

A guide to successful employment mediation

By Judith Ryan

Experienced counsel, understanding the risks of litigation and the benefits of resolution, come to the mediation fully prepared with the goal of resolving the matter. How could the mediation fail? The following factors can often impact the successful outcome of a mediation and are particularly critical in employment mediations, which can be more emotionally charged than business and commercial mediations. Avoiding these pitfalls can lead to a successful mediation.

Pre-mediation Misperceptions

Issues arise when there is a misperception as to the parties' actual positions coming into the mediation. Prior to the mediation, most parties have exchanged demands, and in some cases, there have been responses to those initial demands. However, it is not unusual if there has not been any "formal" response to the demand, although there may have been discussions between counsel. Often counsel come away with different understandings as to the positions of the parties. This can impact the process, particularly as counsel prepare for the mediation.

It is important that the parties are candid and clear in their pre-mediation discussions in order to avoid unnecessary misunderstandings at the outset of the mediation. Having these misperceptions at the start of the process impacts the credibility of the process, adds confusion and detracts from addressing the main issues and purpose of the mediation.

The Unprepared Client

Regardless of the sophistication

level of the client, he or she needs to be fully informed not only as to the case, but also as to the mediation process. Fully informing the parties about the process should first come from counsel, not from the mediator at the mediation. That information should include what will happen during the course of the mediation from the caucusing, the ex parte communications, the issues of confidentiality and the amount of time that could be involved (and thus the patience often required). Clients, even those with a high level of sophistication, should always be given an overview of mediation if it is their first time going through the process. This overview can include how offers are conveyed and the fact that offers and responses may at first have little resemblance to the ultimate resolution.

It is extremely important that potential settlement proposals and possible resolutions be discussed prior to coming to the mediation session; the client should not be confronted with these issues for the first time at the mediation. Additionally, it should be explained that potential settlement options may include both monetary and non-monetary components.

The client should also be prepared for decisions that will be made if a settlement is reached as to the settlement agreement, disposition of the settlement funds and any potential tax considerations. These matters should not be discussed for the first time at the mediation.

Failure to Manage Expectations

Managing the client's expectations is one of the most critical aspects of the mediation process; the failure to do so is often a ma-



Shutterstock

Managing expectations is critical in the mediation process.

job stumbling block to a successful mediation. The client needs to be educated as to what can be anticipated in the litigation process, including potential outcomes, costs of pursuing the case and a realistic risk/benefit analysis prior to coming to the mediation. The client should not hear about the potential downside for the first time at the mediation.

It is equally important that the client's expectations have been discussed prior to the mediation. What does the client want? A major impediment is a client who has unrealistic expectations that have not been explored with counsel or unrealistic expectations that may have been fostered, intentionally or unintentionally, by counsel because they were not discussed, or not discussed fully, prior to the mediation.

Rushing the Process

The mediation process should then be allowed to work — it takes time. Some parties come to decisions faster than others. Experienced counsel have advised their clients to exercise patience prior to coming to the mediation. The matter will resolve when all parties are comfortable with the decisions they are making; not everyone comes to that determination at the same time.

Remember, the time involved in the mediation process is time that is not involved in the litigation process.

Failure to Use the Mediator Effectively

The parties have come to the mediation to seek a resolution through the assistance of a professional mediator, so use the mediator. The mediator has been chosen because of prior background and experience in the subject matter and success in resolving such cases.

Use the mediator to facilitate the process. Allow the mediator to interact with the client and give the client the ability to express their position directly. Use the mediator as a "partner" in the process to work with the client and not as an adversary. Give credence to the mediator.

Conclusion

Mediating an employment case should not be like going into an unknown galaxy. A failed mediation can be avoided if the above pitfalls are recognized.

A successful mediation is the result of preparation. Fully informed clients with realistic expectations can participate with counsel in the mediation process and better achieve successful resolutions.

Judith M. Ryan is a retired Superior Court judge and JAMS neutral based in



JUDITH RYAN
JAMS

Southern California. She is known for her keen ability to quickly grasp the strengths and weaknesses of a case and is highly effective in guiding parties toward settlement.