**Focus** | ADR/Collaborative Law

# Top Eight Mediation Tips for Employment Disputes

BY GARY FOWLER, KAREN FITZGERALD, AND SARAH MITCHELL MONTGOMERY

Three attorneys—a mediator and two attorneys who represent opposite sides in employment litigation—offer the following tips for effective mediation.

**1. Prepare and exchange a proposed settlement agreement before the mediation**. Typically, parties focus on one or two principal terms—such as the settlement amount—and leave other "standard terms" to be addressed after mediation. This can cause settlements to fall apart or, at the least, more money and time spent to reach a final agreement. Exchanging settlement drafts before mediation can help parties avoid this pitfall. The mediator can assist by requesting drafts to assuage lawyers who fear appearing too anxious by sending pre-session drafts. Consider using this template from the Dallas Bar Association's Labor & Employment Law Section: https://shorturl.at/xDGHV.

**2. Hold a pre-session call with the mediator**. The mediator will often schedule separate pre-session calls with each side before the mediation, but if your mediator does not, schedule a call yourself. An attorney/mediator pre-session call allows the attorney to be more candid about the strengths and weaknesses of each side's case. Pre-session calls can also identify fundamental misunderstandings, such as the status of prior offers or fundamental differences in damage calculations.

**3. Bring back joint sessions**. Posturing, rehearsing jury openings and insulting the opposition's integrity can all drive parties apart at mediation. The purpose of mediation is to reach a resolution, not pummel the other side. A good mediation opening provides each party the opportunity to present their views *and* to listen to those of the other party. It allows both sides to see who is there and to feel that they will be heard, taken seriously, and treated respectfully. If the parties adamantly oppose a full opening session, consider a "meet and greet," where the mediator lays out basic mediation and secures confirmation that the parties will work toward resolution. In some cases, an opening session may not be appropriate (e.g., harassment cases). If so, discuss this with the mediator during the pre-session call.

**4. Exchange position statements with the other side**. Attorneys craft well-written, persuasive position statements. Why not share them with the other side? Relying on the mediator to state your position is inferior to giving it yourself. Cover items that you wish to share only with the mediator in a pre-session call, or create a separate version to share with the other side. Be sure to send your mediation statement at least 24 hours before the mediation.

**5. Do not rely on virtual mediation when, depending on the case, in person may work better**. The pandemic brought us the benefits of virtual mediations. While these do work, employment cases involve emotions that are often better addressed in person where the mediator can more easily establish rapport with both sides. At the same time, a hybrid mediation, where the insurance representative or a key decision-maker participates by videoconference, can be used effectively to ensure that the person with authority participates in the mediation. This eliminates those desperate "calls for more authority" to someone who has not heard the arguments or participated in the mediation process.

**6. Evaluate both sides' strengths and challenges with your client before the mediation**. Parties tend to emphasize their strengths and ignore their weaknesses. For example, in employment cases, employer-side attorneys minimize the risk of non-economic damages, such as emotional distress, reputation loss, and punitive damages. Recent jury verdicts demonstrate the peril of such avoidance. When a client does not want to hear the challenges of the case from their own attorney, share that with the mediator during the pre-session call so that the mediator can explain those risks to the client.

**7. Consider the costs of litigation**. It is not cheap to litigate any case through trial. The certainty of paying fees when there is no resolution should be weighed and discussed before and during mediation. Mediators can draw from their own experience of what it costs to try a case. Mediators can also point out the risk that, when authorized by statute or law, prevailing plaintiffs (even when damages are limited) can seek hundreds of thousands of dollars in fees and costs.

**8. Know the current case law and agency positions regarding settlement terms**. Confidentiality restrictions, non-disparagement, and no-rehire provisions, particularly when overly broad, can create post-settlement surprises for employers. For example, in *McLaren Macomb*, the National Labor Relations Board held that the mere offer of a severance agreement unlawfully conditioning receipt of severance benefits on the forfeiture of statutory rights violates Section 8(a)(1) of the National Labor Relations Act. Other agencies object to no-reapplication and no-rehire provisions. Be familiar with agency views on what is and is not legal in a settlement agreement before including them in a draft settlement, particularly one that is presented after the parties have agreed to other principal terms. **HN**

Gary Fowler is with JAMS; Karen Fitzgerald is the founder of Fitzgerald Law; and Sarah Mitchell Montgomery is a Partner at Jackson Walker L.L.P. They can be reached at gfowler@jamsadr.com, karen@fitzgerald.law, and smitchell@jw.com, respectively.

## Professionalism Tip

"I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life."
*- Excerpt from the Texas Lawyers Creed*

Find the complete Creed online at tinyurl.com/jve7h93h