clear at the outset of the mediation that my objective is to get a global settlement, but make it clear as the negotiations proceed where I put the defendants on notice that since it appears that there is not going to be a global settlement, that I will try to do partial settlements with whomever wants to settle. This way I do not get accused of playing favorites with some of the parties. Like Caesar's wife, I want to be above suspicion.

So, if we have a partial settlement contingent on the good-faith order being granted, I do not write a declaration because I do not want to be seen as a partisan. Instead, counsel for the settling party will file a declaration setting forth how the settlement was arrived at, that it was the product of an arm's length mediation, with all defendants participating, that it was before a former judge of the Los Angeles Superior Court who sat on the bench for 10 years, including four years in a civil direct-calendar assignment, with 20 years' experience as a private mediator, and that it ultimately settled based on a mediator's proposal which was accepted by both sides, among other things.

Mediation continuance

I have had mediations that at the end of the day did not settle the case but had a highly likelihood of settlement, and required some due diligence by one or both sides and warranted a continuance of the trial date.

Insolvent defendant

I have had two scenarios encountered in the past that come up often enough to mention. The first, where it was clear that defendant was insolvent and plaintiff needed to do its due diligence to determine alleged insolvency. Defendant agreed to provide the financial records to substantiate the claim of insolvency. They first needed the financial records and then needed their forensic accountant to review the financial records. The other is when there will be a sale of a going business and there is a need to retain an appraiser to value the business.

Trial date continuances

The trial date is around the corner and counsel need to go ex parte with a proposed "stip and order" for the court. I have prepared a declaration setting forth my involvement and need to continue the trial date, and telling the court that counsel are coming back on a specific date for a follow-up mediation. Of the ten or more times that I have done this, I can only think of one where the federal judge in the Central District rejected it summarily (you probably can guess which judge it was).

Conclusion

One last comment, and this should not be taken as a rejection of using non-judges as mediators. (In fact, I think that non-judge mediators are often better mediators because they listen to the parties.) The courts in the above scenarios are likely to give more weight and deference to a former, experienced Superior Court judge than to a lawyer mediator. I hope you will find the above useful in your practice.

Judge Enrique Romero (Ret.) is a former judge of the Los Angeles Superior Court and founding member and partner with Signature Resolution, *where he continues to do mediations and arbitrations. Email: JudgeRomero@SignatureResolutions.com.*