MASTERS & RIBAKOFF

mediation • arbitration

FAIL SAFE SUGGESTIONS FOR SUCCESSFUL MEDIATION

The information in this memorandum is provided to assist you in preparing for mediation with me and to increase the likelihood of resolution of the pending dispute These suggestions are gleaned from my almost twenty years of mediation practice as a neutral and almost 40 in the field of employment rights. My hope is that reading this will cause you to consider changes to your usual mediation preparation.

I. PREPARING FOR MEDIATION

A. Determine Persons Who Should Be Present

Mediations are much more successful if the parties really think about who will be present and what message they are trying to send to the other side. Obviously, the physical presence at mediation of those individuals whose approval is needed for resolution is crucial. But automatically including witnesses or even a named defendant may not always be productive; nor is merely bringing a "life body" (i.e. a low level individual who has nothing to do with the dispute and/or no settlement input or authority), which can indeed be counter productive. Rather, I suggest that you identify the proposed attendees for your side and discuss your ideas with me well in advance of the mediation. We can discuss including individuals by phone or Skype.

When an insurance carrier is involved, ideally a carrier representative/decision maker should be physically present at the mediation session. If that is not feasible, make sure you have cell phone and home phone numbers in case the mediation runs late. If there is a pending worker's compensation claim, consider whether you want to attempt a global resolution. An intention to include a worker's compensation claim in a global resolution is something that needs to be disclosed and discussed with me in advance of the mediation so that I may insure all necessary parties and counsel on board and have appropriate authority.

B. Determine What Documentation To Prepare and/or Exchange

Don't wait until the last minute to prepare your case for mediation. From the moment we set the date, begin to think about what will be most useful to me in helping to resolve your case. Think outside the box when you prepare for mediation.

A thoughtfully prepared brief submitted well in advance of the mediation is critical to the success of your mediation. Presumably, you have chosen me to mediate your dispute because of my experience in employment rights cases; therefore you do not need to make a basic textbook presentation of the law in your brief. Where there is a unique or difficult legal issue, a more in-depth analysis may be appropriate. I may ask that you provide copies of applicable cases. Reports of jury verdicts are helpful only if they are recent and relevant to your case.

A brief containing a concise chronology (linked to any documentation) and a summary of any previous settlement discussions is most helpful. Focus your brief on explaining the strengths and weakness of your case, based on the law and the evidence (especially documentary evidence), and what creates risk for the other side. Simply stating that a certain claim "will fail" without explaining why gives me nothing to use with the other side.

If there are major factual discrepancies between the two sides, consider submitting declarations of witnesses to me. I can review them in private or, with your agreement, share with the other side at an appropriate time. Alternatively, consider (and arrange) to have critical witnesses available to speak directly with me during the mediation. Instead of attaching pages and pages of documents to your brief, bring probative documents or deposition transcripts (highlighted for ease of use),. Also bring information about former/current compensation and benefits, economist's report, psyche/medical reports, and expense. Consider potential mitigation issues, Medicare set aside issues, reinstatement and/or continuation of benefits.

Exchanging briefs with your opponent(s) can frequently reduce the amount of time spent during the mediation exploring factual issues and positions, especially where the matter is being mediated pre-discovery. Any confidential information you wish the mediator to know can be provided in a private letter to the mediator or during a private caucus.

C. Evaluate Your Settlement Position

Prior to the mediation, clarify your client's interests or needs, as compared with your legal position. It is crucial that you and your client come to the mediation with an open mind, open to the possibility that you may not have all the facts and that current settlement expectations may not be realistic.

In order to properly evaluate your case for settlement, you must critically evaluate the likely outcome if the matter is arbitrated or litigated. An assessment should include an analysis of likely litigation costs (including expert witness and attorney's fees, court costs), time expenditures, the effect on career or workplace, emotional impact, disruption, publicity and precedential effects. You should also consider how the other side is likely to evaluate the probable outcome and cost factors, and how you might change that evaluation.

D. Participate In A Pre-Mediation Conversation With The Mediator

In contrast to arbitration or litigation where ex parte communication with the judge or arbitrator is prohibited, I make every effort to communicate with counsel before the mediation. It is an opportunity for me to learn about any problems you expect to encounter and to begin to understand the dynamics of the relationship between counsel in advance of the mediation day. I usually schedule a telephonic conference separately with each side a week or two before the mediation date.

During that call, we will discuss the procedural posture of the case, who will be participating, and how you envision the mediation day. We will also explore whether each side should be given an opportunity to express his/her view of the dispute directly to the other side. If it is agreed that a substantive presentation would be productive, I will make suggestions regarding the content. Frequently in pre-litigation mediations, it can be important for counsel to meet the other side and hear his/her version of the dispute.

II. THE MEDIATION DAY

Ensure that you and your client schedule enough time for the mediation. Attending to other commitments may "short circuit" the mediation process. Exploring the facts, positions, and interests of the parties and counsel takes time; it is important for you to remember, and remind your client, to be patient.

A. Beginning the Mediation

At the outset of the mediation, I meet with each side separately to introduce myself and answer any questions. I may suggest that the parties and/or counsel convene with me in an administrative "joint session". During this joint session which is not intended to be adversarial, I will explain the ground rules for the day and circulate the agreement to mediate for signature by counsel and other attendees. (A copy of Agreement to Mediate may be found elsewhere on this website.) I generally make some remarks about the mediation process and the logistics of the day. I may pose questions to the lawyers in order to clarify a position or better understand the factual basis of your dispute. The joint session may last a short time, or much longer, depending on the parties' wishes and how fruitful the session appears to be.

I will encourage you to share information on my website with your clients, so that they are familiar with me and the mediation process.

B. The Private Caucus

During the private caucuses, reality testing will occur. I suggest that you be willing to acknowledge weaknesses in your case, in addition to emphasizing its strengths. Of utmost importance is that you be realistic. Please avoid unsubstantiated and outrageous demands or offers which will only serve to alienate and defeat the process. Educate your client in

advance that the negotiation process is a deliberative one, and that the opening demands and counter offers are just part of the process of reaching a compromise.

I may meet privately with you outside the presence of your client, if such is determined to be a helpful way to obtain or impart information. Remember, ex parte communications with me in my role as the mediator are not inappropriate.

C. The Settlement Terms

There are myriad factors and options to consider in reaching resolution of an employment dispute. The beauty of mediation is that you are not limited to what a court or arbitrator might award. More creative solutions are possible. For example, items you might discuss with your client are reinstatement, transfer, continuation of benefits either at the employee's or employer's expense, consultant agreements for ongoing services, outplacement services, training programs, early retirement options, deferred payment plans, characterizing the monies paid as something other than wages, agreed upon reference letters and/or public statements, expungement of personnel file, personnel policy changes, contributions to pension plans or charities, direct reimbursement of attorney's fees, and/or extension of stock option periods. I am sure there are other options as well.

When a settlement is reached at mediation, I strongly encourage the parties to finalize and sign an enforceable settlement agreement before the mediation is adjourned. At a minimum, be prepared to execute a deal points memo.

Please consider exchanging a draft settlement agreement with your opposing counsel. It does not suggest weakness or intention to settle at all costs. After a long day of negotiating, it may be extremely beneficial to have the non-monetary terms ironed out, or at least, identified beforehand. Please also bring a draft agreement to the mediation session in a usable format or have the ability to obtain one from your office via email or thumb drive.