

Stories from Beyond the Courtroom

There Has to Be a Better Way

By L. Lee Byrd, Sands Anderson PC

Lesson Learned. Several years ago, my law firm tried a relatively non-complex breach of contract case in front of a rural jury, with less than a week left before Christmas. The out-of-pocket legal expense to the client was extremely high. While the jury deliberated, a colleague who helped try the case presented our plaintiff client with a bottle of wine as a holiday gift. Unfortunately, the jury returned its verdict for the defendant. As I headed to the parking lot with the client on that disappointing day, he told me that he really appreciated "the \$200,000 bottle of wine."

My first thought was how rude the client was to say such a thing after we had been in the trenches together during several hard-fought battles that had arisen during the case. My *much more important* second thought was that, during this moment of candor from the client, I had just witnessed the case from his point of view for the first time in nearly two years' worth of legal wrangling. I thought: "Who can blame him for feeling this way?" I knew that there had to be a better way for this case to end.

Clearly not all commercial cases lend themselves to early resolution. Hotly contested issues of fact or law may lead one or both parties to pursue the issues, regardless of the cost. But the cost of litigation is very high. Thus, an early "facts of life" discussion is essential to managing a client's expectations – both about the true cost of litigation and the risk of a negative result.

Lesson Applied. In my recent case, neither of the parties appeared truly interested in early case resolution. Seeing that the expense of the case would very likely consume any realistic economic benefit that *either party* would receive from the case, I suggested strongly to our out-of-town client that a face-to-face meeting with the other side might be the best hope of avoiding protracted, expensive litigation. After a couple of billing statements, the client eventually saw "the dollars and cents" writing on the wall and agreed to engage in early negotiation.

Despite its obvious importance, discernment of the client's goals is often not an easy task. I took the time to clearly explore with the client his goals. His company was the defendant, but the company had a significant counterclaim. The client wanted to resolve the case on reasonable terms and, if still possible, preserve the business relationship with the plaintiff.

Excluding *pro se* cases, any litigation has at least four key players: the plaintiff, her lawyer, the defendant, and his lawyer. "Buy-in" by all four principals is essential for early negotiation to have a realistic chance of success. At this point in time, I had two of the four players on board – me and my client. Since a lawyer cannot communicate directly with an opposing party who is represented by counsel, any discussion about early negotiation must go through opposing counsel. It is also in the client's best interest for her attorney to have a good working relationship with opposing counsel in order for early negotiation to work. It helped that opposing counsel was a trusted colleague. We discussed what the negotiation might look like. Counsel agreed to see if he could get his client on board with the concept; which he was able to do quickly.

The final key consideration was agreeing to a case resolution process that suited the needs of the parties. We retained a retired state court judge with whom both lawyers were very comfortable to mediate the case. The typical written position statements were submitted in advance, and a mediation was held at my firm.

It presented the first opportunity for the parties to meet face-to-face. Getting these two pragmatic businessmen into the same room proved crucial to the early case resolution process. After skillful negotiations by our mediator, the case settled for a modest sum of money. The prospect of doing another business project together in the future remained intact.

Perspective. At the end of the day, the case was never really about "big dollars" – it was about human beings who simply needed to know that their thoughts and feelings had been heard by the other side. Thus, while a given case may be shortened by the early resolution process, a meaningful attorney-client relationship most assuredly will be extended. Champagne, anyone?

L. Lee Byrd is the President of Sands Anderson PC in Richmond. When not leading the firm, Lee helps business owners protect their investments by getting their disputes resolved fairly and creatively.

Stories from Beyond the Courtroom

So That's What the Client Really Wanted

By Will Shewmake

We attorneys take pride in zealously representing our clients, and we often measure our success in doing so by how large (or for defense counsel, how small) the resulting settlements or verdicts are. Such a measure provides what appears to be an objective criterion to gauge how well we have discharged our duties, not to mention that it can stroke our egos and confer bragging rights. But a mediation early in my career taught me a valuable lesson: a case is not about me and what I would want. Rather, I need to understand what my client really wants to achieve, while ascertaining the motives and, perhaps, hidden agendas of the other side. I also learned that mediation provides an opportunity for the advocate to discover the often unspoken causes giving rise to the ongoing dispute, especially when a skilled mediator is involved.

Many years ago (more than I care to recall or disclose), a man had lost his child when a routine procedure went horribly awry. The dad epitomized a hard-working “man’s man” as the cliché goes, and loquaciousness was definitely not an attribute from which he suffered. He filed suit, and, after extensive discovery, the case went to mediation. It soon became apparent during the mediation that the defendant wanted to settle the case, and early on the defendant put a very reasonable offer on the table. In fact, the offer could well have exceeded what a jury might render. But the burly father refused to entertain the offer, and no amount of cajoling could dissuade him. The case seemed destined for trial, despite the reasonableness of the offer and the financial risk the father would be taking by going forward with the case. But thanks to the mediation process, the parties finally discovered what mattered most to the grieving father. The case wasn’t about the money. It was about how much the man loved and missed his child. His love for his child and his grief from the child’s death came pouring out. It became clear to all that the child was that man’s life, and the father had latched on to the lawsuit as an emotional life line connecting him to his dead child. As long as the case remained ongoing, the dad felt that somehow his child remained alive. Once that simple truth was uncovered, the mediation was no longer devoted to arguing about money. It instead was devoted to helping this grieving, loving man come to terms with the fact that the lawsuit would eventually end, and that the litigation could not possibly fill the cavernous void in his life. Through mediation, the parties explored and agreed upon what fitting tributes could be made to honor an excep-

tional child of whom the dad was so justifiably proud. As a result of that successful mediation, the father could recommence the grieving process and avoid the utter emptiness he would have surely experienced after a verdict was rendered and the case closed.

What happened in that case has stayed with me and has made me a better lawyer and mediator. I never assume what is important to my client, to the other side, or to the parties involved in a dispute. And while I understand that when someone says it’s not about the money, it’s often about the money, I also realize that the converse can likewise be true. When someone says it’s about the money, sometimes it’s not about the money at all. So when representing your client, remember that mediation is a vehicle that allows you to explore fully why the parties are at odds and to craft a settlement that will best serve your client and accomplish what he or she really hopes to achieve.

Stories from Beyond the Courtroom

Things Left Unsaid

By Jeanne Franklin

The early summer day was a clear one, a bit cool near water's edge perhaps, and illumined by bright sunshine. Colors were sharp; the blue of the pond sparkled with light. A low horizon was spring-green where new growth covered distant sand dunes. I walked happily around the small rectangle of homes that were mostly quiet, waiting for owners and renters. Some year-rounders or regulars were out and about. A wave hello, calling out, "Welcome back," "How was your winter?" or "It's been a late spring," were all that was needed to make a person feel at home. People there are New England-independent; they appear content to putter endlessly around yards and boats. If there is a common culture, it is love for the seaside – a passion to be in, on or just close to the water.

Even with the serenity of such an environment, people are people and can mess things up or at least complicate them. On this day, after a walk with my granddaughter, I sat on an old bench by the pond while she engaged in her 4-year-old's version of "just puttering." Rising to leave, I saw that an older gentleman had pulled up, parked his pickup, and was sitting in the front seat, just gazing at the view. I knew him to be the brother of the cottage owner next door, Marty, who had died at winter's end after a devastating, brief illness.

I walked over to introduce myself and say how truly sorry we were for his loss – and that Marty was always so pleasant. That was just enough to encourage him. He said how sad he was – that whenever he looked at the water, thoughts of his brother who loved it so much came over him. He said he could never be the same, would never stop missing him. And then he pointed to the child who was still inspecting sand, seaweed and other treasures. Brightening, he said children make life worth living; their joy is what keeps us going. I just listened. His words filled the space.

Finally, he thanked me for approaching him, for expressing sadness, and hearing him out. It was, I thought, the least one could do, the natural thing. My granddaughter and I then headed back for a sandwich, and he stayed there with his thoughts. But this day was not over.

Later, I encountered another man on the boat dock where I like walking to its end to inspect the pond bottom for swimming, crawly things, and even lie down to scoop water to my face. Mike was more than a regular. He was an institution – a true waterman out on his boat early most mornings to

fish. His house is right up against the pond with unimpeded views. He takes his boat across the pond, out the channel into open waters where he gathers catches from traps he has set. He sometimes tells folks how to cook crabs, lobsters and other seafood, once in a while shows off crustaceans to a curious child on the dock, and might even share some of his bounty with a close neighbor. Tanned, with salted black and silver hair, a slightly lined face and strong body, he asserts proudly his more than 85 years. This day, he held the pole of his fishing net thrown over his shoulder and carried a bucket of crabs in the other.

"Hello, how are you?" is our comfortable, mutual, annual greeting. Something led him to then point out how much it cost him to cut down most of the trees and foliage that had filled the vacant lot for years right behind his home. I shook my head and said I'd noticed that change, and waited as he stood still and looked down.

A background story flew through my mind as I waited. Mike and Marty had had some kind of disagreement about that vacant lot which stood between them, in front of Marty's place. Hearsay was that Mike planned to sell it to someone who would build on it. It was not zoned as buildable and Marty contested Mike's application for a variance. Mike planted beautiful evergreens and let the lot go wild. The growth obscured Marty's view. Marty designed and built a second floor with lovely porch views. Mike maintained the growth and it eventually even approached second story views. Over ensuing years, no one seemed to speak of it. There was an open-air, sea breeze aura in this tiny pond-side community complicated it seemed with one fierce, small square of a "jungle," raging uniquely in its midst.

Then Marty was diagnosed. His wife said they were determined he would live to see the birth of their grandchild. It was a relatively brief illness and word was circulated in the spring that Marty had passed away. Three months later, the house had renters in it and the lot was clear with the view restored. Another neighbor had told me he didn't know what to make of it – any of it.

Mike was still looking down as we stood together on the dock. Then he lifted his head and looked over my shoulder, at that blue sky, and started talking again. I remember he said "Yes, I cut it all down for Marty – so Marty would enjoy the view and be made happier. The end came fast. So sad."

Continued on page 13

Things Left Unsaid

Continued from page 12

I listened and my eyes stayed on his face. I don't believe I came up with words – just the sort of utterances one makes when hearing big things. There was sadness in the air again and from Mike, did I sense other regret, perhaps unspoken remorse?

Timing and words are so powerful. I wondered to myself if these neighbors had found the gift of right timing and words – if bulldozer and chain saws had worked as words.

Mike and I wished each other well and went on our ways. I went back, sat down, and wrote to Marty's wife. And I hoped that Marty's brother would pull up again to water's edge – very soon – that when he does, Mike will be returning with his day's catch, will bend into the car to greet him, and maybe even offer him something.

Stories from Beyond the Courtroom

Repeating the Same Mistakes

By Deborah Wood Blevins, Deputy Commissioner, Workers' Compensation Commission

“I am so sick of this! I have been turning in mileage and travel expenses for ten years and every time whoever the adjuster is takes forever and they always say no to something!”

Joe, in his mid-fifties, was a coal miner until he was injured in an accident ten years ago. He was awarded lifetime medical benefits in conjunction with his workers' comp claim, which include mileage and reasonable travel expenses back and forth to the doctor. Joe lives in the mountains in Southwest Virginia, in a remote, hard-to-reach little place in Dickenson County. He drives to Kingsport, Tennessee, for monthly office visits with a physician, and once a year he follows up with the specialist at the University of Louisville in Kentucky who performed his surgery immediately after the accident.

After Joe's outburst in telephone mediation over a mileage and travel claim, the insurance adjuster, Betty, has an opportunity to respond:

“We have guidelines here at XYZ insurance, and we cannot just send a check when Joe sends in a mileage and travel log. We need receipts for hotels and meals if he is staying overnight in Louisville. Plus MapQuest shows there is a shorter way to get to Kingsport than the way Joe went – by 20 miles one way shorter.”

If Joe had to wait to go to a hearing to resolve this dispute, he would wait 60 days and have a car ride of an hour and a half, one way, to get to the courthouse. Betty would have to pay for her attorney to make a similar drive from Abingdon to get there. They opt instead to try to resolve the claim in Issue Mediation with the Workers' Compensation Commission, and they, their attorneys, and the attorneys' paralegals are on the phone with a Commission mediator. The mediator is a Deputy Commissioner, who is also a mediator certified by the Virginia Supreme Court.

Telephone mediations are a challenge. The mediator loses the ability to interpret nonverbal communication and to establish rapport using nonverbal communication. In this type of mediation, it is critical to establish as a ground rule that participants take turns and do not interrupt each other. The mediator, more so than during an in-person mediation, needs to control the process, identify who has the floor to speak,

and ensure that every person on the phone has an opportunity to be heard.

After 30 minutes of exchanging information, the participants agree that Joe is entitled to the mileage he submitted for the trips to Kingsport. Had he gone the MapQuest Route suggested by Betty, the trip would have taken an hour longer one-way to drive. They agree that he is entitled to most of the travel expenses submitted for the trip to Louisville.

Before terminating the mediation, Betty's attorney asks:

“Is there a way we can agree to submit these expenses in the future so that we don't have to go the Commission for help every year?”

Doesn't the mediator wish she had thought of this? Yes! Here is the lesson learned from this mediation: **In cases where the parties have an ongoing relationship, help them explore ways to avoid the same problem in the future.** In this case, 10 more minutes of conversation resulted in an agreement about how Joe and his attorney would keep travel records and submit them to Betty so that she could quickly and easily process them for payment. Avoid repeating the same mistakes!

Share your Stories from Beyond the Courtroom with us. Email Communications Subcommittee Chair Debbie Blevins at deborah.blevins@workcomp.virginia.gov