

nic-Calabasas A, Inc. v Frank Moreno, the Court declared that mandatory arbitration provisions, which waive the right to a 'Berman' hearing, are against public policy and unconscionable.

left his position with Sonic. In December 2006, he filed a wage claim with the Labor Commissioner for violation of Labor Code Section 98.

He petitioned the Superior Court to compel arbitration and to dismiss the pending administrative action. (Code of Civil Procedure, § 1281.2.) Sonic argued that Moreno waived his right to the arbitration agreement. The Labor Commissioner ruled in Moreno's favor, and arguing that the arbitration agreement did not preclude Moreno from filing an administrative action under Section 98. The Labor Commissioner also ruled that a Berman hearing was compatible with the arbitration agreement and could be followed by arbitration in lieu of an administrative action under Section 98.2. Sonic contended that a contrary interpretation of the law would give a Berman hearing would violate public policy, and that the Court's decision regarding mandatory employment arbitration in *Armendariz v. Foundation Health Psychcare*, 45 Cal.4th 83.

Sonic argued that the petition to compel arbitration as provided in the petition stated that, as a matter of "basic public policy," the preliminary non-binding hearing and decision, the arbitration provisions of the employment agreement, and any petition to compel arbitration is void. Sonic appealed from the order of denial. The Court, however, concluded that Moreno had not waived his right to a Berman hearing and that enforcement was not required.

The Court reversed, finding the provision to be contrary to public policy. As the Court explained, "[i]f an employer requires an employee to choose between two principal options. The employee may seek redress through a Berman hearing or through a civil action against the employer...[o]r the employee may seek redress through an administrative relief by filing a wage claim with the com-

missioner. The Supreme Court stated that the question is whether the employee's statutory right to a Berman hearing, with all the possible protections that follow from that right, is so fundamental that an employee cannot be compelled to waive that right as a condition of employment. The Supreme Court concluded

that, "[a]lthough the statutory protection afforded by the Berman hearing and the posthearing procedures afford some relief over a number of years, their common dependence on the average worker on prompt resolution of the Berman hearing and the costs of affording an employee with a merit-based hearing, chiefly designed to reduce the costs of such a hearing, recognizing that such costs and risks are inherent in becoming a reality. These procedures, including the one-way fee provision, also serve the purpose of prolonging a wage dispute by filing an administrative action, which furthers the important purpose of ensuring that workers are paid wages. The Berman procedures, therefore, is not merely a procedural device but in fact central to that purpose. It is no doubt that permitting employers to require an employee to waive their right to a Berman hearing undermines the efficacy of the Berman hearing statute's public purpose behind the statutes."

The Court concluded the Berman waiver at issue was unenforceable. The Court's conclusion was the same when it addressed the enforceability of the arbitration agreement, stating that "the arbitration agreement indisputably imposed as a condition of

employment. The FAA did not pre-empt its finding that a predispute arbitration agreement was contrary to public policy.

The Court held that employers with similar arbitration agreements could not compel arbitration of similar claims before the Labor Commissioner until after a hearing before the Labor Board. An employee has the right to a Berman hearing in the arbitration agreement, and that right may be enforced after a Berman hearing has

Scott A. Freedman is an attorney at Morris, Mitchell & Purdy LLP. He specializes in labor and employment law and has an extensive background handling cases dealing with discrimination based on gender, race, age, sexual orientation, disability, pregnancy and sexual harassment. He can be reached at (415) 417-5317 or sfreedman@mpplaw.com.

... to raise the price of Norvir like GlaxoSmithKline to sell it in rebecca_beyer@dailyjournal.com

Professional Tools for Litigators: Settlement Conferences

By James P. Gray

Back in the Dark Ages when I was trying cases as an attorney, it was considered a sign of weakness to be the first to suggest settlement discussions. Fortunately that day has passed, and most attorneys now realize that they can best serve their clients if they help to resolve their cases expeditiously.

But this begs the question: What is a litigator's job description? In my opinion, it is to provide as good a resolution for the client as we can within the law and ethics of the legal profession, and for a reasonable price. In other words, it is to provide value. The job description for judges is different. It is both to arrive at as right and equitable a result as possible under the facts and the law, within a reasonable time, and also to enable all concerned to believe that this has been accomplished.

This is a competitive world, and sometimes, just to get a potential client in the door, attorneys feel they must promise them something that they cannot reasonably deliver.

What are the biggest pitfalls working against the reasonable resolution of a case? The most prominent obstruction comes from attorneys who initially oversell case results. This is a competitive world, and sometimes, just to get a potential client in the door, attorneys feel they must promise them something that they cannot reasonably deliver. If a reasonable proposal is offered to settle the case for \$40,000 when the client was earlier "promised" a settlement of at least \$100,000 by their attorney, the client might accept after lots of cajoling. But the client will never be satisfied, which means that the attorney will never receive any repeat business or referrals from that client.

The second pitfall results from attorneys not having a theory of the case. Insightful attorneys begin to form a theory of their case from the moment they speak with the client. This allows the attorney to act accordingly by premising each step taken with: "Will doing this further my chances of establishing my theory either to the jury or the judge?" Unfortunately, all too often as a judge I found that attorneys, during settlement conferences, did not have a theory. Sometimes I would not know what the attorneys' theories were even after opening statement at trial! And the poor results at settlement conferences, trials and motions, etc. almost always bore witness to that defect.

The third pitfall is not having the decisionmakers present at the settlement conference. As a sitting

judge, our local rules dictated that the actual decisionmakers had to be present. If they were not, usually I would set the matter for an order to show cause for sanctions in the amount of the costs of bringing the non-offending party and counsel back for a second try. I would also order the absent party's decisionmakers to be present at the second conference. (Actually, as long as I used this approach with cases in which the absence really did make a material difference, the second conference almost never took place because I would hear that the case settled "on its own.")

Along the way I have learned some tips in facilitating a reasonable and prompt settlement. At all costs, the participants are to avoid what I call "poisonous words." That means that any time counsel or a party uses words like cheat, fraud, scoundrel, liar, or dirtbag, for example, I would immediately interrupt and instruct that such terms were not allowed, because all they do is to push people further apart.

I would also ask counsel and the parties if they felt this case was being pursued as a business decision, or based on emotions. If the answer was emotions, I would advise that it would be hard to settle the case because emotions are hard to quantify. This accomplished two worthwhile purposes. First, it helped everyone determine if the case had a reasonable chance of settlement. And second, it often helped the parties to switch their focus, and actually begin to base their case on business decisions. But this would only usually happen after those parties had an opportunity "to vent" to me as the neutral judge or mediator, thus giving rise to the feeling that they had their "day in court."

There is also what I call the "psychology of numbers." Many times I found, for example, that if I pursued a settlement for \$70,000, defendants would object and hold firm that this was simply too much money, and they would never go that high! But if I suggested \$68,750, they would readily agree.



Conversely, most plaintiffs would realize that the lower figure was only \$1,250 less than the higher one, and that would give them no problem at all. So many cases will settle, as long as you do not cross some psychological barriers. It is a real study in human nature.

Similarly, in a tort case you can use a practical "formula" for arriving at a settlement figure. Take for instance a settlement conference with all counsel present. I ask plaintiff's counsel what she believes is a standard, "plain vanilla" verdict from a jury on the case. If her response is \$80,000, which is not really out of the ballpark, then I would agree, and ask what her views are of the chances that her client will get a judgment at all. If she says 70 percent, I explain that the case has a settlement value around \$56,000, which would be 70 percent of \$80,000. I continue by asking that if they get a judgment at all, what percentage of comparative negligence would the jury reasonably find against her client — because there is almost always such a finding. If she says 20 percent, then I subtract 20 percent from the prior figure, and suggest the final settlement amount should be around \$44,800. The parties seem to attach significance to this formula, because it makes things seem less amorphous, and the cases will usually settle right around that figure.

There are many more similar little "tricks of the trade," but I want to use the remaining space to focus on some traps for the unwary once a case is close to settlement. Be aware and careful of tax issues that may result from the proposed settlement. Always make a formal recommendation



James P. Gray is a retired judge of the Orange County Superior Court, and works as a private mediator and arbitrator for ADR Services Inc. He is the author of *"Wearing the Robe: The Art and Responsibilities of Judging in Today's Courts"* (Square One Press, 2010), and can be contacted at JimPGray@sbcglobal.net, or through www.JudgeJimGray.com.

to your clients to seek competent tax advice before the settlement is finalized. In addition, always put on the record that no one present can bind any government agency to any particular tax result, so regardless of how it comes out with the Internal Revenue Service and Franchise Tax Board, the settlement will still be binding upon the parties.

Furthermore, under Code of Civil Procedure Section 664.6, there simply is no settlement period unless either all of the material terms of the settlement agreement are placed on the record before the court, and agreed to by all parties, or all the terms are contained in a writing that is signed by all of the parties.

Two final thoughts. First, do not forget to file a motion for a minor's compromise, etc. in appropriate cases, and second, decide if it is in the best interest of the parties to waive Section 1542 of the Civil Code, which means that each side waives and gives up any and all claims they may have against the other, whether known or unknown. This means that the parties will be able to be rid of each other's shadow regarding anything that has happened between them up to that moment. In most cases, that is a good thing, unless they have other dealings or agreements that should still be enforced. But be careful, because sometimes this can be really important.

Looking back, I believe that generally the most gratifying thing I did during my 25 years on the bench was helping people to resolve their differences voluntarily if they could. This can really be uplifting for just about every reason imaginable, and I hope that some of these recommendations will assist you to achieve that same gratifying experience.