By Daniel Pollack

Mediating Lawsuits Against Human Service Agencies

A top-notch litigator provides an invaluable service by skillfully arguing contested issues in court. But the vast majority of lawsuits against human service agencies do not go to trial. They are settled, many times through mediation.

A mediation is a meeting, typically at the mediator's office or the office of one of the attorneys, where the mediator assists the parties to resolve their differences so the lawsuit can be settled without going to trial. A mediation is not the same as a hearing or an arbitration. The mediator is an impartial negotiator who has no authority to decide the merits of the case. Instead, the mediator identifies aspects of the case that lend themselves to compromise and helps the parties reach a voluntary resolution. Neither party is coerced or forced to settle the case. If a voluntary settlement cannot be reached, the mediation concludes and the lawsuit continues. And, as the expression goes, "What happens in Vegas stays in Vegas." Discussions with the mediator are strictly confidential.

The principal benefit of mediation is that it is a quicker, less expensive way to resolve a lawsuit than going to trial. Ironically, settlement at mediation often results in a higher *net* settlement to the plaintiff, even if a trial verdict would result in a higher gross recovery.

Unlike a lawsuit that goes to trial, the parties themselves decide how to compromise rather than having a judge or jury impose a decision. For this reason, mediation is a process that often leads to favorable and amicable outcomes for all parties involved. In fact, mediation has proved so useful that many jurisdictions require mediation prior to trial.

Mediation is often a preferred alternative in instances when the participants' relationship with one another is important and likely to continue (e.g., when a state department of human services and a foster care placement agency are opposing parties or are co-defendants). It can be particularly effective after the discovery process has been substantially completed. At this stage, the parties generally have an understanding of the potential strengths and weaknesses of their case and their opponent's case.

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Who makes a good mediator for human service lawsuits? According to New York attorney Carolyn Kubitschek, "The best mediators know the governing law and command the respect of the parties. They learn the case by asking each side to explain the issues of the case from their own perspective and by asking probing questions until they're sure they know all the undisputed facts and the disputed facts. Then they take a very active role, pointing out the weaknesses in each side's case and, if necessary, suggesting a dollar amount they think would be a reasonable settlement. Unlike commercial cases or employment cases, cases against human service agencies are often difficult to settle because the damages are not easily quantifiable. Plaintiffs and defendants often have widely divergent views on how much constitutes a reasonable settlement. A mediator who is respected by both sides can break through that logjam."

A good human service mediator must be able to grasp concepts that involve complex and nuanced law, regulations, and standards of care. Mediating a human service lawsuit is not the time for on-the-job training. Human service law is a highly specialized field so the mediator should have specialized experience at the outset. Notes Arizona attorney Gary Popham, Jr., "Understanding the politics and policy at play, in addition

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to the facts and circumstances giving rise to the lawsuit, equips mediators with tools that best enable the possibility to successfully achieve settlement. Furthermore, good mediators understand that their success rate is determined by the cases that are settled, and that their reputation of being instrumental in settling cases of a particular type is gained by having a progressive understanding of the subject matter involved. Good mediators also know this leads to repeat business."

Settlement is often a matter of timing. Make sure to have all the major stakeholders at the mediation. That way everyone will appreciate the reasoning, complexity, and multidimensionality of the final agreement and absent stakeholders cannot blame others if the agreement proves dissatisfying. Mediation is not just a matter of timing, it also takes time. Impatience will torpedo the process. An attorney who emotionally announces, "We'll see you in court" may doom a unique settlement opportunity. Conversely, a patient party engaged in mediation where the other side appears impatient but, in actuality, desires a settlement, is likely to move closer to the position of the patient party in order to reach an agreement to settle.

In like manner, mediation is not the time for grandstanding. The parties should refrain from spending precious time negotiating dollar figures that are obviously out of bounds. Such behavior fritters away precious time and goodwill. The party that courageously steps forward with the first reasonable offer may ironically gain a bargaining advantage in the long run.

We all do what we perceive to be in our best interest. And so, conflict is normal; but it need not be catastrophic. A skilled mediator can guide parties to a vision of settlement that is more attractive than the uncertainty of going to trial. By doing so, the mediator, and the attorneys, can deliver the result every client seeks—a favorable, cost-effective resolution. P

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