

Random Thoughts on Effective Settlement Techniques in Employment Disputes

1. Introduction

If you prefer the certainty of resolution over the lotto of trial, with its attendant costs and disruption, there are apanoply of Alternative Dispute Resolution modalities for you to consider: early neutral evaluation; fact-finding; summary judgment or mini trials; formal mediation. My experience is that mediation is a highly effective process, if participants are relatively informed, prepared to devote time to the process, and maintain an open mind. Combining neutral fact-finding with mediation works especially well where the complaining party is a current employee, or where one side doesn't know the strength of other side's evidence. What follows are random thoughts on how to increase the likelihood of resolution.

2. Emotional Realities

To insure the greatest likelihood of success: recognize the emotional tension in an employment case and be prepared to let the mediator deal with it. On the employee's side there is often desperation, despair, sense of betrayal, loss of self-esteem, vulnerability, in addition to economic loss. Many employees have seen huge verdicts reported in the newspapers and may not realize that what makes those verdicts newsworthy is the fact that they are so rare. Getting the employee to understand that their case will probably not result in a huge verdict is one of the reasons that a mediation frequently takes a long time.

On the employer's side too, emotions exist. Management participants may misperceive the risks of going forward into litigation for a variety of emotional reasons: frustration, fear for losing their job because of having made a bad decision, desire for vindication for "false charge", fear of setting a precedent, belief that the employee is extorting company. Be aware and understand dynamic/conflict among all the participants and others who may play a part in the settlement decision, including the employer's insurer. These emotional realities need to be disclosed to the mediator who must insure that the necessary individuals attend the mediation.

3. Getting Other Side to the Table

There is no stigma in being the first to suggest mediation; it is no longer seen as sign of weakness or imperative to settle. You can even use the mediator to help convene a mediation. Nor is there a down side to mediation, even if the matter doesn't settle. You are in charge of what information gets exchanged, so that you don't need to disclose

information (or your deposition strategy) if it doesn't appear likely that settlement will be reached. Often you learn what a neutral third party perceives as weakness in your case and streamline your approach at trial.

Do consider the timing of mediation. Some attorneys do not believe in mediation before complaint or until after plaintiff's deposition. Others swear by it. My suggestion is to be flexible. There are times when mediation is perfect to ease the exit of a high level executive.

Do consider whether to engage in pre-mediation negotiations. But again be flexible. Some attorneys insist on pre-mediation demands, but often the mediator may be able to start the negotiations with a lower demand than what the employee would have asked for otherwise or a higher offer than what the employer had planned. If there are pre-mediation demands and offers, those parameters should usually be respected. This is an important topic to bring up with the mediator in advance of the mediation.

4. **Selection of Mediator**

There is no perfect mediator, one who can settle everything. What settles cases is the parties' intent to reach resolution. However, it's always appropriate to try to match mediator to the dispute. Sometimes you may need to use a retired judge, whose judicial presence will hold sway with a difficult client. Sometimes an experienced litigator might be needed to second counsel's view or opinion to a reticent client. Some mediators are more soft; some more hard. Some have set ways; others allow the mediation process to develop. It's important for you to decide if you want/need a mediator with evaluative or a more facilitative approach. But always check out a proposed mediator, asking colleagues and talking with the mediator regarding his/her style and approach. Don't automatically reject a mediator suggested by the other side; they're telling you something.

Send information regarding potential mediators to your client - some will simply accede to whom you suggest; others will have good input.

5. **Pre-Mediation Preparation**

A mediation reduces a lengthy litigation process to a single day. To be successful preparation is required. Some lawyers think the process will work without preparation; they're wrong. The best lawyers know that it is important to develop a theme of the case, supported by the evidence, and to be prepared to parse out that evidence from time to time throughout the mediation. I find it quite helpful if counsel prepares a factual chronology of events, rather than a legal primer. It is also helpful to organize your documents chronologically and to obtain witness statements, rather than just telling me what the witnesses will say.

Do consider the pros and cons of a joint session and discuss your thoughts with the mediator. Also consider having a client representative speak at joint session, assuming that person is credible and controllable.

It is also crucial to objectively evaluate your case, considering the following:

- 1) What are the probabilities of a favorable litigation outcome?
- 2) What are the costs associated with the litigation?
- 3) How long of a delay will there be in obtaining a final decision in the litigation process?
- 4) What are the parties' interests in obtaining an expeditious resolution at mediation?
- 5) What is a reasonable monetary range of the value of the case?
- 6) What is the other side's anticipated range of values to be?
- 7) What are current jury verdicts on similar cases?

It is also helpful to prepare negotiation strategy/plan.

- 1) Outline several hypothetical negotiations and evaluate the probable outcomes.
- 2) Consider who is the negotiator on the other side? What is his/her style?
- 3) Adopt a flexible negotiation approach and anticipate probable responses to your proposals along with your anticipated counter-proposals to such responses.
- 4) Review your negotiation plan with the client prior to the mediation session.
- 5) Obtain all necessary approval or authority to negotiate as per your plan.

6. The Mediation Process

Pre-mediation: Always use your mediator to talk about particular issues or concerns you may have.

Joint-session: A joint session can be incredibly productive or incredibly counter productive. Work with the mediator to decide what might be accomplished. Regardless, posturing in mediation is seldom productive. Don't dump on the other side – power point presentations, charts, summaries of other cases may short circuit process.

Caucus: When mediator feels a joint session is no longer fruitful, s/he will separate into private caucus usually with the complainant first. Sometimes it is helpful to meet with counsel only. Prepare your client representatives to talk to the mediator without giving away secrets or showing some trait that will not further your cause.

Remember that there are several negotiations going on during a mediation: you and your client(s); you and the other side; you and co-defendant or insurer; and you and the mediator. Mediators always believe there is fluff in offers and demands, so it is not generally advisable to give your bottom line, unless you are ready to go there. That said, at some point you're going to have to trust the mediator if you want to settle. Remember that you can mediator to reality test, to help do a risk analysis, assigning a risk percentage to each aspect of the litigation.

Track negotiations: Do outline each offer or demand, tracking the length of time it takes to get each new proposal. Compare each new proposal with your last proposal and assess how much of a gap remains and how much the gap has been narrowed as a result of the process. Determine, based on the size of each new proposal and the time consumed in obtaining it, 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.

Do not draw a "line in the sand" too early. Once you draw the line, stick to it within reason. Do not out of pride or ego categorically reject a counter-proposal that, while not meeting your absolute number, comes close to it. Don't let the moral high-ground derail an otherwise acceptable settlement. Remember should the negotiation not end in a resolution, express an appreciation to the other side for its efforts. You may be negotiating with that other party at some other time in the future.

Planning, patience, and proper analysis of the negotiation are the keys to success.

7. Breaking Impasse

There are a variety of effective techniques to move recalcitrant parties into settlement during a mediation. None of these techniques can be used in every situation. It is imperative that you consider opposing counsel, the nature of the dispute, and of course, the parties' interests.

You can call the other side's bluff. If opposing counsel unreasonably rejects or resists a demand/offer, withdraw it. You may be surprised how happy counsel is to accept that proposal after it becomes unavailable. Don't threaten to leave if you are not

willing to do so. Consider making a last, best, final proposal. Discuss with the mediator the possibility of a mediator's proposal or the use of confidential ranges from each party to determine where there may be overlap. Consider adjournment so that additional information may be obtained, informally or formally, i.e. through deposition.

8. Closing

Don't leave without negotiating major points:

- 1) non-reemployment - at which facilities
- 2) scope of the release; mutuality
- 3) payment - tax consequences, timing
- 4) non-disparagement/neutral references
- 5) confidentiality - scope and enforcement, i.e. liquidated damages
- 6) costs of mediation

Being careful of implications that a deal will be made, consider discussing the non-monetary terms before the day of mediation .

Will a deal points memo suffice, or is a formal final settlement agreement preferable. Bring a draft agreement on a laptop.