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Reflections on Employment Mediation

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Mediation has become an institutionalized part of litigation, particularly for employment disputes. The question is no longer whether to mediate, but when, with whom, and how to achieve the best result. Institutionalized mediation, however, has profoundly changed mediation, particularly when mandated early in litigation.

This article will identify the bottlenecks to successful mediation and how to avoid them. Perhaps the biggest change — one which mediators and litigants should anticipate — is that mediations often require multiple sessions or significant follow-up. Understanding this phenomenon is crucial, or the parties (and mediator) may give up on what will ultimately be a successful process, resulting in increased acrimony and litigation costs.

When to Mediate

Early mediation is not a panacea. Some cases, especially wage-and-hour class actions, require discovery before they are ready for mediation. Many cases benefit from pre-lawsuit mediation. These include those with a highly developed factual record, such as when the parties have exchanged detailed information regarding an administrative complaint of employment discrimination.

Pre-suit mediation may also be productive following an in-depth internal investigation of a claim of sexual harassment or employment misconduct, when a detailed report will be provided to the former employee. Written employment contract claims, particularly those with arbitration clauses, are also well-suited to early mediation.

The major reason why early mediations fail is that the parties have had little chance to discover key documents or take essential depositions, and lack the ability to realistically evaluate the case. The chance of success at an early mediation can often be enhanced by each side's agreement to take limited discovery before the mediation. An agreement that permits each side to propound one set of requests for production and take one day of the plaintiff's deposition and that of the key defense witness (waiving the one-day deposition rule) is an efficient way to evaluate the opponent's case before mediation.

An employer may believe that a dispositive motion can dramatically reduce the settlement value of the case. This may be a significant factor dictating the time for the mediation. Thus, mediation briefs that explore the strengths and weaknesses of a motion to dismiss on grounds such as the statute of limitation, failure to exhaust administrative remedies, preemption or the inability to prove a material element of a claim (for example, no protected complaint in a retaliation case) can promote a successful mediation.

Selecting the Right Mediator

Employment lawyers tend to favor mediators with significant substantive knowledge of employment law. Although mediators should have strong process skills — the ability to listen, and to build trust and empathy with the parties and their lawyers. The ability to evaluate strengths and weaknesses through in-depth knowledge of employment law is often crucial. Plus, it is no longer considered a risk to mediator neutrality for the mediator to diplomatically express his or her own view of the parties' legal positions.

Before the popularity of mediation, the parties often viewed each other's mediator recommendations with great skepticism. It has become increasingly easy to vet mediators by obtaining information from colleagues. Mediators should be willing to discuss with you, in a brief telephone conference during the selection process, their mediation styles and the kinds of cases they have handled, and to provide references. You might even consider asking for the names of lawyers in unsuccessful mediations.

Another major consideration is who will be effective in overcoming the likely obstacles to settlement. For example, in a sexual harassment lawsuit, is the mediator candidate someone a sensitive, emotionally traumatized plaintiff can trust? Likewise, will a stubborn, experienced lawyer or corporate executive respect and listen to the mediator?

Finally, the most important qualification is that a mediator be tenacious and resourceful. Tenacity is a mediator's most important trait — never give up, never stop exploring possible solutions, even if the mediation is not settled during the first day.

The Pre-mediation Telephone Conference

Mediations should be orchestrated in advance. A proactive, managerial mediator should begin the mediation process before the face-to-face session. Therefore, a pre-mediation telephone conference with all counsel, or discussions with each lawyer separately, preferably several weeks in advance of a mediation, is an ideal tool to ensure the mediation has the best chance of succeeding.

An important subject for discussion is who should attend. The participation of in-house counsel — but no other company representative — may send the wrong signal as he or she may not be the "real" decision maker. If the decision maker is a high-level executive who may be able to participate by telephone in important discussions, that level of participation may suffice.

As employment practices liability insurance becomes ubiquitous in employment cases, the attendance of the claims adjuster is often an important issue. Employment cases may be "too small" to induce adjuster attendance. This should be addressed ahead of time to avoid surprise and disappointment at the mediation. An agreement that the adjuster will be available to participate by telephone at key mediation stages should be adequate in most cases.

The contents and exchange of mediation briefs should also be discussed. The mediator should help the parties explore the key legal and factual issues on which the briefs will focus. The brief should be fact based, particularly if the mediator has significant substantive knowledge of employment law. Do not string cite as we do not have law clerks and have limited time to prepare.

Defense counsel should discuss damages, even if the employer denies liability, as this can help realistically frame the damages discussions. The briefs should normally be exchanged, subject of course to mediation's confidentiality safeguards. The parties can supplement the exchanged briefs with confidential letters for the mediator's eyes only.

The parties also should discuss whether to hold a substantive joint session or a "meet and greet" joint session, if any. A substantive joint session may be counterproductive and only further polarize the parties, particularly if there has been significant discovery and the parties know each other's positions.

What is crucial is that the parties effectively communicate their positions in a way to maximize the likelihood that each side understands the benefits of settling and the risks of litigating. The mediator's goal should be to devise the best way of doing this, through the exchange of briefs or a substantive joint session.

Finally, one of the most important issues to discuss with defense counsel is bringing a draft settlement agreement to the mediation, which can be revised to reflect the negotiated material terms. It is crucial to include all of the material in a final settlement agreement or it may not be enforceable.

The key, non-boilerplate terms, other than the amount of the settlement, include confidentiality and how it will be enforced (often through liquidated damages or arbitration with the prevailing party to recover its fees and costs), the allocation of the settlement proceeds between wages and emotional distress damages, and the scope of the release.

Conduct of the Mediation

Constructive Use of the Opening Joint Session

The opening session permits the mediator to set the right tone. An oft-repeated mistake of both mediators and lawyers is to treat the opening session as routine where the mediator distributes the confidentiality agreement and the lawyers make opening statements. This rote treatment can polarize the parties if a lawyer's conduct or statement is overly aggressive or antagonistic.

Thus, the mediator and lawyers should discuss and plan what can be accomplished that is positive during the opening session. For example, it may be crucial for the plaintiff to express how much he or she was harmed or was emotionally affected by the employer's conduct. If this is essential, a mediator can prepare the employer's representative and counsel for a hard-hitting statement.

Non-Monetary Terms

Employment mediations are overwhelmingly about money, as reinstatement of a terminated employee rarely occurs through a negotiated settlement. Nevertheless, it is also important to consider whether the settlement "pie" can be expanded beyond money.

Some of the key non-monetary issues are a mutually agreed upon, truthful, positive letter of reference; culling information from performance evaluations; a procedure for handling references; and training on reasonable accommodations, sexual harassment or non-discrimination obligations, depending upon the underlying claims.

Breaking Impasse

Although lawyers are familiar with the mediator's proposals — a take-it-or-leave-it proposal to both sides at the end of the session — they are often less familiar with another essential tool: bracketing. Bargaining frequently stalls as the parties try to maneuver the negotiations toward the midpoint of their desired settlement. This leads both parties to a stalemate — "the other side needs to make a significant move" — although both have substantial room to move.

The mediator can then make a bracketing proposal — if the employer goes up to "x" and the plaintiff comes down to "y," which should be significant movements for both parties — to break the stalemate. The bracketing proposal is aimed at getting the parties much closer to the real negotiation. The mediator should state that the bracket is not intended to imply that each side will split the difference within the bracket. Instead, the bracket is intended to close the gap and get closer to settlement.

Although the mediator wants his or her bracket to be accepted, the parties can reject the mediator's bracket and propose counter brackets. Counter brackets further disclose the real settlement gap between the parties, often the final, crucial barrier to settlement. If the actual gap between the parties requires a 10–20% move by each side, there are strong settlement prospects on the day of the mediation, even if the gap must eventually be closed by a mediator's proposal.

It's Not over until It's Over

Many cases settle, just not on the day of the initial mediation session. The mediator should persevere and suggest a plan that will permit the parties to continue their negotiations in several weeks or months.

If the mediator became evaluative during the first day of the mediation, a cooling-off period and further consideration of the information exchanged may lead the parties to reconsider their positions and resume negotiations. The mediator may also suggest that the parties reanalyze a key legal issue or take one or more key depositions. Following this "homework," the mediator should follow up and probe to determine if further negotiations may succeed.

Employment lawsuits much more frequently conclude with a mediated settlement instead of dismissal through summary judgment or trial. The path to a mediated settlement has become more tortuous as the courts frequently impose early mediation on litigants, before the case is ripe for mediation.

It is the role of experienced employment mediators to convert these "immature" cases to settlements, and to customize the mediation of each case to enhance its chance of settling. ■

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