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## Beware Asking the Arbitrator to Join in Settlement Discussions



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. **[READ MORE..](#)**

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