Will a Court Ever Order Discovery in Aid of Mediation?

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Discovery disputes are among the most common problems presented to courts. These, however, would not appear to be of particular concern when voluntary mediation is involved. Generally, parties who have agreed to mediate also recognize that success is based in great part upon an exchange of information that will allow for a proper assessment of the case. Moreover, when a question arises as to what disclosures are appropriate, the mediator will often assist the parties in resolving this issue.

A recent memorandum opinion issued by a federal court, however, may suggest that greater attention should be given to whether parties might unexpectedly find themselves subject to a discovery order issued in aid of mediation.

In *Selective Way Insurance v. Schulle*, Civil Action No. 3:13CV00040 (W.D. Va. 2/5/2014), the U.S. District Court for the Western District of Virginia was confronted with an issue common in cases involving multiple defendants, i.e., whether the insurance company, Selective Way Insurance Co., had the right to discover co-defendants' settlement amounts. After reviewing conflicting authority, the court ruled that under the appropriate relevancy standard, discovery should be allowed as the information was relevant to Selective's continued liability and right of setoff.

The court's opinion, however, did not end with this ruling. It further held that the discovery should be ordered because the parties had agreed to mediation, stating: "In addition, the court is a proponent of transparency in the mediation process and believes that disclosure of the requested information will facilitate the upcoming mediation. As other courts have recognized, discovery of settlement information permits the remaining parties to assess their liability and 'evaluate their risks in continuing with the litigation' and, thus, may ultimately 'promote settlement of the remaining claims.'"

The opinion continues by quoting language from another federal case emphasizing the need for a defendant to be able to realistically evaluate the case against it based upon the terms of the settlement with the co-defendants; and, that the defendant "plainly depends on that information to a meaningful degree." Disclosure of this information would assure that the remaining defendant "should not be left to grope blindly in the dark. So long as the policy of the [Federal Rules of Civil Procedure] is the promotion of the 'just, speedy and inexpensive' resolution of cases, then fairw

settlements must always be encouraged. Fairness cannot be achieved when one side is needlessly blindfolded."

The approach of the court in *Schulle* can certainly be understood in the context of that litigation. As the court noted, the amount of the earlier settlements had legal relevance, without regard to mediation, because Selective would be entitled to a setoff in such amounts against any future adverse verdict in the existing litigation. Thus, the additional language justifying the ordering of discovery by reason of the pending mediation might be viewed simply as dicta. This is particularly true as the agreement to mediate in *Schulle* was apparently voluntary, and either party, presumably, was entitled to terminate it at any time. Otherwise stated, without regard to the agreement to mediate, the discovery ordered in *Schulle* was deemed to be warranted because it was relevant to litigation that had already commenced.

But might a similar order be entered if such a motion is filed before litigation has begun, when the parties have a mandatory mediation provision in their contract?

Consider, for example, a situation in which a dispute has arisen between two contracting business entities. The seller claims that the purchaser has breached the contract by failing to pay for the products delivered. The purchaser contends, however, that the seller has breached the contract by delivering defective products resulting in damages to its business. Although both parties are prepared to go to court, they have not yet done so because the contract also requires that they mediate any dispute before either of them may commence a lawsuit.

As the seller is preparing for the mandatory mediation, it requests but is refused information from the purchaser regarding how its damages have been calculated. Conversely, the purchaser has been receiving disturbing reports that the seller is in serious financial difficulty, and that a judgment against it may have little value as it is likely to push the seller into bankruptcy. Accordingly, the purchaser has requested but been refused detailed statements regarding the seller's financial status.

Had suit already been instituted, knowledge of how the purchaser was calculating its damages would appear to be both legally relevant and discoverable. However, knowledge of the actual financial status of the seller, including the possibility of it being forced into bankruptcy by reason of an adverse judgment, would not appear to be legally relevant to the issues ultimately to be determined at trial.

Nonetheless, information as to both of these issues would be of significant importance to the respective parties as they are deciding what positions to take in seeking to resolve the dispute through mediation. Such knowledge would allow them to engage meaningfully in effective mediation; they would not, as characterized by the court in *Schulle*, be "groping blindly in the dark" or "needlessly blindfolded."

In such circumstances, one may envision both the seller and purchaser, prior to the actual filing of a complaint, seeking court orders for disclosure of the information described above by reason of the mandatory mediation provisions of their contract. The argument in support of such motions would be that the parties' contractual duty to mediate contemplates an obligation to proceed in good faith through adequate disclosures that will provide a reasonable prospect of success; and, failure to make such disclosures consistent with the contractual obligation to mediate might represent a breach of that obligation.

I believe that most practitioners involved in alternative dispute resolution (including me) would be

surprised to be confronted with a discovery order issued by a court in aid of mediation. This would be particularly so where litigation had not yet commenced, and, therefore, the information sought was not relevant to ongoing litigation. Nonetheless, based upon the court's statements in *Schulle*, it is not beyond peradventure to contemplate the issuance of just such an order to enforce a party's contractual obligation to mediate in good faith. Indeed, the approach in *Schulle* suggests that some courts might order such discovery in the expectation that full disclosure will facilitate mandatory mediation and promote settlements by allowing parties to better prepare and realistically assess their interests and positions.

In light of the policy considerations expressed in *Schulle*, perhaps counsel should give careful consideration to whether agreements to mediate, prepared before or after the dispute arose, should clarify the parties' expectations and limitations with respect to discovery through other than voluntary exchanges. In the absence of such an understanding, a court may determine that an agreement containing a contractual obligation to mediate may also warrant the imposition of a duty to disclose certain information in preparation for the mediation.

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