Another Day, Another Marvin

By Alec Wisner

9/21/2009 8:49:07 PM Central Standard Time

Today, I conducted a very contentious six hour mediation. The rubric of the case was legal malpractice. The underlying case involved a suit by the live-in girlfriend of a deceased celebrity, under *Marvin*, for quasi-contractual recovery of as much as $2 million dollars. The malpractice itself was, as I saw it, clear. The damages, though, as is the usual case, were very slippery. The case was either going to be a home run for the Plaintiff, with a recovery of as much as half the proceeds from a very successful album, as well as live performances, or, on the other hand, a defense home run, with a *Marvin* case, bereft of the music adn of minimal value.

In this case, there was no middle ground. The value was either *de minimus* or substantial. To exacerbate things further, defense counsel had to answer to an insurance adjuster in the Midwest. On the face of it, this was precisely the sort of case that might scream "impasse" to a less experienced mediator.

Fortunately, the two attorneys had a collegial relationship. I took a huge risk and, after doing a lot of groundwork with each side, decided that further incremental bargaining would not be fruitful. Instead, I caucused with both attorneys and did something very unusual. I told them the range of what I thought the case was worth and that I would make a mediator's proposal in that range if I had no tools left. But I suggested that if counsel would cooperate with me, I wanted to structure the negotiation to land there or thereabouts. Under this circumstance, both sides agreed to openly discuss where the negotiations were at that time. This was made somewhat easier by the fact that each side had already gone way out of what they believed their settlement range to be.

The case then moved forward. I continued to work at softening up the Plaintiff in terms of the number itself, while defense counsel worked on her adjuster. By mid-afternoon, she told me that the adjuster had made a serious move, but had then hardened his position. Again, I conferred with both attorneys, obtained helpful information from both, and suggested that I make a proposal, given

the relatively narrow gap that we had before us. I told them that I would give them the rest of the week to respond to the proposal.

My proposal did several things. First, it was in an area that defense counsel could not have possibly broached without the extreme likelihood of completely losing her adjuster. Second, it was not so far away from the number I'd been working on with Plaintiff that it was likely to cause an end to the negotiation. Finally, and most importantly, I calculated that the number would cause an equal amount of choking and indigestion for each side.

We adjourned after six hours. I felt that I had gone the extra mile and produced a result. Both attorneys thanked me profusely (and separately). This didn't surprise me, since neither of them gave this case much, if any, chance of settling. The gap had been well over $1 million dollars once I got started. We ended with a gap of no more than $50-60,000 by the time we adjourned.

This story is just another illustration of my prime credo: impasse is just an excuse for not going all out. I don't believe in impasse, save for the rare exception.