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Practical Skills for Experienced Employment Litigators

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MEDIATION BEGINS THE DAY YOU DECIDE TO MEDIATE

I. INTRODUCTION

When does a mediation begin? Lately I have been contemplating this question in connection with why some mediations result in resolution and some don't. Invariably I have found that the most successful mediations started long before the actual mediation day. This article addresses the issues of convening a mediation and provides some food for thought about opening demands and offers.

Contrary to the popular trope, mediators possess no "magic" by which they can simply create resolution. Rather the best mediators come up with creative arguments which have not been made, solutions no one is considering, and next steps to get everyone on a path to resolution. I recognize that there is an understandable frustration among attorneys these days with mediators who are paid a substantial amount of money, and then simply walk back and forth as a messenger, adding nothing to the process. That said, mediators are frustrated by counsel who haven't put in the time to prepare and simply expect the mediator to make silk from a sow's ear. Resolution comes from preparation and meaningful thought given to the issues by the mediator, by the parties, and especially by counsel.

II. CONVENING

Convening is the first stage in conflict intervention. Its role, as the name implies, is to bring about a preliminary agreement whereby counsel and their clients may discuss the issues in dispute and consider the available options for its actual resolution, such as informal resolution, mediation, arbitration or litigation.

The process usually goes something like this: The lawyer meets with their client or client's designated point person (who may not be the ultimate settlement decisionmaker) and decides on mediation. Then the lawyer contacts opposing counsel about possible mutually acceptable mediators and possible dates. One of the lawyers has their assistant contact a mediator or two, for availability. Finally, often with no more information than the case name, the selected mediator is told to book a date.

Convening a mediation in this manner is merely the first in a series of agreements that ultimately can lead to a resolution. My view is that the convening process has so much more potential and can lead to much more satisfying results. Convening presents opportunities for counsel to begin preparing their clients, opposing counsel, and the mediator for the negotiations ahead. Mediators, such as I, use the convening process to gather information to ensure that the parties' chosen option for resolution, i.e. mediation, proceeds as efficiently and smoothly as possible.

A. Preparation is Crucial

Once a date is tentatively set, I begin to prepare for resolution during the convening process, and counsel should as well. My practice is to immediately request information - the complete case name showing all named parties, the nature of the dispute, what has been done prior to calling my office, copies of demand letters, complaints, administrative charges, any proffered severance agreements or other pertinent documentation, and who are the stakeholders (including settlement decisionmakers such as spouses, owners, third party administrators, insurance carriers, and the like). Specific inquiry is also made about the location of the mediation and the fee split among the parties. These items are not decided by rote, but rather tailored to each individual matter. Many mediators, myself included, personally connect at least once, and usually more, with counsel via email and/or telephone after a date is set.

1. Client Preparation

Once a date is confirmed, begin to prepare the client - in person, on the phone, and in writing. Too often, the only preparation with the client happens just before the mediator enters the room. The client's issues, imperatives, and concerns should be vetted thoroughly long before the mediation day. Only then can you begin to focus on the client's mediation goals/expectations in light of the best alternatives to a negotiated

agreement (BATNA), the likely outcomes of litigation, and the potential risks and costs, including both direct costs (such as filing and other court related fees, depositions, and the like) and indirect costs (disruption to one's personal life or business, including the time necessary to attend properly to discovery).

Take the time to prepare your client well for the mediation. The client should know who the mediator is; direct your client or client representatives to the mediator's website for information about the mediator and how they work. The client should also know the importance of arriving on time (or early) and of dressing appropriately, the pros and cons of a joint session (discussed in more detail hereinafter), the fact that it could be a long day, that some cases may require additional sessions or follow up to reach resolution, and some cases will not settle at all.

2. Communications from the Mediator

Even if you are well versed in mediation, it should go without saying that you must read and respond to everything from the mediator, or their office. Even before confirming a date, I or my Case Manager will request information about the nature of the dispute and its procedural status, and the identity of all parties and counsel. Once a date is confirmed, further inquiry is made regarding the location for the mediation, the details of the fee split, and the anticipated participants at the mediation day. Additional questions include whether insurance is involved and the existence of other pending claims, including worker's compensation. Such information is extremely helpful to the mediator as they begin to plan how the mediation day will go.

After confirmation, but before notice is sent, if counsel have not responded to our inquiries, we again request information to identify all stakeholders, and who will be physically present at the mediation, the preferred location and fee split. The Notice of Mediation (confirming the date and location of the mediation, fee split, parking instructions, and cancellation policy), and any other information received from the mediator, should be immediately forwarded to the client.

3. Pre-Mediation Conference Call with the Mediator

Beginning with my first mediation in 1994, I have found pre-mediation calls invaluable. Such calls allow a discussion of the procedural posture of the

dispute and history of settlement negotiations, and more importantly the dynamics of the dispute and the goals and challenges of the settlement decisionmakers involved in a given dispute.

Information not generally found in a position statement can be frankly discussed, including: personalities and emotional temperature of counsel and parties, ground rules about the order of the negotiations (which party do I meet with first), confidentiality, and the benefits/risks of any joint session (even a "meet and greet"). Most importantly, the mediator needs to learn who is the settlement decisionmaker and will that person be physically present at the mediation or will further approval be required in order for resolution to be reached. The pre-mediation call offers an opportunity for counsel to influence the decision of who should be asked to attend the mediation.

It is important for the mediator to be able to assess the broad picture of the conflict in order to ensure that everyone is mediating the same dispute. Issues frequently arise in disputes with current employees as we may be mediating continued employment or an agreed resignation. In addition, worker's compensation claims exist, which the parties may or may not want to negotiate as part of a global resolution.

If possible, the calls are made two to three weeks in advance to allow adjustments in thinking about the process, the participants, strategy, and goals. During the pre-mediation call, the mediator can ascertain if any participant has fears about meeting with or even running into another participant, time constraints (flights, child care, and the like), a need for a translator, or any dietary or physical restrictions which will need accommodation.

4. Written Position Statements

After twenty+ years of mediation practice, it still amazes me that lawyers do not adequately prepare for mediation, a fact particularly evident from the mediation submissions I receive, many of which are pure cut and paste jobs replete with typos. While I understand that caseloads are heavy and there are last minute emergencies, I still believe that there is no excuse for not timely submitting adequate information to the mediator who will be your best ally in reaching an informal resolution of the dispute.

A helpful position statement is not lengthy, nor is it conclusory. All that is

generally necessary is a factual chronology tied to the documentary evidence, a detailed analysis of potential damages or lack thereof, the history of any settlement negotiations and why the case hasn't settled, and the evidentiary support for disputed factual issues.

There is usually no need to explain general legal principles to an experienced employment mediator; obviously if there is newly published authority or a legal question which is unique or particularly problematic, it should be identified for the mediator. A statement which repeats cursory conclusions (e.g. "the claim for sexual harassment will fail") and cites a string of case authority is not nearly as helpful as setting forth a timeline and the testimonial or documentary evidence in support of one's position.

It is important to carefully analyze the facts your client has presented, and even more important, to obtain the best actual evidentiary support therefor. Identification of the strongest facts in your favor is only the beginning - describe the *evidence* which will prove those facts. Overstating your case calls your integrity and credibility into question.

Mediators appreciate and use documents/declarations. Such materials should be tailored to the dispute (seldom does a mediator need a complete copy of the Employee Handbook) and appropriately highlighted and tabbed and sent with a Table of Exhibits. Allow the mediator to disclose information at their discretion, or to couch information in such a way as to conceal the identity or source of the information, where necessary. This decision is obviously affected by whether you are exchanging briefs as mentioned below.

a. To Exchange or Not to Exchange

Especially in pre-litigation matters where the only facts which have been presented are contained in a demand letter or draft complaint, I encourage counsel to consider the exchange of position statements, or parts thereof. Although many defense attorneys are reluctant to share a written position statement, I find doing so to be extremely beneficial in creating an efficient process leading to resolution. Moreover, I strongly recommend a draft settlement agreement be circulated before the mediation. It is in no way a sign of weakness or desperation to settle. Settlement agreements in employment cases frequently involve certain key terms which must be carefully considered and negotiated: tax treatment of settlement proceeds, time parameters for payment, confidentiality issues, separation/rehire

issues, and the like.

Exchanging information and settlement terms serves to recognize the fact that the parties want closure accomplished in a short period of time. Finalization of terms of a settlement agreement when everyone is tired and hungry serves no interest and can lead to errors. An exchange will allow each side the opportunity to gather any responsive information/evidence before the mediation, rather than calling "time out" during the mediation and requesting to adjourn in order to "investigate" the newly disclosed information.

Moreover, the parties and counsel may find it beneficial to have time to evaluate the potential risks of going forward in light of the entirety of the evidence. Particularly in cases where an insurance carrier is involved, exchanging information also allows for the appropriate setting of a reserve amount and to secure the participation (either in person or via phone) of the appropriate level of decisionmakers.

If briefs are to be exchanged, carefully consider what to include and whether you want to submit a side brief for the mediator's eyes only. A timeline is almost always helpful to both sides, frequently serving to identify areas of factual disagreement or misunderstanding. Counsel for an employee, trying to formulate their opening demand, will find most helpful the inclusion of, and evidentiary support for, the alleged business related reasons for an adverse action. Counsel for an employer hasn't seen a damages analysis and may benefit from a detailed and reasonable calculation and explication of economic and emotional distress damages in seeking to obtain proper levels of authority.

It is my experience that inclusion of a discussion of punitive damages is seldom persuasive. Nor is inclusion of a specific monetary demand or offer usually helpful. Either usually results in a negative response to a perceived overly aggressive demand or perceived insulting offer, and can anchor one's client to unrealistic expectations.

b. Timeliness

Most importantly, don't wait until the night before to send your statement. Like counsel, mediators have lives and other cases – a mediator who is forced to stay up reading until the wee hours of the morning before the mediation is not likely to be at their best in the mediation. Experienced

and successful advocates know that the neutral needs information, documents and witness testimony to use in the process of reframing and restating issues, and getting the other side to reassess the risk of not settling.

5. More Preparation

Outline a mediation strategy before the mediation. Remember that mediation is a process. You don't want to shortcut the process; rather you want to help it develop in a positive manner. Prepare as you would for court, anticipate the other side's strongest points, and plan how to counter them. In each individual session with the mediator, focus on a specific point or two, giving the mediator something new to work with - a document, a declaration, or legal authority to justify your settlement position. Don't overload the mediator with all your points at once.

Arrange to have crucial witnesses available by phone during the mediation day if you cannot obtain signed declarations. It can be very impactful for the mediator to report that they have just spoken to an important corroborative witness, especially where both sides have insisted that the same witness would support their position.

If the actual settlement decisionmaker cannot be present at the mediation, obtain a realistic amount of authority, perhaps beyond what you think will be necessary or appropriate to serve as a buffer when new information is presented causing a need to re-evaluate. You don't have to disclose your entire authority to the mediator and it may be what is necessary to avoid impasse.

Bring a draft settlement agreement on a thumb drive to the mediation if you haven't already shared it with the other side, particularly if you have specific language you want. Don't assume that the other side will agree to your confidentiality language at the end of the day. Work out problems early – it is not a sign of weakness to be willing to talk about non-monetary terms early in the process. Agreement on non-monetary terms can be one of the cascading yeses that lead to ultimate agreement.

III. THE MEDIATION DAY

A. Starting the Day

It is common to hear from the lawyers that joint sessions are a waste of time, that they don't want to even see the other side, and that they just want to get started negotiating. It is true that joint sessions, especially where each side presents their case, can be polarizing; it is also true that starting the day with a group meeting can result in myriad benefits.

Of course, any group meeting must be planned with the parties and carefully controlled by the mediator, who will model civility and good manners. It can be as simple as introducing the participants who may exchange greetings, followed by the review and execution of the mediator's confidentiality agreement. Such a meeting saves time as the mediator will not have to review the agreement separately with each side.

It can also set the tone for the whole day, a tone of cooperation rather than competitiveness. The mediator can emphasize the importance of listening and collegiality. By building some relationship with each other, the parties may find it harder to walk away from the table later if negotiations get tough.

During a group meeting, the mediator may explain the mediator's role, i.e. to assist parties and counsel in evaluating risks/benefits of proceeding and in making an informed decision of what is in their best interests. The mediator may also be able to quickly summarize what they know about the case procedurally and to tee up issues for later discussion. I often find an opportunity to mention the negative effects of unconscious bias: group think (tendency of people in groups to reinforce each other), cognitive dissonance/confirmation bias (to value only that which is consistent with an existing belief), certainty and advocacy bias (belief in accuracy of prediction of outcomes), reactive devaluation (minimize the value of information or offer simply because it comes from the other side).

Finally, mediator can discuss the fact that no one – neither the lawyers nor the mediator - has a crystal ball which can *guarantee* the outcome of a dispute in litigation or arbitration. It is possible on occasion to identify areas of agreement and disagreement, and even possible to agree to disagree and still reach resolution.

In an era of where joint sessions are readily dismissed, there are those cases where a substantive presentation by the parties is crucial. Such a presentation may humanize the parties to each other. A senior executive may talk about the seriousness with which the company considers allegations of discrimination and steps to rectify the problem. A terminated employee may put a human face on damages and demonstrate that they are not afraid of meeting the other side, hence are ready, willing, and able to proceed with litigation if the case doesn't settle. If handled well, such "dangerous" mediation techniques, as Ken Cloke would call them, increase the odds of party buy in and satisfaction with the process. That said, joint meetings can always blow up and must be considered carefully and discussed with the mediator.

B. Private Caucus

At the outset of the day, most mediators want to get to know your client. Let them – it will help. Although you may have prepared them well, it is still a foreign process to most participants. Before counsel starts arguing the facts and the law, they need to feel some trust with the mediator, have an understanding of the context in which their dispute will go forward and the fact that only a very small portion of cases actually go to formal adjudication in court or arbitration. They need to know that it is their job to decide, with the advice of their counsel, whether to settle the matter or continue into a litigated forum. They must feel comfortable, involved, and prepared to listen to the advice of their counsel in order to decide what is in their best interests.

In private caucus, most mediators prefer that counsel make an initial concise presentation of facts and legal arguments before making a demand or offer. This allows the mediator to be frank about what arguments or challenges they are facing from the other side, and also gives counsel an opportunity to provide other information and/or potential solutions to those challenges.

Although many lawyers come into the mediation day with a specific settlement goal in mind, and a strategy to obtain that goal, in many cases they haven't yet heard the other side's position and they certainly haven't had the benefit of a neutral's impartial perspective. Give the mediator an opportunity to help frame the negotiations into reasonable realistic parameters.

There is no science to making an opening – some mediators use the concept of "ZOPA" – the zone of possible agreement – to help counsel open. Others use analogies – open in the ballpark, or at least the parking lot (courtesy of Ralph Williams), the same city, or the same state. Listen to the mediator who has been speaking to the other side in crafting a credible but not insulting, opening. Non-partisan evaluations of the range of resolution are less subject to cognitive distortion and thus valuable in assessment of possible outcomes.

Remember the concept of anchoring, but don't let it create unrealistic client expectations. Moreover, initial openings that are "pie in the sky" or "total low-ball insult" do not advance the settlement discussion. Cooperative more reasonable second moves guided by the mediator can often correct the discussion and re-set the parameters.

Reinforcing the importance of client preparation before the mediation, you can and should be aware of what non-monetary terms might be important to your client: tax issues, neutral reference/limitation on information to be disseminated, eligibility for rehire, what is to be said to colleagues and coworkers where resignation of employment occurs, non-contest of UIB, medical benefits, apologies, and the like.

In most mediations, even when attorneys and parties really want and often need to reach resolution, they require help in understanding the dynamics affecting the particular dispute and how and why it may be valued differently by the other side, a judge/arbitrator, or jury. During private caucus, the mediator can help the parties get past their own implicit biases, offering their view on what might resonate with a judge/arbitrator or juror, and move them toward a compromise.

C. Breaking Stalemates

Many times, counsel and the parties get stuck on non-issues, issues which are not that important or which are not really material to resolution. The amount of time wasted in mediations discussing non-issues is astounding, and time is precious in mediation. Resolution comes from using mediation time to talk about the real issues (not just posturing) and making progress on those issues.

I didn't like being hammered when I was an advocate, and I try not to do it as a mediator. Instead, I attempt to present a fair and measured

assessment of the case. While I allow for emotions to be expressed, I control the temperature of the room, keeping my voice soft (for the most part), and suggesting breaks, food, tea, walks.

Wherever possible, I focus on the parties themselves and include them in my analysis and discussion of what they need to consider in making a decision about a particular settlement proposal, and ultimately, whether to settle (and if so, on what terms) or to proceed with litigation or arbitration. I make a special effort to do this, particularly when counsel appear to be not hearing/listening to their own clients.

Obstinance and ego are the biggest obstacles to reaching resolution. Often attorneys are victims of repetitive compulsion, if they just keep repeating something often enough, in their minds it makes it so. Active and intelligent listening and being open to compromise carry the day; that, and remembering that most, almost 96%, of all civil cases settle before trial. That said, there are cases where resolution is just not possible during mediation, e.g. where there is a need for an authoritative ruling. A good outcome in that case is having identified the issues and having the parties understand why a resolution could not be reached.

That said, mediators are retained by the parties to reach resolution, and must forge on even where the parties appear stuck. As agents of reality and devil's advocates, most mediators are indefatigable in their efforts to focus the parties on the weaknesses in their case and the horrors that can befall them in litigation.

Research shows that those with a stake in the outcome, including counsel, cannot be totally objective in evaluating the likely litigation outcome. There are several studies of civil trial outcomes compared to pre-trial offers and demands. All found that approximately 60% of the time, plaintiffs received less than the last pre-trial offer, while 24% of the time, defendants paid more than the last pre-trial demand. Plaintiff's errors cost on average $43,000; defendant's errors cost $1,140,000.

Most mediators are well skilled at conditional negotiations, e.g. if I could convince plaintiff to reduce their demand to $X, would you be willing to go to $Y? Such "bracketing" as suggested by the mediator can bring the parties closer to agreement with a few additional moves within the newly set parameters. Frequently the parties need to feel that the mediator has

convinced the adversary to make a concession, avoiding the reactive devaluation trap into which some advocates so easily fall.

If those steps fail to bring the parties to agreement, there is always the possibility of a "mediator's proposal", an end game move to avoid the possibility of an impasse. There is controversy in the profession of commercial mediators as to the appropriateness of such a technique. Some object to it as usurping the autonomy of the parties to make their own decision free from influence of the mediator; others object to putting their imprimatur on any particular term as inconsistent with mediator neutrality. Many advocates in California have come to expect mediators to use proposals. Under the right circumstances, I believe that a proposal can serve a useful purpose

Again, there is no science in making a mediator's proposal. The settlement "value" of the case is what one side is willing to accept and the other side will offer. In making a proposal, the mediator does not decide what is fair, but rather what the parties might be willing to choose as a better alternative to litigation alternative. A successful proposal will almost certainly have been pre-negotiated or tested in the private caucuses; it is seldom that the mediator will not know the settlement range of a given case and how to push to resolution. The parties will know the risks of proceeding, and can now make a binding choice – to accept perhaps a less than ideal settlement or to pursue a time consuming and expensive litigation process with absolutely no certain outcome.

If a mediator's proposal is not appropriate, i.e. the parties are too far apart, without sufficient information, or otherwise not open to a proposal, it might be time to adjourn, rather than impasse, the mediation. Consider what it might take to re-evaluate your position. On occasion, it could be helpful to ask the mediator to summarize the push points, the strengths and weaknesses of the case, particularly where a key decisionmaker was not present at the mediation.

IV: Conclusion

Good mediators do not just carry numbers. Most employment practitioners want mediators who are "evaluative" in their approach and, in fact, expect the mediators to use their experience to facilitate settlement. Mediators often "test" or "float" possible ranges of resolution during the convening

process, and by the time the mediation day starts, and certainly before lunch, most usually have an idea of the possible settlement range.

As a result, during the early stages of the mediation day, most mediators will begin to discuss possible non-monetary items. They will remind counsel and the parties that some things that may be important to them are simply not available remedies later, and that they will relinquish their decision making. One of the many beauties of mediation is that the parties themselves have the ability to decide what is in their best interest.

As impartial guests in a given dispute, mediators serve as the eyes and ears of a potential factfinder, whether judge, arbitrator, or juror. By sharing a different view of the case and its risks with the parties and their counsel, mediators play a vital role in bringing about resolution. To achieve the best result for your client preparation, critical analysis of the merits and possible outcomes, and an open mind are essential.