

Beware Asking the Arbitrator to Join in Settlement Discussions

Judge Abraham J. Gafni (Ret.)

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Often, in the midst of an arbitration, parties, and occasionally the arbitrator, sense that it would be appropriate to engage in settlement discussions. The suggestion is made that perhaps the arbitrator, who is already familiar with the matter, should participate in such discussions, rather than engaging the services of a separate mediator, and thereby extra costs may be avoided.

What danger lurks, however, if this procedure is employed?

This question was addressed recently by the New Jersey Superior Court, Appellate Division, in *Pami Realty v. Locations XIX*, 2021 WL 2961473 (July 15, 2021).

The parties initially agreed to submit their dispute to arbitration. The arbitration retainer made no reference to mediation, but did provide that except on procedural matters, there should be “no ex parte communications with the Arbitrator concerning the arbitration.” Another provision stated that “all discussions, if any, concerning settlement remain confidential, and that no party shall subpoena the arbitrator to testify concerning statements made by anyone during the arbitration or during settlement discussions.”

On the second day of the arbitration, the parties discussed settlement, but disagreed as to what led to these discussions.

Defense counsel stated that it was the arbitrator who “offered to assist the parties in discussing settlement if they were inclined to do so, and provided they waived any conflict of interest and agreed that he would continue as arbitrator if a settlement was not reached;” and that neither counsel nor parties objected, and everybody agreed with this proposal.

Plaintiff’s counsel, however, asserted that after having an ex parte communication with defense counsel in a separate office, the arbitrator “came to their breakout room and stated that the case needs to settle as soon as possible and directed that we would be using the remainder of the day to conduct settlement negotiations. This wasn’t a question posed by [the arbitrator], it was an instruction.” Moreover, there was no discussion of any conflict.

Following the unsuccessful mediation, the arbitration was completed, and the arbitrator advised that he would be finding in favor of the defendant. The plaintiff's counsel responded that this was inconsistent with the discussions during the mediation and, for the first time, objected to the arbitrator's participation in the settlement discussions, asserting that this had created a conflict which neither party had waived.

The arbitrator disagreed with the plaintiff's counsel. He asserted that the parties had discussed this procedure with their clients who had enthusiastically agreed and waived any conflict; and that after the settlement discussions were unsuccessful, the conflict was waived again, and the arbitration was completed. He further stated that he was the only one who raised the conflict issue at the appropriate time, and that plaintiff clearly waived it. Accordingly, he rejected plaintiff's attempt to invalidate any award.

The plaintiff eventually moved to vacate the arbitration award on the ground that the arbitrator had exceeded his powers when he resumed the role of arbitrator after having acted as mediator in the midst of the arbitration. Defense countered that the language in the arbitration agreement, which recited that the arbitrator would not be subpoenaed concerning statements made "during settlement discussions," contemplated that the arbitrator might participate in settlement negotiations; and that this alleged conflict had been waived by plaintiff's failure to object both initially and during its subsequent participation in the balance of the arbitration proceedings.

Eventually, a motion judge vacated the arbitration award on the ground that the arbitrator, by acting as both arbitrator and mediator, had exceeded his authority. The judge further found that there was nothing in the arbitration retainer or in any agreement that supported a finding that the parties had agreed to that potential dual role. Finally, the court only conducted oral argument but did not hold an evidentiary hearing on the circumstances leading to the mediation or otherwise address the waiver issue.

On appeal, the court was essentially asked to address three matters:

- Under what circumstances may an arbitrator continue the arbitration hearing after serving as a mediator?
- Must any agreement to allow the arbitrator-turned-mediator to continue as arbitrator be in writing?
- How must such conflicts with respect to any such agreement be resolved?

The appellate court agreed that arbitrators may serve as mediators in the midst of an arbitration, but "the parties engaged in arbitration must explicitly agree to permit an arbitrator to continue hearings as arbitrator after conducting a mediation." In support of this position, it relied upon the Code of Ethics for Arbitrators in Commercial Disputes of the American Bar Association as well as the Rules of the American Arbitration Association.

It did not agree with the motion court, however, that such a request or agreement must be in writing, finding no such requirement in either New Jersey's arbitration act or case law. It viewed such an agreement as based upon "bedrock contract law establishing the validity of oral contracts and agreement."

Nonetheless, it emphasized that an oral contract in these circumstances is not the best way to proceed. Rather, it stated, “no doubt, the better course is to put the agreement in writing. Litigants could avoid the imbroglio in which these parties now find themselves.”

How then should the conflict in testimony as to the circumstances under which the arbitrator ended up serving as a mediator be determined? The court noted that this issue is “inherently fact-sensitive and cannot be based on conflicting certifications from counsel.” Accordingly, it reversed the motion court’s denial of defendant’s request for an evidentiary hearing and remanded the matter for an evidentiary hearing to resolve the parties’ conflicting factual contentions and determine “whether the parties had, in fact, agreed that arbitrator could participate in settlement discussions and resume his role as arbitrator.”

One issue that the court specifically left open for the motion court was whether the arbitrator should be allowed or might be required to testify in the remanded court hearing. The agreement between the parties set forth that “no party shall subpoena the arbitrator to testify concerning statements made by anyone during the arbitration or during settlement discussions.” The court decided that it would be for the motion court “to determine the meaning and application of that the provision under the present circumstances and the structure and scope of the evidentiary hearing, with the understanding that the point of the hearing is to resolve the parties’ conflicting contentions regarding whether they agreed the arbitrator could participate in settlement discussions and resume his role as arbitrator.”

Finally, because the issue to be decided only involved whether there was such an agreement, the court did not “see this case as involving waiver or estoppel or laches. For an arbitrator to have had authority to participate in settlement discussions and then resume his role as arbitrator, the parties would have had to agree to give him the authority. If that agreement existed, the arbitrator did not exceed his powers. If that agreement did not exist, then he engaged in ‘unauthorized action.’” Undecided by the court was the relevance of the fact that a party now objecting had continued to engage in an arbitration following the arbitrator’s earlier involvement as a mediator without objecting prior to the continued proceedings.

The warning for parties in these circumstances is, therefore, very clear. It may occasionally be both tempting and advisable to seek the services of the arbitrator, who is familiar with the case, to provide mediation-type services while the arbitration is ongoing. Recognize, however, that this may viewed as creating a conflict which all parties should waive in an agreement that fully identifies and confirms an understanding of the conflict to assure that a subsequent arbitration award is not subject to vacatur; or, in the case of objection to such a proceeding, such objection should be timely made and properly documented. •

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