MEDIATING A QUI TAM SUIT

THE IMPOSSIBLE DREAM?

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Settlement remains one of the most awkward, complex and unaddressed issues in qui tam litigation. Negotiations stretch out over protracted periods of time, and meanwhile, parties continue to pay the high costs of litigation and trial.

In virtually every other civil litigation context, the parties regularly mediate and resolve cases. Qui tam cases, however, remain notoriously difficult to settle and are rarely mediated.

Qui tam cases are, admittedly, more difficult to mediate than other types of lawsuits. The difficulties are not insurmountable, however, and for the sake of every stakeholder, the qui tam bar needs to embrace mediation solutions to these cases.

This paper will discuss 11 difficulties with mediating qui tam lawsuits, and how to address those complicating factors so that the mediation can be successful.

1. Negotiations Involve Multiple Entities.

Having multiple parties complicates any mediation, and is an inevitable factor in qui tam cases. Qui tam negotiations involve at least three entities: DOJ (and hovering in the background, at least one agency); at least one relator; and at least one defendant.

To minimize the complications, it is critical to have all of the major stakeholders present at the mediation. Empty chairs are dangerous, because the parties that are present are uncertain whether the agreement they reach can be "sold" to the absent party. The uncertainty makes the parties less willing to compromise or think creatively to reach solutions. And at the end of the day, the parties are left to wonder whether the deal they have reached really is a deal.

Sometimes the Government or the defendant considers excluding the relator from the mediation. In rare situations where the relator will create instability and chaos at the mediation, excluding the relator may make sense. Usually, however, the parties will be more likely to reach an acceptable solution if everyone who has a stake in the result is present.

The parties also can smooth the path toward settlement by resolving or agreeing on issues in advance of mediation. Qui tam cases have between 2 and 6 "negotiations within a negotiation" (see *infra*). To the extent that any of those negotiations can be resolved in advance and eliminated before the mediation, the parties increase their chances of reaching a settlement at mediation. By eliminating issues, the parties can focus their time and attention on the issues that must be resolved in order to settle the case.

Beyond having all of the stakeholders present, the parties have to be willing to be flexible during the mediation, and they have to accept that their interests will shift depending on the issue. Sometimes the Government and the relator will have aligning interests — and sometimes they will not. The Government and the defendant will usually be on opposite sides of an issue, but they may find themselves allied on a particular matter. Although these shifting alliances can be disorienting, they are important, and the parties have no choice but to embrace them.

2. Unsettled, Changing Area of the Law.

For most lawsuits, the law that applies to the case is only a minor issue. The parties may dispute liability or damages, but they agree on what legal framework will be applied. In qui tam cases, by contrast, the parties often have true legal disputes that have no clear answer in case law. Because relatively few qui tam cases are filed each year, and because the entire area was largely dormant between World War II and 1986, the body of qui tam case law is small. Furthermore, the False Claims Act has been amended an unprecedented three times since 2009.

When the parties are not sure about what law applies or how it will be applied, they have a harder time valuing a case and deciding whether to settle. Everyone may agree that the case has a high dollar value — but only IF the court does not dismiss it.

Cases that involve unsettled case law can still be settled — just as cases often settle on appeal, even when one party is disputing the law. In order to settle the case, though, the two sides need to exchange arguments. The Government and the relator need to understand the defendant's best arguments, and vice versa.

We lawyers are a secretive bunch; many times we hold onto our best arguments, figuring we gain some advantage by keeping them under wraps until the last possible moment. If it helps, think of it this way: mediation IS the last possible moment. If you want to settle the case, you will have to reveal your best arguments. The other side has to understand what it will face in order to make a reasoned analysis of the legal risks involved in the case.

Similarly, both sides need to supply the arguments to the mediator. The mediator has to have a foundation in qui tam law sufficient to allow her to review and thoroughly understand the legal issues at play. The fact that so few mediators do have that foundation makes these cases very difficult to mediate, and will be discussed more below.

3. Obtaining Government Authority and Approval Where the Government is Present at Mediation.

The Government's attorneys need to get approval before they can settle the case, but they cannot get approval until after they have a concrete number to present. That Catch-22 means that at the end of the mediation, the parties *think* they have a settlement, but the settlement cannot be finalized until the Government runs the mediation result through the entire approval process.

To minimize the uncertainty and to increase the chances of settlement, the attorneys who will be negotiating for the Government should grease the approval wheels in advance. In other words, before they leave for mediation, they should talk to the people who ultimately will need to approve the settlement, discussing any open or uncertain matters that could affect the value of the case and an acceptable range of settlement under the circumstances as they presently stand.

In truth, insurance adjusters face this issue every day, although the approval process obviously works itself out on a much smaller scale. In order to increase the chances of settlement, before the mediation starts the insurance adjuster talks to her supervisor about the facts of the case and the potential outcomes at trial, and together they craft a mediation strategy and come up with a maximum authority for settlement.

This problem cannot be entirely eliminated, but the mediation is far more likely to be successful if the Government's attorneys let the other participants know that they *believe* they are operating within a range that is *likely* to be approved. Obviously the Government's attorney cannot make any guarantee that the settlement will be approved, but the parties are more likely to negotiate toward settlement if they at least have reassurance that the Government's attorney has thought through the approval process and done all that he was able to do before mediation.

Additionally, the relator and the defendant can increase the chances of settlement by letting the Government see their damages models and numbers in advance of mediation. That way, the Government can be sure the key decisionmakers have evaluated and discussed those options before mediation.

4. Obtaining Government Authority and Approval in Non-Intervened Cases.

Even if it has not intervened in a case, the Government still has to approve the settlement. To make the approval process easier, if at all possible, the Government attorney assigned to the case should attend the mediation. If the Government is not present, the parties may hold back on their positions, reasoning that they need some room to maneuver if the Government makes new demands after the mediation. Additionally, defendants want to be reassured that they are negotiating for a release from the Government as well as the relator.

If the Government does not plan to send an attorney, the parties can increase the chances of settlement if they keep the Government's attorney fully informed in advance of the mediation, and ask her to at least be available by phone. During the mediation, the parties and/or the mediator should be in frequent contact with the Government to be sure that the agreement the parties reach is likely to get Government approval.

5. Lack of Mediators Who Understand this Arcane Area of the Law.

Qui tam cases are rare and unique, true unicorns of the law. Few lawyers have experience with them, and since mediators are drawn from the pool of lawyers, even fewer mediators have experience with these types of cases. When the mediator does not understand how these cases work and does not appreciate the distinct pressures on each litigant, the chances for a successful mediation plummet. Ultimately, the dispiriting lack of success at mediation may discourage attorneys from even attempting a mediated settlement.

This problem can be avoided if the litigants carefully select a mediator who has experience in the qui tam area and understands the legal framework. To appreciate the pressures faced by each of the parties — government, relator and defendant — the mediator has to understand how these cases work, both legally and practically. For example, the mediator needs to be aware that most qui tam cases involve multiple negotiations about topics ranging from relator's share to a potential corporate integrity agreement. The mediator needs to explore where the parties stand on these sub-negotiations, because unresolved issues make it less likely the parties will reach a settlement and then be able to hammer out a final agreement.

6. Offshoot Negotiation #1: Relator's Share.

Qui tam mediations involve multiple, offshoot negotiations. For example, the relator has a claim to a share of the Government's take, and the percentage of that share may be in dispute. If so, either the Government or the relator may be reluctant to agree to a settlement.

To increase the chances of settling at mediation, the mediator needs to work with the parties in advance to identify, and if at all possible resolve, the subsidiary negotiations. The mediator should ask the Government and the relator whether they have discussed the relator's share. If they have not reached an agreement, the mediator can work with them to generate some back-and-forth discussion, and ideally even resolve the issue before the mediation begins. If the relator's share cannot be worked out in advance, of course, the mediator can simply add it to the bundle of issues to be addressed at mediation. But if the issue can be addressed up front, the parties can focus the mediation on the chief issue of how to settle the qui tam case itself.

7. Offshoot Negotiation #2: Non-Monetary Terms that Apply to the Defendant.

The government sometimes imposes non-monetary terms, such as a corporate integrity agreement, and on occasion the underlying agency considers excluding key stakeholders at the company. When the defendant is unsure what sanctions will be imposed, it may be reluctant to agree to a settlement.

Before the mediation starts, the Government's attorneys should discuss the settlement with the agency, to be sure they understand what position the agency will take on non-monetary terms. Usually the Government will be up front at the mediation about what non-monetary terms the agency is considering; the more certainty the Government can offer to the defendant, the more likely the defendant is to settle.

8. Offshoot Negotiation #3: Settlement Agreement Terms.

At mediation, parties tend to focus on the raw numbers of the settlement, but it would be a shame to reach a number and then have the deal blow up because the parties did not agree on what constituted the "covered conduct," or because a key stakeholder expected a release which the Government refuses to provide, or because the defendant was anticipating a non-admissions clause, while the Government was not. Ideally the parties should discuss the most important settlement terms at the mediation. As with the question of non-monetary terms, the chances of reaching a final agreement increase if every stakeholder knows what to expect.

9. Offshoot Negotiation #4: Multiple Relators and First-to-File Issues.

Increasingly, qui tam cases involve side disputes between multiple, competing relators. The relators are fighting for their legal lives, because under the statute, only the relator who filed first can recover - and if a relator does not recover, in most situations neither does his counsel. Of course, a later-filed relator may have a legitimate stake in the proceedings if his claims were, for example, related to different conduct, a later time frame, or a separate defendant.

Relators are increasingly turning to mediation to resolve their competing claims. Ideally, this mediation should take place before the main case mediation. If the relators can present a united and focused front at the main mediation, they will increase the chances that the case can settle. If the relators cannot reach agreement, their dispute can complicate the main mediation. The relators may have competing ideas about settlement proposals and how to respond to defense proposals. Additionally, the parties may have to address complex sub-issues, such as what amount of the settlement applies to each unique claim. The case will be easier to settle if all of the relators are united in their response to the defense and can agree to a single number that will settle all of the relators' claims and then be split among them in accordance with a pre-arranged agreement.

While this issue typically affects the relators more than the Government or the defendant, the debate between the relators can spill over into the main negotiation. Additionally, if the multiple cases are filed in different jurisdictions, the parties may be forced to navigate through more than one court to obtain stays and then finalize the settlement and releases.

10. Offshoot Negotiation #5: (h) Claims.

In many qui tam cases, the relator also has filed an (h) claim for retaliation. This issue has to be negotiated separately, but it can be addressed in the same mediation where the parties are addressing the primary claims. The Government may not get directly involved in the negotiation, but it is nonetheless affected, because adding any additional issue complicates the mediation experience for all of the participants.

As with any mediation, the relator needs to be sure that the defendant has complete information about the damages in advance, so that the defendant can come to the mediation

with sufficient authority to settle the claims. Except in cases where the defendant has a great deal of animosity toward the relator, the defendant tends to focus more on the Government's claims, which typically have a higher dollar value. If the relator can make a demand in advance of mediation, it will help to ensure that the defendant comes prepared to address the (h) claim as well.

11. Offshoot Negotiation #6: Attorney's Fees.

Under the statute, the defendant must pay the relator's attorney's fees. These claims may be substantial, but debate reigns as to just how to resolve them.

Some relator's counsel, concerned that they not allow their own interests to compete with the interests of the relator, believe that the issue of fees needs to be set to one side while the parties negotiate the main claims. Some relator's-side counsel even refuse to tell the defendant what the fees are until after the parties have reached a settlement on the relator's main case.

Defense lawyers contend that it is very difficult to advise a client to settle when the fees remain outstanding and unknown. The defense counsel is picturing this ugly scenario: the defendant labors over the decision about whether to pay $4 million to settle a case, and on the advice of counsel, finally concludes that the rational decision is to pay that amount rather than go to trial. Then, after the agreement is inked, the relator's counsel submits a claim for $4 million in fees. If the defendant had known that the fees claim was so high, defense counsel would have recommended that the defendant take its chances at trial. Perhaps that result is not the norm, but when the defense counsel has *no idea at all* what the fees will be, he feels he has to assume the worst.

The ironic result is that while the relator's counsel is trying to avoid a conflict by keeping the fees separate, she may actually be decreasing her client's chances to settle the case.

In the end, counsel can take comfort in the fact that Congress — not the relator or her counsel — provided that the relator and the relator's counsel would pull their payments from a single source. If that factor creates conflict between the relator and her counsel, it is conflict that was created and sanctioned by Congress. Fortunately, any conflict can be disclosed and managed.

CONCLUSION

For the sake of all the stakeholders, the qui tam bar needs to embrace mediation as a way to resolve cases faster, more cheaply, and with maximum input from all of the stakeholders.

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