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Washington's Supreme Court Continues to Focus on Eliminating Racial Bias From the Jury System

By Ian C. Cairns

As previously noted in this column, the Washington Supreme Court has been a leader among state high courts in addressing unconscious racial bias in the jury selection process, perhaps most notably through its adoption of GR 37.[1] More recently, our Supreme Court has issued two decisions reinforcing its commitment to eliminating racial bias from our jury system. This article provides an overview of these cases and then highlights some of the key takeaways for practitioners.

In June of this year the Supreme Court issued its decision in *State v. Zamora*, which reversed the convictions of the defendant, a Latino, and held that the prosecutor committed misconduct when, during jury selection, he repeatedly asked the potential jurors about their views on unlawful immigration, border security, undocumented immigrants, and crimes committed by undocumented immigrants.[2] In reaching this result, the Supreme Court "ask[ed] whether the prosecutor's questions and remarks *flagrantly or apparently intentionally* appealed to jurors' potential racial bias" and stressed it would apply an "objective observer" standard to answer this question rather than assessing the prosecutor's subjective intent.[3] The Supreme Court explained that an "objective observer" is "one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State."[4]

The Supreme Court reversed despite the lack of objection to the prosecutor's questions, explaining that "[u]nlike the rules for general prosecutorial misconduct, the rule for race-based prosecutorial misconduct does not differentiate between a defendant who objects and one who does not object" and that it would "not skirt the responsibility of upholding a defendant's constitutional right because defense counsel failed to appreciate the impropriety of the prosecutor's conduct."[5] The Supreme Court also refused to engage in harmless error analysis, stating that "[t]he state-sanctioned invocation of racial or ethnic bias in the justice system is unacceptable" and that "when a prosecutor flagrantly or apparently intentionally appeals to a juror's potential racial or ethnic prejudice, bias, or stereotypes, the resulting prejudice is incurable and requires reversal."[6]

Four months later the Supreme Court issued *Henderson v. Thompson*.[7] In that case, the plaintiff, a Black woman, sued the defendant, a white woman, after a car accident.[8] During the trial,

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Do You Trust Your Mediator? If Not, Get a New Mediator

By Eric Gillett

How many times have you found yourself walking into a mediation without a high level of trust in the good intentions of players in the other room? Sometimes it is borne from the fact that throughout discovery you were faced with one obstacle after another. Maybe every response to an interrogatory contained more objections than information, forcing you to schedule repeated discovery conferences followed by motions to compel. Or when taking depositions, you had a visceral feeling the deponent was well coached to answer questions in a manner that best suited their particular interest and that the truth was only offered grudgingly or when it aligned with their interests. Maybe their mediation brief set forth positions that stretched credulity at best and bordered on misrepresentation at worst. Some or all of these circumstances leave us wondering whether a mediation has any chance of success. If the other side is unwilling to acknowledge well established facts, address the applicable law in a reasonable manner, and acknowledge risk that a jury will see a case differently, then very little headway can be made to navigate your case to a mediated settlement.

As important and elusive as trust may be between the parties, it is even more important that it exist between the parties and the mediator. An oft-quoted 19th century Scottish poet, George MacDonald, said, "To be trusted is a greater compliment than being loved." While this statement was probably not offered in the context of 19th century mediations, it rings true for mediation

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as well as anything else in life. Because without trust, there is little chance a party will be willing to compromise their hard fought and well defended position.

To ensure that trust, what should you look for when considering a possible mediator? A short list, albeit not exhaustive, should include the following: (1) a genuine interest in helping your client; (2) a positive demeanor; (3) integrity with the process; (4) and demonstrated competence. So let's talk about each of these in the context of mediation.

1. A good mediator will demonstrate a genuine interest in helping your client.

How many times have you appeared at a mediation and early on it becomes clear that your mediator has not prepared for the day? Sometimes they appear to have read your materials but easily lose track of the facts, get parties mixed up or even misstate an important rule of law applicable to your case. We sometimes describe these mediators as "phoning it in." They seem to believe that their skills as a mediator do not require them to take the time to understand the facts, the law, and more importantly, what makes your client tick, what will motivate your client to settle?

A good mediator should spend enough time reviewing the information both sides provide so that they know the case, based on that information, as well as you do. In addition, there is no excuse for not offering to speak with you before the mediation to discuss the facts, the law, the credibility of witnesses, the relationship between the lawyers, the relationship between the parties, the risks faced by each party, and any obvious or nuanced impediments to settlement, such as liens or other expenses.

These discussions can and should also take place during the mediation as the day progresses. But having them several days before the mediation will help you, as the attorney, begin to think more critically about your positions before you are "on the spot" at the mediation in front of your clients. In essence, this pre-mediation discussion allows you to rehearse your positions. You are allowed more vulnerability to come forward without risk that it doesn't play well for your client or the other side.

This takes us right to the main issue of trust. You must trust the mediator not to abuse this vulnerability. You must trust these issues are discussed because doing so will help you resolve the case in the best interests of your client. A mediator who takes these steps before the day of mediation demonstrates that they are genuinely interested in helping your client resolve their case.

2. A good mediator will command a sense of confidence that, with the parties' help, the case can be resolved.

Most mediators walk into the room with a friendly demeanor. They address the parties and their lawyer respectfully. If, however, they fail to exude a sense of confidence in their ability to resolve the case, little trust can be achieved. Occasionally, a mediator will let on very early that they see more obstacles than pathways which often causes your client and you to lose hope. You should expect that your mediator will focus on the pathways, not the obstacles. Navigating your case to a settlement requires a high level of positivity.

A lawyer recently talked to me about a mediation where this became a problem. It was a significant injury case and about halfway through the day, the mediator's attitude became a hindrance. The lawyer explained that the mediator expressed her skepticism about getting the case settled. According to the lawyer and confirmed by his client, it felt to them like she had given up. This was disappointing to the lawyer and his client because they felt like they were cast adrift. Their trust in the mediator was lost. While they got the case settled, they felt like they did so despite the mediator's involvement. They had to take over the lead role and provide the mediator with direction she should have commanded from the beginning.

Your mediator should maintain the parties' trust by always demonstrating a high level of confidence in the process. Without that, their role can become an impediment and one that may prevent a settlement.

3. A good mediator will demonstrate integrity with the mediation process.

Mediation is a sociological paradigm. Two or more parties with disparate interests are forced together knowing they will be encouraged to compromise their strongly held beliefs. This does not happen without trusting that your mediator believes in the mediation process. Whether the mediation process is evaluative, facilitative, or transformative doesn't matter. Trust in the process must be achieved or the parties will not engage in compromise. Without trust, without the ability to compromise, a mediated settlement is nearly impossible.

It is an axiom that 99% of all litigated cases settle rather than go to a verdict. The reasons for that accepted truth are multifaceted. Risk and expense are two major factors. But aligned with those factors is the fact that a good mediator, genuinely interested in helping the parties, confident in their ability to navigate a case to settlement and aligned with the mediation process allows the parties to see a path toward a solution.

How many times have you heard a lawyer talk about a good settlement is one where everyone walks away a little bit unhappy? The reason a party is unhappy is because they decided to compromise. They made this decision because their mediator gained their trust and guided them to a better alternative than a risky jury verdict. "It cost me more money, but we closed the file." "I accepted less than what I might have received from a jury, but I didn't have to sit in a courtroom for two weeks worried that a jury would not understand how badly I was injured." These are just a couple of thoughts we hear from our clients. The process worked because a good mediator helped your clients understand that it works.

4. A good mediator will demonstrate a high level of competence with respect to the facts and the law involved in your case.

It is important to trust that your mediator knows what they are talking about. If you go to see your family doctor because you have a cough and she tells you that you probably have cancer, you would be well advised to seek a second opinion from an oncologist, someone who has a high level of competence diagnosing cancer. The same is true for mediation. At a minimum, your mediator needs to understand the law that a jury will consider when evaluating your case.

This does not necessarily mean they have worked in this particular area of law. The law may be easily understood given sufficient effort to do so. This takes us back to the first principle discussed, that your mediator has a genuine interest in helping your client. If the mediator is willing to take enough time to learn the law involved, they might be perfectly suited to navigate your case to a fair settlement.

For example, while a mediator may have a background steeped in tort law, this does not preclude them from assisting you with a contract dispute. Or your mediator may be known for handling construction defect cases but with sufficient effort, they may be a great choice for your negligence case.

The reason for this is because there are several factors, some of which are discussed above, that contribute to whether you have a good mediator. A weakness in one area may be sufficiently outweighed by their strengths in other areas. It is important that you vet your potential mediators by considering where their experience lies and opinions from others about how the mediator handles their cases.

Trust is a predicate to the ability to compromise. If you can't trust your mediator, then you will not feel safe demonstrating vulnerability. You and your client will not want to "show your cards" because you will not have the faith that your mediator will play them to your advantage. The ability to compromise requires that you feel safe when you are vulnerable.

A final thought. Gaining your trust should not be easy. It is an important asset. As a mediator, the only thing more important than gaining your trust is never losing it. Once lost, trust is exponentially harder to regain. A good mediator will not lose your trust. ■

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