As a mediator, I try to be likeable. In fact, I’ve always thought that if the parties like me, then they will be more likely to settle. The alternative, after all, would be for the parties to have to fight each other as well as me as the mediator. A number of months ago, I mediated a case involving damage to a car by a shopping cart at Big Grocery Store (BGS). The plaintiff asked for $1000 in damages due to the repair costs. The store representative from BGS claims that most “cart claims” are worth $200-$300 and that this claim for $1000 is far out of line from the usual case. In joint session, the plaintiff explained to me that his vehicle had an intricate paint design (and he provided pictures), and that the reason that the estimate was so high was because the cart hit his car at a particularly bad spot, requiring three different paint colors and many hours of labor costs. The defendant did not care about plaintiff’s elaborate paint job and was unwilling to pay more than $300 to the plaintiff.

At this point, I broke the parties into caucus to explore any number of options. During caucus, the plaintiff says that he “doesn’t need the money” and that this case is a “matter of principle.” The plaintiff has already spent the $1000 to repair the damage to the custom paint job. After exploring some options, the plaintiff seems unwilling to settle for anything less than $1000. After all that posturing, the plaintiff turns to me and says: “But I like you. And if it is better for you that I settle the case, I will settle it.”

What should I do next?

Author’s Discussion

The March/May ethical dilemma considers the limits of self-determination and whether a party can have a legitimate interest in pleasing the mediator.

Two of the central tenets for mediation are that the mediator be both unbiased and neutral. A mediator is unbiased when she has no preference for any of the parties. A mediator is neutral when she does not have a stake in the outcome. The party’s comment about wanting to settle for the sake of the mediator potentially implicates both bias and neutrality. When parties start to question a mediator’s own interests, then the mediator may start to feel biased in favor the party who is interested in keeping the mediator happy. In addition, the party’s comment may have an effect on the mediator’s neutrality, if the mediator then has a “stake” in the outcome. The other side of the coin, though, is party autonomy and party interests. Can a party have a legitimate interest in pleasing the mediator? If so, then the party should be able to explore that option and how it could be satisfied.

As a practical matter, the mediator should be clear with all of the parties that the mediator is unbiased and neutral and thus has no stake in the outcome. The mediator should thank the party for the concern and assure the party that the mediator will suffer no negative consequences if the parties do not settle (i.e., the mediator will not be paid any differently or lose association with a provider organization). The mediator can also re-examine the party interests in order to determine if any settlement options exist and a zone of agreement can be found. If no zone of
agreement exists and the mediator has explored options with both parties, then the mediator should let the parties come to an impasse under these facts.