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HOW EMPLOYMENT CASES ARE VALUED IN MEDIATION

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By

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1. INTRODUCTION

In deciding to mediate an employment dispute, obviously it is crucial to think about how the case will be valued. There is no magic formula for how employment cases are valued in mediation. Nor are there typically any "smoking guns" appearing in mediation which affect the value of a case dramatically, just as there are no smoking guns at trial any more. The value of a case depends on many factors, including the strength of the evidence, the availability of witnesses, effects of adverse publicity, the level of risk aversion in the parties, and from whose perspective the valuation is made, i.e. the employee's, the employer's, and the mediator's perspective.

An employee believes that there is no amount of money that can compensate for the injuries s/he has suffered and is sure that a jury of their peers will understand their suffering and punish the employer. Even when acknowledging that things could have been done better, an employer believes that a jury will find that no unlawful conduct took place or that the plaintiff's damages are exaggerated. Many times employers believe that the entire case has simply been fabricated.

Into this world of extremes comes the mediator, who examines both sides of a case from a neutral perspective, without the rhetoric and self-interest of the parties. Indeed it might be said that a mediator takes no sides of a dispute, but takes all sides of a dispute. As human beings and experienced practitioners, mediators may have an opinion as to the value of a case. However, the mediator's opinion really doesn't matter unless you are using them as a sounding board and seeking some feedback as to whether you see the risks clearly and are assessing the potential exposure correctly. Usually the mediator's job is to try to convince both parties that the other's side view of the case might carry the day if no settlement is achieved and work to see if there is a common ground for settlement somewhere in between the parties' respective evaluations of the case.

This paper offers some suggestions that you may want to consider when preparing for a mediation and during the mediation itself which may increase the likelihood that the case will settle within the range in which you value it.

2. KNOW ENOUGH ABOUT YOUR CASE

It is my experience that most cases can be successfully mediated even though every piece of evidence has not yet been gathered and some uncertainty exists. Assumptions, predictions, and outright guesses are present in any mediation. The threshold question in

determining whether or not the case is ready to be mediated is whether you have sufficient information to enable you to make reasoned, informed decisions. If important information, information that could dramatically affect your, or your opponent's, settlement posture, has not been obtained, mediation could be premature. Consider allowing opposing counsel to interview your key witnesses, or engage in an informal exchange of information, prior to mediation.

It is not unusual that evidence is gathered in the course of the mediation process itself. The mediator and/or opposing counsel may be asked or allowed to interview critical witnesses, if depositions or written statements are not available or critical facts are in dispute. These interviews can be conducted prior to the mediation, during, or even after the actual mediation session. That said, the better practice is to bring persuasive evidence to the mediation and disclose it to the mediator and/or opposing counsel, when appropriate. It is counterproductive and ineffective at a mediation to claim that certain purportedly persuasive evidence is at home or at the office or not yet gathered, but does in fact exist. If it is important, it should be gathered and made available during the mediation. Don't worry about providing "free discovery"; there are few surprises at trial and cooperative sharing usually begets the same.

When you arrive at the mediation, you should know the case (both from your perspective and from the other sides' perspective), appreciate its strengths and weaknesses, and have calculated loose settlement parameters, which may need to be revised in order to reach a settlement. An open mind and flexibility are critical to a successful mediation. Don't fixate on a case in terms of "right" and "wrong", or by trying to prove to the mediator that the other side is lying. Rather, look at the big picture; try to see the case as a jury might see it; and consider all the options for resolution in lieu of litigation, where you will give up control of how the case resolves to a judge, arbitrator, or jury. Remember that no case is without risk and be willing to listen and evaluate dispassionately the other side's position. Remember too that the mediation briefs prepared by counsel reflect the best case scenario, not always how counsel actually evaluates the case. If the case settles, it will likely be on terms that involve a compromise by both sides.

3. UNDERSTAND THE MEDIATION PROCESS

Mediation is a process that the parties themselves create and agree upon, and hence the process, like the case, is never exactly the same. Learn as much as you can about the mediator and about his/her mediation style. Some mediators provide informational material which can and should be studied.[1] If you do not have experience with a particular mediator, address style issues in a pre-mediation telephone conference with the mediator. I regularly use telephonic pre-mediation conferences to learn about the case in advance, to identify any particularly sensitive issues which might arise, to make sure the right people will be in attendance (discussed more fully below), and to suggest how counsel may make their briefs most

[1] As an example, my mediation materials may be viewed at www.masters-ribakoff.com

helpful to me. I believe that knowing what to expect during the mediation process tends to have a calming effect and will allows everyone to focus on resolution rather than being distracted by heightened anxiety.

Most mediators utilize a joint session at the outset of a mediation in which all parties and counsel are brought together in the same room. Before this happens, I generally meet with each party and counsel in separate rooms, introducing myself to the participants and answering any questions about the mediation process. At that time, I also do some "coaching" on how the parties and counsel might approach the joint session to make sure it is effective in moving the parties toward resolution rather than polarizing them. Foregoing a joint session may set the wrong tone, and may be perceived by the other side as weakness or disingenuousness. Be prepared to observe a level of collegiality among counsel during the joint session, and throughout the day.

It is not unusual for the mediator to ask to meet alone with counsel. Although such meetings may appear to be improper, be assured they are appropriate and are not intended to be exclusionary or disrespectful. Meeting separately with counsel may be the most effective way for the mediator to communicate certain information from the other side, particularly information that could be hurtful or inflammatory. Consider using non-traditional methods, such as allowing the parties to meet alone without counsel, with or without the mediator being present.

4. BRING THE RIGHT PEOPLE

Early on in the process, it is important to let the mediator know who will represent the company, and if there are individually implicated or named defendants involved. If individuals (whether named as defendants or as percipient witnesses) are attending, there are frequently factual, legal and/or psychological issues which have to be dealt with by the mediator in separate private caucus to insure that the mediation goes smoothly. Careful consideration of whether the presence of an alleged wrongdoer will help or hinder settlement is required.

Who attends the mediation on behalf of an employer can signal the level of interest the company has in the claim, i.e. a high level officer may signal that the company takes the claim seriously, while a low-level human resources staff person may be viewed as insulting. Remember that what you originally think should be appropriate to settle the case may change, and hence it is important to have individuals present or available who are able to make a settlement decision which is outside the parameters of initial internal settlement discussions.[2] If the ultimate decision-maker or insurance carrier representative cannot be physically present,

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[2] In cases involving governmental entities, where any settlement must be approved by the relevant board or council, it is important to have someone at the mediation whose recommendation will most likely be followed.

consider having that person participate in the joint session via telephone or allowing (or requesting) the mediator to speak with him or her directly during the mediation.

Remember that the employee may need to have others present at the mediation in order to reach resolution. Don't automatically reject such a suggestion. Sometimes children, spouses and/or therapists can provide valuable assistance in getting the matter resolved. Try to ascertain who will be present from the employee's side in advance and discuss with the mediator who should be present in the joint session.

Don't forget that independent fact-finders often make effective presentations at the joint session.[3] In addition, expert witnesses or treating physicians or therapists may also be used at the mediation or be available as a resource, either in person or by telephone. Their presence depends on your strategy.

5. PLAN YOUR MEDIATION STRATEGY

Logistics

You have decided to mediate, have gathered sufficient information to make an informed settlement decision, and have tentatively decided on a settlement range and who will participate. Although the mediation process may require a great deal of flexibility, a certain amount of logistical planning is warranted. In setting the date of the mediation session, consider the date in connection with travel schedules and holidays. Also consider whether one day is sufficient, or whether more time will be required. You may want to consider having the mediation take place between specific hours; mediations that begin without an agreed-upon cut off time often drag on unnecessarily. The location needs to be determined. I have offices specifically designed to be conducive to settlement, but will travel to any location so long as there will be sufficient space and access to amenities. Don't place undue emphasis on the location of the mediation; rather, try to ensure physical comfort (private rooms, lunch, parking).

Briefs

The mediator needs information about the dispute in order to facilitate a discussion of its resolution. Agreeing to exchange mediation briefs is an efficient way of beginning the mediation dialogue and lessens the need for time-consuming discussions of the other side's contentions, especially when the mediation takes place at an early stage of the dispute and before extensive discovery has been taken. The goal of the brief should be to convince the other side, not the mediator, that there is an unacceptable risk in proceeding. Confidential information can always be provided to the mediator separately. If you choose not to

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[3] Masters & Ribakoff has had great success in transitioning from a role as independent fact-finder to serving as a mediator in the same dispute.

exchange briefs, make sure you give the mediator what s/he needs to demonstrate the risks of not settling. Mediation briefs that contain a chronology of important events and bullet points of important evidence are helpful; briefs that recite well known legal principles are not.

Opening Statements

Counsel generally make an opening statement in the joint session, and it is often effective for an employer representative to do so as well. But, consider its purpose and desired effect. Placatory remarks from an employer representative which empathize with the plaintiff can be powerful and set a cooperative tone. You should also be prepared to respond to clarifying questions from the mediator in the joint session, and possibly, but not typically, from the other side. Elicit input about your opening statements from the mediator; ask for suggestions as to tone and content for a given dispute. One effective strategy for an opening statement is to attack the problem, not the person, in a sincere and constructive tone. Another strategy is to make a forceful opening statement, but this can have an alienating effect.

Remember that the employee him or herself, will make a statement during the joint session. Such statements usually include remarks about the impact of the dispute on her or his life and emotional state. It is important not to react negatively or disrespectfully if the employee says something with which you disagree.

Initial Negotiations

Before the mediation you should give some thought as to how negotiations may proceed. Outline several hypothetical negotiations and evaluate the probable outcomes of each. Keep in mind who is the negotiator on the other side, and what is the most effective way to deal with his/her style. Obtain all necessary approval or authority to negotiate per your plan, remembering to maintain flexibility and an open mind.

Most of the negotiations are done in private caucus after the joint session. Do not overwhelm the mediator with information during the first private caucus. Rather, provide him or her with selected information to discuss initially with the other side and then disclose additional information throughout the day if it appears that settlement discussions are progressing.

An opening demand or offer are just that - starting points from which each party knows movement will be made. Opening proposals do not typically reveal a party's true settlement goals. That said, you should be able to convincingly articulate the basis for each settlement position in order for it to be credible. Taking positions that you know are not worthy of belief or disputing facts which cannot seriously be disputed is counterproductive. Show the other side that you know what you are doing.

Continuing Negotiations

It can be helpful to explore potential non-monetary elements of settlement early in the mediation process. Continued participation in company benefit plans, such as medical, dental, and life insurance, short and long term disability, or tuition reimbursement programs are frequently of great interest to employees. Senior level managers or executives may also be quite interested in recouping the loss of corporate perks, such as stock options, automobiles, golf or country club dues, and company reimbursed tax preparation and financial advice. In the absence of reinstatement (which is quite unusual outside the public sector), most terminated employees are interested in limiting the dissemination of negative information about them and seek to have some kind of letter of reference to utilize in a reemployment search. Obviously, the possibility of offering such things needs to be identified and considered before the day of mediation.[4] Sometimes offering non-monetary items, which may not be available to plaintiff at trial, helps build trust and move the process forward.

Although you should be clear on your ultimate settlement expectations, it can be foolhardy to communicate that number to the mediator too soon, if at all. If disclosed too soon, it will be difficult to modify without "losing face". Whenever a "bottom line" is disclosed, the mediator's efforts will be focused on achieving it, or something close. But maintaining unreasonable or unjustifiable settlement positions for too long can short circuit what could otherwise be a successful mediation.

Similarly, never confess to the mediator that you have more than an average desire to settle, are unable to proceed to trial, or would pay "anything" to be rid of the case. Such information favors the opposing party's settlement position. Instead, ask the mediator to leave the room while you discuss how to respond to a particular demand or offer. Then ask the mediator for his or her reaction to your proposal. Given his or her understanding of the other side's posture, the mediator may be able to refine your response and make it more productive.

It is important to track the negotiations during mediation, including the length of time it takes to get each new proposal. You should constantly assess how much of a gap remains, and determine whether you need to make a more significant move to kick the negotiations into a higher gear and to see whether the other side responds in kind. It is also important not to draw your "line in the sand" too early. Once you draw the line, stick to it within reason; however, do not out of pride or ego, categorically reject a proposal, that while not meeting your absolute number, comes close to it. In that instance, you may ask the mediator to make a "mediator's proposal" to close the gap. A mediator's proposal is usually reserved until the mediator can assess if there is a number which both sides, if truly pushed, would accept to reach resolution. It is a proposal made to all parties simultaneously. If accepted by all, a deal is struck. If rejected by one, the mediator announces that no settlement has been achieved. This process protects the parties' last stated settlement proposal, so that if the mediator's proposal is

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[4] Company personnel who deal with benefits issues generally do not attend mediation but must be consulted in advance and made available during the mediation.

not accepted, the parties have not disclosed their bottom line. The mediator's proposal is frequently an effective way to get a deal done, where one of the parties may need some additional time to obtain more authority or to think about resolution.

6. RECRUIT THE MEDIATOR TO BE YOUR ALLY

Recruiting a good mediator to be your ally does not mean finding a mediator who plays favorites. Rather, it means that you recognize the value of using the mediator as a resource and select someone with whom you are confident, just like the other side does. Don't attack the mediator; s/he is simply doing her/his job; you do not have the level of information that the mediator does about what is happening in the other room. If you feel inclined to trust the mediator's input, do so; your instincts are usually right.

7. MAKE SURE IT'S A DONE DEAL

Get something signed, even though everyone may be exhausted. I suggest that you bring a draft settlement agreement to the mediation or have the ability to have one e-mailed or faxed to the mediator's office. It can save a lot of time to sign the final agreement at the mediation while everyone is in a cooperative mood and the mediator is there to iron out any disputed provisions. In my experience, the power of the ceremony of signing something at the conclusion of a mediation tends to raise client satisfaction and increase the durability of the agreement. Failing that, a memorandum of understanding or deal points memo should be prepared which can easily be translated later into a more formal agreement. Contact the mediator if the formalization of the settlement stalls; most mediators are willing to provide reasonable follow up without further charge.

8. CONCLUSION

Mediation can be transformative for all involved. At the very least it offers the opportunity to bring closure to the dispute, allowing the disputants to move forward with their businesses and lives. The level of satisfaction with the process however, is directly related to the effort invested in the process. It may be a difficult and emotional day, fraught with uncertainty and frustration, but trust the mediator to work his or her magic, confident that even a bad day in mediation where settlement is achieved usually beats a good day in litigation, where no one ever really "wins".