

Tips for Successful ERISA Mediations: Five Things to Consider as You Prepare for Your Next ERISA Benefit Mediation

By Adrienne Publicover, Esq.



“If you fail to plan, you plan to fail.” This adage credited to Benjamin Franklin is true for mediations, but perhaps even more so for those involving Employee Retirement Income Security Act (ERISA) benefit claims. Mediating these cases involves a delicate balance between emotion, legal expertise, and financial considerations.

For the claimant, the issues may involve financial security, mistrust or misunderstanding of the legal process, and/or feelings of anger or hurt. For the plan or the insurance company that insures the plan, these claims can present the risk of damaging legal precedent, the threat of significant fee awards, or scrutiny of internal business processes. Accordingly, it is important to fully prepare a client for the journey toward settlement.

As a litigator, I never took the opportunity to sit down with a mediator and ask what I could do to more effectively prepare for the mediation. Now in the neutral’s chair, I greatly appreciate when lawyers are prepared, know the law, understand the benefits at issue, and have evaluated their cases appropriately. I also ask counsel and their clients to remain optimistic and be open to compromise.

1. Know the critical facts, applicable law, and relevant jurisdiction

ERISA is a specialty, and the law in this area is constantly evolving. In mediating an ERISA case, perhaps nothing is more challenging than when the lawyers are either unprepared or do not know the applicable law. Time can be the enemy because mediations are typically scheduled for only four or eight hours, which provides a relatively brief time in which to work together to reach a settlement.

Issues that commonly arise include new theories and defenses not contained in the denial letters; information outside the administrative record and whether the court will allow it to be considered; standard of review for self-insured plans; the correct standards to be applied in assessing the vocational aspects of the claim; other income sources that may properly be offset against the contractual benefit; overpayments and whether they are recoverable; and available remedies. It is important to be familiar with the legal theories advanced and how they might apply to your facts.

In addition, key legal issues are routinely perceived by one side completely differently than they are by their opponent. This is one of the reasons why it is particularly important to submit briefs to the mediator on time. A recent case before me involved the arbitrary and capricious standard of review, which we frankly do not see very often in California. This was an important consideration for settlement, one that the plaintiff had not even briefed. It was especially helpful to have the submissions well in advance of the mediation and to be able to discuss the legal issues in a confidential pre-mediation telephone call.

Finally, it is critical to review recent decisions from the presiding judge. As the mediator, I do this as well. For example, a case I mediated involved a judge whose background seemed somewhat conservative and pro-defendant, but his reported decisions also reflected a soft spot for individuals with health concerns. This information was important in assisting the parties from an evaluative perspective.

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2. Understand the benefits at issue

A settlement of an ERISA long-term disability benefit case often involves the entire contract—past benefits as well as the discounted present value of future benefits available under the plan. This may entail a complicated analysis of offsets, discount rate, and cost-of-living adjustments, among other factors. Indeed, even if one side is arguing for a closed benefit period, it is important to have a full understanding of the entire contractual benefit.

I like to spend a significant amount of time with the parties discussing the factual and legal issues before any negotiations commence. As part of those negotiations, I attempt to ensure that the parties have an appreciation of the claimed damages. At a minimum, I identify the areas and scope of any disagreement. It is especially helpful when the parties share this information before mediation.

Once negotiations begin, momentum is everything. Nothing derails a negotiation quicker than an erroneous calculation. Valuable mediation time should not be spent doing high-level math tricks.

3. Exchange all relevant, non-privileged information well in advance (including mediation briefs)

Some of the most important work an attorney can do to facilitate settlement occurs well before the date of the mediation. In some cases, the parties are reluctant to exchange mediation briefs. There may be legitimate reasons why a party would want to keep certain information confidential or wait to have specific messages conveyed by the mediator. But I have found that the chance of settlement goes up dramatically when briefs are shared, and shared early in the process. And why not share? There are few secrets in ERISA claims litigation, especially when the lawyers are sophisticated and knowledgeable.

Having pre-mediation phone calls and receiving the briefs early allow your mediator time to marinate on not just the legal and factual issues, but also the settlement strategies. These interactions also create a valuable opportunity for the mediator to earn the trust of the parties. It is advisable for a mediator to spend time connecting with the litigants and understanding their respective goals and interests. I recently had a pre-mediation call with a mistrusting and skeptical

plaintiff and his counsel in advance of the litigation. This was instrumental in setting the stage for a successful mediation.

Similarly, if one or more parties plan to move to augment the administrative record, why not consider sharing those documents as well. In the event that the case does not settle, the court certainly will appreciate it. Moreover, liability exposure and expectations for settlement are (hopefully) set well in advance of the mediation date. Oftentimes it is difficult for parties to have to readjust their expectations on the day of the mediation. Surprises are terrific for holidays and birthdays—not so much in litigation.

4. Understand the parties' goals

When I represented insurers and plans, the focus for settlement generally was monetary. I would consider the claim for past due benefits, the prospect of future benefits, and the likelihood of a potential fee award. There may also, however, be business considerations. Does the litigation present a risk of negative precedent? Could the case bring unwanted scrutiny to the defendant's internal practices? Are there reputation or regulatory issues?

For claimants, the analysis also might involve a potential return to work, a current financial consideration, whether that claimant is receiving Social Security benefits, tax consequences, and a myriad of other concerns. There also may be a value to the claimant in settling and thus being able to close the chapter and move on.

It is important for a litigator to understand a client's goals in a litigation. Similarly, a mediator should identify and understand those goals as well.

5. Remain optimistic and allow for creativity

I am a chronic optimist, and optimism in mediation is especially important. When parties get discouraged or frustrated, they are more likely to pull away from the negotiating table and give up. To avoid this, I encourage parties to be in the moment and think creatively about the possibilities for settlement. Sometimes the lawyers need to break from tradition and be open to unconventional strategies.

Optimism also allows the process to work, and mediation absolutely is a process—like a dance. My husband and I have been taking dance lessons for more than three years.

One of our favorites is the cha-cha, which we have started to combine with the hustle (which we affectionately call the “cha-hustle”). Each dance involves eight beats of music, so it is possible to combine the two into one seamless pattern. You can start with one dance, move into the other, and then switch back to the initial dance. Similarly, in mediation, the best results are achieved when the mediator, attorneys, and parties take a flexible approach to the process. Again, be open to the possibilities.

Impasses do occur, however, even in negotiations that are conducted in the best of faith. One negotiation technique that can help parties overcome an impasse is the use of brackets. When the parties’ settlement proposals are widely divergent, a mediator can work with the parties to formulate a “bracket,” that is, a conditional agreement that “We will move our demand to X if you move your offer to Y.”

I sometimes use brackets much earlier than traditionally would be expected. Proposing an initial bracket early on in the mediation can be particularly effective in cases that involve a long future stream of benefits. Often, having a more realistic understanding of the other party’s true settlement range early in the process—before positions have become entrenched—encourages both sides to be more flexible.

At other times, it is not the dollar amount of the settlement proposals that creates an impasse, but rather, the potential tax consequences of the settlement. In limited circumstances, a proposal to split the settlement proceeds between two tax years may be just the compromise that gets the case resolved.

A mediator’s proposal is another effective path to resolution. When a mediator suggests a proposed settlement, that number does not necessarily reflect the mediator’s valuation of the case; rather, it is the number that the mediator believes has the best chance of being accepted by all the parties. By proposing a settlement confidentially to each side, the mediator allows everyone to preserve their bargaining positions in the unlikely event the case does not settle.

Parties may start very far apart and make slow, cautious moves. But the time this takes allows the mediator to work, to have more in-depth conversations with the parties, and to devise creative solutions for settlement.

Conclusion

The foundational aspects to a successful ERISA benefit mediation are knowing the relevant law, having accurate calculations regarding the policy benefits at issue, and understanding the respective goals of the parties. Perhaps equally important is that the attorneys and parties maintain an open-minded, flexible approach. Once these crucial pieces are in place, an effective mediator can focus on creative strategies geared toward resolution.

Adrienne Publicover, Esq. counseled domestic insurers and brokers in litigation matters in state and federal courts throughout the U.S. and in the London market before joining JAMS. Ms. Publicover brings energy and enthusiasm to mediating complex first- and third-party insurance disputes, including those involving life, health and disability claims, as well as personal accident, commercial general liability, property, directors and officers, and employment practices liability policies.

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