THE RIGHT WAY TO DO THE RIGHT THING

Ethical Dilemmas in Mediation

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The Hypothetical Case – Polyps v. Vibra-Glow Fertilizers, Inc.

Peter Polyps has hired top-rated trial attorney Melody Maters of the boutique agricultural litigation law firm Maters, Taters, Cukes & Lopes, to bring an action against Vibra-Glow Fertilizers, Inc., for physical damages he encountered when he inhaled a dollop of Vibra-Glow's newest plant stimulant, "Turbo Trip". His damages consist of a chemical imbalance in the brain causing severe psychotic episodes – at times Peter thinks he's a root vegetable. There were no warnings on the label.

Vibra-Glow is represented by the prestigious law firm of Bluesuit, Whiteshurtz, and Tassels. Vibra-Glow is insured by Slippery Mutual Insurance Co., which has also retained Bill Billum from the law firm of Clockit, Billum, & Runn to defend their insured's interests.

Roy Reconcile will be the case mediator.

I. Accepting the Engagement – "Conflicts"

When Roy Reconcile's name first came up as a likely candidate to serve as the mediator in the case, a telephone conference call was scheduled, information exchanged, and the following facts appeared to Roy:

A. Through a mutual fund in his retirement account, Roy owns $10,000 in Vibra Holdings, Inc., stock. Vibra Holdings is a multimillion dollar conglomerate that owns, among other entities, Vibra-Glow Fertilizer, Inc., the defendant in the case.

B. Roy and another Clockit & Billum lawyer not associated with the case are golf buddies, members of the same country club, and frequently team up in club tournaments.

C. Slippery Mutual has used Roy before, admires his skills, and is trying to negotiate a preferred provider "understanding" with him regarding reduced fee concessions in exchange for volume referrals.

D. Roy was a former member of the Bluesuit, Whiteshurtz law firm. While he was a partner, others in his firm did legal work for Vibra-Glow Fertilizer.

II. Statements about Settlement Authority.

Roy Reconcile is selected as the mediator, and a date for the mediation is set.

During his opening introduction on the day of the mediation session, Roy dutifully stressed the need for "having the right players at the table" to conduct meaningful settlement negotiations. He also noted the Florida rules require a certification to be filed with the court demonstrating that Party Representatives appearing at mediations will be the "final decision maker" in the case, and any insurance carrier representatives will appear with the authority to pay "up to the last demand or policy limits, whichever is less". Roy specifically asks whether all parties have the required authority. All defense lawyers and the carrier enthusiastically assure Roy they have "all the settlement authority they need".

Prior to mediation, the plaintiff's lawyer filed a written demand with the defendants for $10,000,000, which was scornfully answered with a $10,000 offer.

During the first caucus with the plaintiff, Melody Maters tells Roy she seriously questions whether the Slippery Mutual representative has any substantial authority. She asks Roy to find out and vows to file sanction motions if she discovers Slippery Mutual is "playing games". She agrees to reduce her demand to $9,500,000 "just to get things started", but stresses that, "it will take a seven-figure number" to settle the case.

During the first caucus with the defendants Roy learns Slippery Mutual had convened a "Special Claims Committee" to evaluate this claim several months ago and, based upon the information then available, the Committee put a maximum value of $500,000 on the case. Billum and the Slippery Mutual adjuster acknowledge they've learned a few new things about the claim during this mediation. They concede the Committee's earlier valuation may no longer be sound. Although they steadfastly insist they still have all the authority necessary, they tell Roy, "Getting any more money may possibly require the Claims Committee to convene again".

Attorney Billum suggests to Roy that they "work to get the plaintiff's demand as low as possible, and then take a break so some telephone calls can be made".

III. Statements about Insurance Coverage.

As the negotiations proceed, Roy learns it is Melody Maters' belief, based upon pre-mediation "table talk", that Slippery Mutual has a $5,000,000 CGL policy in effect with Vibra-Glow. During the opening presentations, Melody tried to confirm that belief with a direct question to Bill Billum, the defense lawyer hired by Slippery Mutual. Mr. Billum indignantly responded to Melody's inquiry by saying, "As insurance defense counsel, I don't get involved with coverage discussions, and I'm not in the business of revealing my client's private contractual business affairs. You are correct, however; there is a general liability policy here with $5,000,000 limits."

In light of that confirmation, Melody and Peter Polyps agree to reduce their demand from $9,500,000 to $4,950,000 – a drop in their claim of over $4,500,000 to get the demand within policy limits.

When this adjusted demand is delivered to the defendants' caucus, Billy Billum tells Roy, "Perhaps I should be just a bit clearer about the insurance situation. There is a base policy of $5,000,000, but there is also an umbrella excess policy with another $5,000,000 in coverage. Slippery Mutual has raised major objections concerning coverage under either policy and Vibra-Glow is at considerable odds with them over these coverage issues. In any event, plaintiff's counsel never directly asked us about excess coverage, and we don't want you to go blabbing about it!"

IV. "Substantive Facts" vs. "Negotiating Positions".

During the mediation session, a major dispute in the case emerges over whether Vibra-Glow knew exposure to Turbo-Trip could produce hallucinatory side effects. In the pleadings, Vibra Glow vigorously denied Turbo Trip is a hallucinogen, asserting Peter's reaction to the product was a, "one in a million anomaly". Interrogatories were served asking if the company knew of its hallucinogenic properties, but the answers given were inconclusive. (The actual interrogatory response was, "Objection: This question is confusing, harassing, vexatious, burdensome, irrelevant, and immaterial, invades attorney-client privilege and is downright rude to boot!") In a caucus with the Plaintiff, Roy is asked by Melody to get a straight answer on the "notice issue" from the defense side. "Roy," she says, "I want you to find out if the company had any idea one could trip out on Turbo Trip!"

Later, in an unguarded moment during a defense caucus, the Vibra Glow corporate representative mentions to Roy that just yesterday he learned his plant supervisors frequently caught employees copping a buzz during lunch hour by smoking Turbo-Trip in a bong. Vibra-Glow's lawyer, Betty Blusuit, is shocked by this revelation – this is all news to her. She quickly tells Roy, "You are not to repeat that information to the Plaintiff!"

In the wake of that news, Slippery Mutual's lawyer, Bill Billum, tells Roy his team made a telephone call to the home office, quickly re-evaluated the case, and now has $2,000,000 in settlement authority. "As a negotiating ploy," declares Mr. Billum, "I want you to go tell them we're offering a cool $1,500,000.Tell them that's how we evaluate the case, and that amount is the maximum of our authority. Our hands are tied!"

Ten seconds into the next caucus with the plaintiff, Roy is asked, "What have the defendants said about the prior knowledge issue?", which is quickly followed by, "How have they evaluated the case, and what's their authority?"

V. Legal Advice, Legal Information, or Legal Malpractice.

In a side bar discussion, Melody Maters confides in Roy that she just realized she "clean forgot" to include a count in the Complaint against Vibra-Glow for a violation of the state's stringent "Truth In Fertilizer Act". TIFA requires fertilizer manufacturers to comprehensively label their products so everyone understands what's being spread around. Among other things, a claim under the Act would have allowed Peter a chance to collect attorney's fees and generous statutory penalties. Peter is clueless; totally unaware of Melody's oversight or the consequences. During the caucus discussions after Roy has learned of Melody's oversight, Peter asks Roy, "Have I got a great lawyer, or what?"

Meanwhile, back in the Defendant's camp, a bitter argument has broken out over the effect of the "Pollution Exclusion" in Slippery Mutual's policy. Vibra-Glow is asserting the exclusion has no application to the claims made his this case, while Slippery is insisting that it precludes coverage entirely. As luck would have it, the "Pollution Exclusion" has been a featured component in 10 of the last 15 cases Roy has mediated. As a result, Roy is a walking encyclopedia on excluding pollution from insurance coverage, and can decisively advise both sides of the legal shortcomings in their arguments. If Roy doesn't say something soon, it seems clear the defense camp will freeze up the negotiations quibbling about this issue.

VI. Settlements – The Devil is in the Details.

Roy is finally able to bring the parties to agreement on a dollar amount for the settlement. At the eleventh hour, however, the defendants raise a couple of new terms.

"See here", says Bill Billum, the Slippery Mutual lawyer, "whether this guy thinks he's a turnip or not, we're paying an awful lot of money on this case! Melody Maters and her experts have been rooting around in our insured's files for two years now; we have no intention of letting her use that information to grow more business. We want a commitment from Ms. Maters and her law firm that they will refrain from bringing toxic tort Delusions of Root Vegetable Syndrome claims against this insured in the future!"

"Agreed", chimes in Ms. Blusuit, Vibra-Glow's outside counsel, "and there's more!" "We don't need word of this concession spread over the fertilizer producers' community – it will raise a stink with our stockholders, not to mention those pesky USDA inspectors. We can't start a flood of product liability claims with every Tom, Dick, and Harry who develops emotional issues with sweet potatoes!"

Together the defendants chorus, "We want Melody Maters off the market and a strict confidentiality clause in the settlement agreement."

In discussing these demands with Peter and Melody, Roy is relieved to learn there is no immediate objection from the plaintiff's camp. Peter, however, claims he has a hot date with a Vego-Matic and wants to go home. He's obviously having one of his "moments" and appears totally unfocused on these formalities. Melody, as it turns out, has been looking at this case as a ticket to retirement and couldn't care less about future work. They agree in principal to the demands.