

VERDICTS & SETTLEMENTS

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Straight to the Point

Deborah Ballati of JAMS tries to avoid cases settling right before trial begins.

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SAN FRANCISCO — For JAMS mediator Deborah Ballati, sometimes the most disappointing settlements can be those that happen on the courthouse steps.

“You sit back after you settle on the courthouse steps and say, ‘Couldn’t I have done this a year earlier and spent way less money for the client?’ And forget about the money; not have them had to go through that process of getting ready for trial.”

Ballati’s process in mediations is focused on research and preparation before the actual meeting so she can home in on the sticking points in a case. She said she starts by asking each side if the case is ready for mediation or whether it is on that track for contractual or other reasons.

Whether there have been previous settlement conversations and especially if there have been offers and counteroffers made, she collects all the essential facts ahead of the actual mediation, Ballati said.

She also encourages a level of communication between both sides.

“I urge the parties to exchange their statements so that we’re all on the same playing field when we start out the day of the mediation,” she said. “I ask about sensitive personality issues. Is there something going on here that you think is an impediment from a personal standpoint?”

“Part of this process that is mediation is the lawyer and their own client and how they interact with each other and what the client needs to believe about what their lawyer is doing,” she said.

During a pre-mediation call, Ballati said she hashes out issues such as whether a joint session is necessary and chips away at what each side might need to come to an agreement.

The actual process of mediation can also be integral to a settlement, she said, noting that careful preparation is necessary to avoid jumping to conclusions before a full analysis can be done.

“You can’t figure out how to solve a problem unless you know, in my view, why it happened,” Ballati said. “So often people want to ignore the possibility that the facts might not be as they think they are.”

Ballati said she at times tells lawyers not to use the words, “This is my bottom line,” too early in a mediation.

“For me ‘too early’ means certainly don’t do it on the first call, certainly don’t do it in the first session, and maybe don’t



Chase DiFelicantonio / Daily Journal

ever do it,” she said. “Once you say the words out loud, especially lawyers, you get wedded to it, and it’s really, really hard to move off of it at that point.”

As a lawyer and mediator, Ballati’s expertise is largely in the construction and insurance fields and she said she has always found it very useful to have decision-makers from the relevant parties or companies present at a mediation.

“I require it as much as I can require anything,” Ballati said. “It works partly because the process morphs as the day goes on and people get invested in the process and they’re invested more in resolving the dispute than they are in the dispute.”

Nothing settles a case like a solid trial date, however, she said.

To boost the chances of a resolution, Ballati likes attorneys to “hit the sweet spot of the case being ready enough that it can settle and not being so ready to go to trial that the number’s gone up or the amount you’re willing to offer’s gone down because you’re so close to trial and you’ve spent the money.”

Many construction and insurance cases are complex and involve multiple parties, according to attorneys who have worked with Ballati as a mediator. She said while she always tries to settle a case that day, extra time can sometimes be helpful in getting to a resolution.

“I also discuss this with the parties when we’re having those pre-calls, ‘Do you think this can settle in a day?’” she said. Depending on the case, Ballati said she might schedule two consecutive days

or space them out, sometimes instructing the lawyers to read each other’s case law more carefully.

A mediator’s proposal is not out of the question in certain circumstances as well, Ballati said, but only when both parties ask her to make one.

“I’ve heard some mediators say that the mediator’s proposal is not what I think the case should fairly settle for, it’s the number I think that the parties each will accept,” she said.

Ballati said she did not take that decision lightly because it meant a more evaluative stance from her as the mediator. She noted there is a divergence of views on whether a mediator should step away from a case after making a proposal.

“It doesn’t necessarily mean you can’t be useful in the future,” she said, adding she carefully explains how it might affect her future role in trying to resolve a case before she puts forth a number.

Ballati has also handled many arbitrations while at JAMS and, before that, as a practicing attorney at Farella Braun & Martel LLP.

She said that while she has never had a dispositive motion brought to her as an arbitrator, “I am very, very open to that and I tell parties.” She noted, however, that it was “risky to grant dispositive motions in cases because it can subject your ruling to being overturned because you failed to take evidence.”

In terms of evidence, she said she “errs on the side of letting things come into evidence rather than simply saying, ‘No, that

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is just so totally irrelevant that I’m just not going to listen to it,” on the assumption it will not be factored into the final analysis.

Ballati said she tries to avoid stepping in and taking over a case as an arbitrator and prefers to let the attorneys do their job.

“As an arbitrator, I will ask clarifying questions if I don’t understand something,” she said.

“She grasped the issues readily, was able to focus in on what the core disputed issues were that the parties needed to mediate and her style is such that it is not in any way confrontational or belligerent,” said Michael Zetlin of Zetlin & De Chiara LLP who handled a construction dispute in a mediation with Ballati.

“She definitely built rapport with all of the individuals involved as far as I can tell and certainly with all of the lawyers,” said Douglas Straus of Buchalter APC.

It was not often that an attorney called on a former opposing counsel to mediate a case, but that is exactly what Peter Catalanotti at Freeman Mathis & Gary LLP asked of Ballati.

“She sort of gives it to you straight, which a lot of mediators won’t do,” he said.

“One of the reasons I asked her to mediate the case I have now with her is because she’s got a real depth of knowledge in insurance coverage issues,” Catalanotti said of the complex insurance coverage case she mediated.

A San Francisco native, Ballati is married to retired San Francisco County Superior Court Judge David Ballati. They have a chocolate Labrador and enjoy cooking, reading and traveling.

Here are some attorneys who have used Ballati’s services: Douglas Straus, Buchalter APC; Alan Packer, Newmeyer & Dillion LLP; Michael Zetlin, Zetlin & De Chiara LLP; Robert Swanson, Boutin Jones Inc.; Peter Catalanotti, Freeman Mathis & Gary LLP